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SUPREME COURT OF NIGERIA

SC.20/2008
FRIDAY 11TH APRIL, 2014

(MOHAMMED; FABIYI; NGWUTA; PETER ODILI; MUHAMMED; KEKERE-EKUN; OKORO, JJ.SC)

TAXATION - Jurisdiction – Federal High Court has exclusive original jurisdiction to determine all matters relating to the revenue of the Government of the Federation.

CIVIL PROCEDURE – Jurisdiction – Determined by the claim disclosed in originating processes.

COMMERCIAL LITIGATION – Abuse of Process – Filing multiple suits on the

same matter and seeking similar relief.

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SUPREME COURT – Original Jurisdiction - cannot be invoked if the dispute is one which falls within the jurisdiction of another court.

SUPREME COURT – Original Jurisdiction - can be invoked in respect of a claim against the Federation but not the Federal Government.

Facts:

The plaintiff alleged that the House of Assembly of Lagos State is entitled to enact laws on the imposition and collection of tax on goods and services supplied within Lagos State to the exclusion of all other legislative bodies. In the same vein, it alleged that Lagos State or its agency is, solely responsible for assessing and collecting tax on goods and services supplied within Lagos State.

It alleged that the Federal Government of Nigeria through the National Assembly enacted the Value Added Tax Act Cap V1 Laws of the Federation of Nigeria 2004 ('VAT Act') which gave the Federal Inland Revenue ('FIRS') the responsibility for collection of tax on goods and services in Lagos State to the detriment of the

Lagos State Government. As a result, the plaintiff alleged that the revenue of Lagos State Government has been and continues to be affected by the enforcement of the VAT Act by the FIRS.

Consequently, the plaintiff commenced an action against the defendants by Originating Summons and sought among other things, a declaration that the VAT Act to the extent of its imposition and collection of tax on goods and services in Lagos State is unconstitutional, null and void. It also sought a perpetual injunction restraining the 1st defendant by itself or agents from continuing to give effect to the VAT Act by imposing and collecting tax on goods and services within Lagos State.

The 1st defendant filed a preliminary objection to the suit on the grounds that the suit constituted an abuse of court process and that the action is not within the original jurisdiction of the Supreme Court.

Held ***(Unanimously declining jurisdiction):***

[1] ***Taxation - Jurisdiction – Federal High Court has exclusive original jurisdiction to determine all matters relating to the revenue of the Government of the Federation.***

Plaintiff's grouse as captured *inter-alia* in the foregoing paragraphs is about a dispute between the Federal government and the governments of the States rather than between the federation and the various states. It is also a dispute pertaining to the operation of an agency of the Federal government, Federal Inland Revenue Service (F.I.R.S.), *vis-a-vis* an agency of the plaintiff. It is not unreasonable to also assess the dispute as one which seeks the interpretation and examination of the operation of the 1999 Constitution as it affects both sides to plaintiff's suit. I do not have the slightest doubt that a dispute on all or any of these comes squarely within the purview of the jurisdiction the makers of the Constitution specifically provided the Federal High Court under Section 251 (a), (b) and (q) of the 1999 Constitution which provision tampers and conditions the original jurisdiction of this Court pursuant to Section 232 (1) of the same constitution. The plaintiff, whose claim clearly relates to the revenue of the Government of the federation, consequent upon the taxes one of its agencies levies and/or seeks the interpretation of the Constitution as to how the operation of the Constitution affects the 1st defendant or any of its agencies, is at the wrong court. This Court must decline jurisdiction. I so hold. **(P. 23 lines 1 - 17)**

[2] ***Civil Procedure – Jurisdiction – Determined by the claim disclosed in originating processes.***

It must be stressed that the jurisdiction of all courts are as provided for by

the Constitution and/or the relevant legislation. Jurisdiction remains a question of law and a necessary requirement in all proceedings. Whenever the jurisdiction of a court is challenged the well laid down position of the law is that the plaintiff's claim determines the issue. The claim of the plaintiff is carefully examined to see if it comes within the jurisdiction conferred on the court by the relevant legislation. See *Bronik Motors Ltd & Anor v. Wema Bank* (1983) NSCC 226, *Chief Danis C. Osadebay v. A.G. Bendel State* (1991) 1 SC (Pt.11) 73 and *Dr. Felix Amadi & Anor v. INEC & 2 Ors* (2012) 2 SC (Pt.1) 1. In the case at hand where the plaintiff seeks to commence his action by an originating summons, the preliminary objection is to be determined on the basis of the totality of the case he puts forward in the summons and the affidavit in support. See *Inakoju & Ors v. Senator Rashidi Ladoja & Ors* (2007) All FWLR (Pt.353) 1 at 87.

…. I am in complete agreement with learned senior counsel to the plaintiff that the crux and substance of the content of the affidavit in support of plaintiff's amended originating summons should inform our decision whether or not to assume jurisdiction over plaintiff's suit. It is indeed the law that the form in which plaintiffs claim has been couched should not be the overriding consideration. Time it was when courts lean on technicalities. In the instant matter only consideration of the crux of plaintiff's claim will ensure the just resolution of the issue in dispute. See *Consortium M. C. v. NEPA* (1992) 6 NWLR (Pt.246) 132 and *Adelusola v. Akinde* (2004) 12 NWLR (Pt.887) 295. **(P.17 lines 44-45; P.18 lines 1-11; P.20 lines 41-45; P.21 lines 1-4)**

[3] ***Commercial Litigation – Abuse of Process – Filing multiple suits on the same matter and seeking similar relief.***

PER MOHAMMED, JSC:

The law is trite that the employment of judicial process is only regarded generally as an abuse of process when a party improperly uses the issue of judicial process to the irritation and annoyance of his opponents, and the multiplicity of actions on the same subject matter against the same opponent on the same issue. See *Saraki v. Kotoye* (1912) 9 N.W.L.R. (Pt.264) 156 at 188 and *Okafor v. A. G. Anambra State* (1991) 6 N.W.L.R. (Pt.200) 659 at 681. However, the case directly relevant to the present situation we have in this case is the case of *A.G. Ondo State v. A.G. Ekiti State* (2001) 17 N.W.L.R. (Pt.743) 706 at 771 where Karibi-Whyte JSC hit the nail on the head when he said –

> "I agree with Mr. Adewale - Hon. Attorney General of Ekiti State, that the action seeking in this Court for a relief already before another Court in a pending action between the parties is without doubt an abuse of the judicial process. Plaintiff did not have an

answer to the allegation - See *Doma v. Adamu* (1999) 4 N.W.L.R. (Pt. 598) 311 and *Bena Plastic Industries v. Vasilyev* (1999) 10 N.W.L.R. (Pt.624) 620."

From the undisputed facts on the pending matters the plaintiff has at the High Court and the Court of Appeal listed in paragraphs 15 and 17 of the affidavit in support of the Originating Summons seeking the declaratory reliefs touching on the power of the National Assembly to legislate on certain provisions of the Value Added Tax Act, some which reliefs had been already granted or refused by those Courts resulting in pending appeals at the Court of Appeal, the action of the plaintiff in refusing to appeal against that judgment of the Court of Appeal of 13th July, 2007 affirming the decision of the Federal High Court on the validity or otherwiseof the provisions of the Value Added Tax Act complained of, only to file a fresh action in this Court after more than one year of the delivery of judgment by the Court of Appeal seeking the same reliefs sought at the High Court and the Court of Appeal, is certainly an abuse of the process of this Court and I so hold. **(P. 32 lines 36 - 44; P. 33 lines 1 - 19)**

[4] ***Commercial Litigation – Preliminary Objection – Court will determine preliminary objection before substantive issues.***

PER MOHAMMED, JSC:

When a preliminary objection is raised in an action such as the present one commenced by Originating Summons, it is always better to take the Preliminary Objection with the substantive so that if the objection to the action succeeds, the case or action is terminated *in-limine*. If the objection fails however, then the Court will proceed to determine the substantive action on its merit. See *Dapianlong v. Dariye* (2007) 8 N.W.L.R. (Pt.1036) 332 and *Amadi v. N.N.P.C.* (2000) 10 N.W.L.R. (Pt.674) 75 at 100. In line with the requirement of the law and the practice of this Court, I shall proceed to consider the Preliminary Objection raised by the 1st defendant to the plaintiffs action filed against it. The duty of this Court and indeed any other Court where Preliminary Objection has been raised to the competence of an action, is to determine the objection first before looking into the substantive matter. See *Onyekwuluje v. Animashaun & Ors* (1996) 3 N.W.L.R. (Pt.439) 637 at 644. **(P. 25 lines 14 - 26)**

[5] ***Commercial Litigation – Jurisdiction – Court will strike out a matter it lacks jurisdiction to entertain.***

PER MOHAMMED, JSC:

The law is indeed well settled that the effect of a Court finding that it has

no jurisdiction to entertain a matter the proper order to make is one striking out the matter. See *Okoye v. N. C. & F. Company Ltd.* (1991) 6 N.W.L.R. (Pt.199) 501 at 534. **(P. 32 lines 31 - 34)**

[6] ***Commercial Litigation – Abuse of Process – Courts lack jurisdiction to determine matters that constitute an abuse of process.***

Courts, including the apex court, lack the jurisdiction of entertaining incompetent claims and/or those that constitute abuse of their processes. They proceed in vain if they do. Being bereft of the necessary *vires* or with their processes having been abused, the decisions which eventually arise lack the authority and so remain unenforceable no matter how well conducted the proceedings that brought them about were. A judgment given without jurisdiction creates no legal obligation and does not confer any rights to any of the parties. Being a challenge to the jurisdiction of this Court to entertain plaintiff's action, therefore, 1st defendant's preliminary objection has to be determined first. Having been raised, all proceedings must abate until the issue is resolved. **(P. 13 lines 25 - 34)**

[7] ***Civil Procedure – Constitution – Court will consider all provisions in the Constitution when interpreting the object or purport of a particular provision.***

It is a settled principle of interpretation that whenever a court is faced with the interpretation of a Constitutional provision the Constitution must be read as a whole in determining the object of the particular provision. This requirement places a duty on the court to interpret related Sections of the Constitution together. See *Nafiu Rabiu v. The State* (1980) 8 - 11 SC 130 at 148; (1980) 8 -11 SC (Reprint) 85 and *Bronik Motors & Anor v. Wema Bank Ltd (supra).* In *Hon. Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) v. A.G. Federation & 2 Ors* (2012) 2 SC (Pt.1) 145, this Court stated thus:-

> ***"The duty of the court when interpreting a provision of the Constitution is to read and construe together all provisions of the Constitution unless there is a very clear reason that a particular provision of the Constitution should not be read together. It is germane to bear it in mind the objective of the Constitution in enacting the provisions contained therein. A section must be read against the background of other Sections of the Constitution to achieve a harmonious whole. This principle of whole statute construction is important and indispensable in the construction of the Constitution so as to give effect to it."***

The determination of the preliminary objections against plaintiff's action requires the application of the principle of community construction of the provision of Section 232 (1) of the 1999 Constitution by considering all relevant provisions of the very constitution that may be helpful in the proper understanding of the particular provision in contention. See *Buhari v. Yusuf* (2003) 6 SC (Pt.11) 156 and *Associated Discount v. Amalgamated Trustees* (No 2) (2007) 7 SC 168. I am of the firm and considered view that a resort to Section 6 (1), (5) and (6) and Section 251 (1) (a), (b) and (q) of the 1999 Constitution as well will facilitate a proper understanding of Section 232 (1) of the same Constitution that is particularly in issue in the matter at hand. **(P. 18 lines 21 - 45; P. 19 lines 1 - 5)**

[8] ***Interpretation – "Expressio Unius Est Exclusio Alterius" - The express mention of a thing precludes others not mentioned.***

PER FABIYI, JSC:

It must be stated that broad interpretation; or liberal approach as often referred to, must be the watch-words. See: *Rabiu v. The State* (1980) 8 - 11 SC 130 at 151, 195. Related sections of the Constitution ought to be interpreted together to produce a harmonious result. See: *Senator Abraham Adesanya v. President of the Federal Republic & Anor* (1981) 5 SC 112 at 134, 321; *Akaighe v. Idama* (1964) All NLR 322. The express mention of one thing in a statutory provision automatically excludes any other stipulation which would otherwise have been applied by implication. See: *Ogbunyiya v. Okudo* (1979) 6-9 SC 32. It is the *Expressio unius est exclusio alterius* Rule which means that the express mention of one thing in a Statutory provision automatically excludes any other which otherwise would have been excluded by implication. See: *P.D.P v. INEC* (1999) 11 NWLR (Pt.626) 2000; *Buhari v. Dikko Yusuf* (2003) 14 NWLR (Pt.841) 466; *Udoh v. Orthopaedic Hospital Management Board* (1993) 7 NWLR (Pt.304) 139; Halsbury's Laws of England 4th Edition, paragraph 876. Finally, specific provisions, are, by implication excluded from general provisions. See: *Government of Kaduna State v. Kagoma* (1982) 6 SC 87. **(P. 35 lines 22 - 37)**

[9] ***Interpretation – Clear and Unambiguous Words – must be given their natural and ordinary meaning.***

A fundamental principle of interpretation is that where the words used are clear and unambiguous, they should be given their natural and ordinary meaning. See: *Ibrahim v. Barde* (1996) 9 NWLR (Pt.474) 513 at 577 BC; *Ahmed v. Kassim* (1958) SCNLR 58; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377 at 402 F-H. **(P. 62 lines 10 - 13)**

[10] ***Interpretation – General and Specific Provisions - Where there are general and specific provisions on the same subject matter, court must adopt the specific provisions.***

Both Sections 232 (1) and 251 (1) (a), (b) and (q) are authored by the same legislators and make up the same 1999 Constitution. It outrightly hits an effective interpreter of these Constitutional provisions that Section 251 (1) (a), (b) and (q) is not only subsequent in sequence to but more specific and special in tenor than Section 232 (1) of the Constitution. A reasonable construction of these provisions also admits the finding that the framers of the Constitution in providing for the first of the two provisions had contemplated the subsequent provision and in providing the subsequent one had not forgotten that the earlier provision had already been put in place.

The specific jurisdiction vested in the Federal High Court under Section 251 (1) (a), (b) and (q) is exercisable "notwithstanding anything to the contrary in the constitution" including the original jurisdiction conferred on the Supreme Court under the earlier Section 232 (1) of the same Constitution. The applicable principle of interpretation in this instance remains what Bairamian J. (as he then was) in delivering the judgment of the then West African Court of Appeal in *Mrs F. Bamgboye v. Administrator-General* 14 WACA 616 at page 619 stated thus:-

> ***"It is an accepted canon of construction that where there are two provisions, one special and the other general, covering the same subject matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision. The reason behind this rule is that the legislature in making the special provisions is considering the particular case and expressing its will in regard to that case; hence the special provision forms an exception importing the negative; in other words the special case provided for in it is excepted and taken out of the general provision and its ambit: the general provision does not apply.....The above rule of construction applies equally, of course, when the special and the general provision are enacted in the same piece of legislation: see Dryden v The Overseers of Putney (2)." (underlining mine for emphasis).***

This Court in its decisions too numerous to readily fathom has cited with approval the foregoing dicta and imbibed the principle so adroitly enunciated therein. See *The Governor of Kaduna State & Others v. Lawal Kagoma* (1982) 6 SC 87 at 107 - 108; *Kraus Thompson Organisation Ltd v. National Institute for Policy and Strategic Studies* (2004) LPELR - 1714 (SC); (2004) 9 NWLR (Pt 879) 61 and *Schroder v. Major* (1989) 2 NWLR

(Pt.101) 1 and *Orubu v. NEC* (1988) 5 NWLR (Pt.94) 323.
(P. 21 lines 32 - 45; P. 22 lines 1 - 26)

[11] ***Supreme Court – Original Jurisdiction - is invoked to resolve disputes between the Federation and constituent state(s) or between states.***

PER MOHAMMED, JSC:

With regard to the nature of the dispute and the type of parties that may activate the Original Jurisdiction of this Court under Section 232(1) of the 1999 Constitution which is in *pari-materia* with Section 212 of the 1979 Constitution, the cases of *A.G. of Kano State v. A.G. of the Federation* (2007) 6 N.W.L.R. (Pt.1029) 164 at 182 - 183 and *A.G. of Anambra State v. A.G of the Federation* (2007) 12 N.W.L.R. (Pt.1047) 4 at 42 - 43, are also relevant. From the interpretation of the provisions of Section 232(1) of the 1999 Constitution in the relevant cases referred to earlier in this judgment, it is quite clear that for this Court to exercise its Original Jurisdiction under that section, the plaintiff's action against the 1st defendant, this Court has to be satisfied that the dispute for adjudication in the action is one between the plaintiff Lagos State of Nigeria as a constituent unit of the Federation of Nigeria and the Federation of Nigeria also as a distinct unit under the Constitution. The words used in Section 232(1) of the Constitution describing the parties are "the Federation," "a State", and "States." In otherwords, the dispute must be between the Federation and a State or between the Federation and more than one State or between a State or States in their capacities as members of the Federating Units of the Federation of Nigeria. The Section in my view is not expected to provide avenue for the resolution of disputes between the Federal Government of Nigeria and a State Government of Nigeria or between Government and another State Government of all of which are only products of elections. **(P. 31 lines 28 - 45; P. 32 lines 1 - 2)**

[12] ***Supreme Court – Original Jurisdiction - cannot be invoked if the dispute is one which falls within the jurisdiction of another court.***

PER MOHAMMED, JSC:

Therefore since the reliefs claimed by the plaintiff particularly the injunctive relief is against the Federal Government of Nigeria, its servants and its agencies, the relief not being against the Federation of Nigeria or any State or States of the Federation as constituent units of the Federation, is not within the purview of Section 232(1) of the 1999 Constitution to confer Original Jurisdiction on this Court. It is for this reason that I agree with my learned brother Musa Dattijo Muhammad JSC in his lead Ruling that the nature of the dispute disclosed in the identified paragraphs of the plaintiffs

affidavit in support of the Originating Summons, are such that the jurisdiction of this Court under Section 232(1) of the 1999 Constitution, cannot be properly invoked. **(P. 32 lines 2 - 12)**

[13] ***Supreme Court – Original Jurisdiction - can be invoked in respect of a claim against the Federation but not the Federal Government.***

The dispute herein is not between the Federation and the plaintiff. It is between the plaintiff and the Federal Government of Nigeria. See relief No.2 by which the plaintiff sought injunction not against the Federation but against the Federal Government of Nigeria, an entity not subject to the original jurisdiction of this Court. No Act of the National Assembly has expanded the original jurisdiction of this Court to include disputes involving the Federal Government of Nigeria pursuant to subsection 2 of Section 1 of Section 232 of the Constitution (supra).

I think that the plaintiff had the mistaken idea that the Federal Government of Nigeria is synonymous with the Federation or Federal Republic of Nigeria. The dispute is not within the purview of Section 232 of the Constitution (supra). I am fortified in this view by the judgment of this Court in *Attorney-General Kano State v. Attorney-General Federation* (2007) 3 SC (Pt. 1) 59 wherein it was held, *inter alia*:

> "It is quite clear from the numerous decisions of the Supreme Court that in order to invoke the original jurisdiction of the Supreme Court under Section 232(1) of the 199 Constitute, there must be a dispute between the Federation and one or more States as component part of the Federation or between States themselves..."

To ignite the original jurisdiction of the Supreme court under Section 232(1) of the 1999 Constitution (as amended), the dispute must be between the whole (Federation) as it were and part or parts thereof, i.e. States as component parts of the whole (Federation) or between States as component parts of the Federation. **(P. 40 lines 21 - 44)**

Obiter:

[14] ***Federalism – Federation and Federal Government - The Federation of Nigeria remains in perpetuity while the Federal Government changes by election.***

In my humble view, the Federal Republic of Nigeria is different and distinct from the Federal Government of Nigeria.

Section 2 (1) of the Constitution of the Federal Republic of Nigeria provides:

"S.2 (1): Nigeria is one indivisible and indissoluble sovereign State to be known by the name of the Federal Republic of Nigeria."

S.2(2) Nigeria shall be a Federation consisting of the States and a Federal Capital Territory."

On the other hand, with respect to the Government, be it the Federal Government or State Government, Section 14 (2) of the Constitution (supra) provides:

"S.14(2): It is hereby, accordingly, declared that –

(a) sovereignty belongs to the People of Nigeria from whom government through this Constitution derives all its powers and authority."

The Federal Republic of Nigeria (or the Federation) is the repository of the sovereignty of the people of Nigeria whereas the Federal or State Governments, in contradistinction, are donees of the powers and authority of the people. A Government is a trustee of the power and authority of the people given through elections. Under the Constitution, the government at Federal and state levels comes and goes. Every four years the mandate is renewed or lost at the elections, but the Federation enures in perpetuity.

PER FABIYI, JSC:

It is now beyond dispute that the Federation of Nigeria is distinct and separate from the Federal Government of Nigeria which often, is a product of election. On the other hand, the Federation of Nigeria remains intact for all times; all things being equal. The two are not synonymous at all.
(P. 39 lines 18 - 45; P. 36 lines 4 - 7)

MUHAMMAD, JSC: (Delivering the lead ruling): By an amended Originating summons filed on the 12th day of August, 2009, the plaintiff claims against the defendants thus:-

"That the House of Assembly of Lagos State of Nigeria is the body entitled, to the exclusion of any other legislative body, to enact laws with regard to the imposition and collection of tax on the supply of all goods and services within Lagos State of Nigeria and that the Lagos State of Nigeria, or any agency of the State, is the body entitled, to the exclusion of any other body, to assess and collect such tax, and that the revenue of the Lagos State Government has been and continues to be affected by the enforcement of the provisions of the

Value Added Tax Act Cap V1 laws of the Federal Republic of Nigeria, 2004 (hereinafter referred to as 'The VAT ACT'."

In its consideration of the foregoing claim, the plaintiff urges the court to determine the following questions:-

"1. Whether upon the coming into effect of the Constitution of the Federal Republic of Nigeria 1999 the said Value Added Tax Act is an existing law within the meaning of Section 315 of the said Constitution, being a Federal Legislation which is deemed to be an act (sic) of the National Assembly?

2. If the answer is in affirmative, whether the combination of the provisions of Sections 2, 4, 6 and 7 of the said Value Added Tax Act which empower a Federal Organ to impose and collect taxes on the supply of all goods and services other than those listed in the first schedule to the said Act amount to an imposition of tax on the supply of all goods and services within the Lagos State of Nigeria and within other states of the Federation?

3. If the answer to question 2 is in the affirmative, whether sections 2, 3, 4, 5, 6 and 7 of the said Value Added Tax Act are within the contemplation and competence of the powers conferred on the National Assembly under Section 4 of the 1999 Constitution?"

On determining the questions, the plaintiff prays the court for the following reliefs:-

"(1) A declaration that the Value Added Tax Act Cap V1 laws of the Federal Republic of Nigeria 2004 is, to the extent that it provides for the imposition and collection of taxes on goods and services in Lagos State (and other states of the federation), outside the legislative competence of the National Assembly and is therefore unconstitutional, null and void and no effect whatsoever.

(2) A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provision of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria."

The 1st defendant, the Attorney General of the Federation, upon being served the amended Originating Summons, the supporting affidavit and the Exhibits annexed

thereto, on 3rd February, 2010 filed a Notice of Preliminary Objection pursuant to Order 2 Rule 29 of the Supreme Court Rules 2002 and Section 232(1) of the Constitution of the Federal Republic of Nigeria, 1999 urging the Court to strike out and/or dismiss plaintiff's suits on the grounds set out in the schedule to the preliminary objection. 1st defendant also canvassed for such further order(s) as the court may deem fit to make in the circumstances of the case.

The two grounds on which the preliminary objection is predicated are hereunder reproduced shorn of their particulars:-

> ***"GROUND 1***
>
> ***The plaintiff's cause of action relates to acts of a Federal Organ and cannot form the basis of invoking this Honourable Court's Original Jurisdiction to entertain this suit***
>
> ***GROUND 2***
>
> ***The entire suit constitutes an abuse of court process and should be struck out."***

Parties have filed and exchanged written briefs on 1st defendant's preliminary objection and, where applicable, also on plaintiff's amended originating summons.

Courts, including the apex court, lack the jurisdiction of entertaining incompetent claims and/or those that constitute abuse of their processes. They proceed in vain if they do. Being bereft of the necessary *vires* or with their processes having been abused, the decisions which eventually arise lack the authority and so remain unenforceable no matter how well conducted the proceedings that brought them about were. A judgment given without jurisdiction creates no legal obligation and does not confer any rights to any of the parties. Being a challenge to the jurisdiction of this Court to entertain plaintiff's action, therefore, 1st defendant's preliminary objection has to be determined first. Having been raised, all proceedings must abate until the issue is resolved. See *Adeyemi v. Opeyori* (1976) 9 – 10 SC 31, *A.G. Lagos State v. Dosunmu* (1989) 3 NWLR (Pt 111) 552, *Jeric Nig Ltd v. UBA Plc* (2000) 12 SC (Pt 11) 33, *Nnonye v. Anyiche* (2005) 2 NWLR (Pt 910) 623 and *Daplanlong v. Dariye* (2007) 8 NWLR (Pt 1036) 332.

The two issues the 1st defendant considers to have arisen for the determination of his preliminary objection as distilled at paragraph 3 of his written brief thereon read:-

> ***"1. Whether the Supreme Court's original jurisdiction can be invoked where the Acts and Allegations constituting the main dispute are Acts of an Agency of the Federal Government.***

2. Whether the present suit filed during the pendency of several suits between the main parties on record of their agents does not constitute an abuse of court process."

On his part, the two issues formulated in the plaintiff/respondent's brief as arising from the preliminary objection are:-

"(1) Whether there is a dispute between the Lagos State Government and the Federation in respect of the Constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other States of the Federation) over which the Supreme Court may exercise exclusive jurisdiction?

(2) Does the present action instituted by the plaintiff amount to an abuse of process of this honourable Court?

Under the 1st issue arising from the preliminary objection, Mr. Daudu 1st defendant's learned senior counsel submits that the original jurisdiction of this Court is provided for under Section 232 (1) of the 1999 Constitution. For the original jurisdiction of the court to be invoked, it is contended, plaintiff's claim must disclose a dispute between the federation and a state or states as constituent unit or units or between the states *inter-se*. The dispute, 1st defendant's learned senior counsel further submits, must be one on which the existence or extent of a legal right of the parties in their capacities as such is involved. Learned senior counsel relies on *A.G. Bendel State v. A.G. Fed* (1982) 3 NCLR 1, *A.G. Federation v. A.G Abia State* (2001) 1 NWLR (Pt.625) 689 at 728, AG *Federation v. A.G. Imo State* (1993) 4 NCLR 178 and more particularly *A.G. Kano State v. AG. Federation* (2007) 3 SC 59 at 1.

Paragraphs 7, 8, 13, 15 and 19 of the affidavit in support of plaintiff's originating summons, it is contended, only disclose a dispute between the plaintiff and an agency of the 1st defendant. Plaintiff's complaint, it is further argued, centres squarely on the collection of Tax on supply of goods and services by the Federal Inland Revenue Services which Act makes it tremendously difficult for the plaintiff or any of its agencies to collect taxes from those sources. Plaintiff's claim is about restraining 1st defendant's agent from imposing and collecting taxes on the supply of goods and services within Lagos State and no more. Being a claim pertaining to the acts of an agency of the 1st defendant rather than a dispute between the federation and the plaintiff or between the states themselves as constituents of the federation, the original jurisdiction of the Supreme Court under Section 232 (1) of the 1999 Constitution cannot be invoked by the plaintiff/respondent. Further relying on the decision of this Court in *A.G. Benue State v. A.G. Federation and 35 others (supra)*, learned senior counsel urges that plaintiff's suit as presently constituted be struck-out for want of jurisdiction.

Under the 2nd issue, learned senior counsel for the 1st defendant contends that plaintiff's suit which seeks to relitigate afresh issues that had been tried and decided by courts of competent jurisdiction other than this Court is an abuse of the process of this Court. Learned senior counsel *inter-alia* relies on *A.G. Ondo State v. A.G Ekiti State* (2001) 7 NWLR (Pt.743) 706, *CBN v. Ahmed* (2001) 11 NWLR (Pt.24) 369 and *Ogoejofo v. Ogoejofo* (2006) 22 NWLR 183 and contends that the suit constitutes an abuse of the process of this Court. It is contrary to justice and public policy, learned senior counsel submits, to allow the plaintiff prosecute such a claim that has already been tried and determined.

Referring to paragraph 15 of the affidavit in support of plaintiff's amended originating summons, learned senior counsel further submits that the plaintiff and the 1st defendant were the principal parties in suit No.ID/105/01 wherein the plaintiff obtained a decision in his favour. The nominal parties and the 1st defendant being dissatisfied with the decision filed appeals CA/L/23/04 and CA/L/727M/06 respectively. The two appeals are still pending. The subject matter of suit No.ID/105/01 and the pending appeals from same, submits learned senior counsel, are discernable from page 5 of the judgment of the trial court, Exhibit "A", annexed to the affidavit in support of plaintiff's amended originating summons. It is the same subject matter, contends learned senior counsel, that the plaintiff raises in the present suit. Again, suit No FHC/L/205/04 between the plaintiff and the agents of the 1st defendant as well as plaintiff's appeal No. CA/L/428/05 on the same subject matter instantly raised by the plaintiff, have all been determined against the plaintiff. The plaintiff is yet to appeal against the decision of the Court of Appeal.

In view of the litany of cases instituted by the plaintiff against 1st defendant's agencies and in respect of which the trial High Courts and the Court of Appeal, as the case may be, have pronounced upon, it is concluded, the original jurisdiction of this Court should not avail the plaintiff to relitigate the very issue raised in the other suits. There must be certainty and end to litigation and the plaintiff should not be allowed to circumvent the processes of the other courts he had already approached. On the whole, plaintiff's claim, learned senior counsel to the 1st defendant submits, should be struck out and/or dismissed.

Responding under plaintiff's 1st issue for the determination of the preliminary objection, Mr. Sofunde SAN for the plaintiff submits that it is the claim of the plaintiff that determines a court's jurisdiction. Learned senior counsel relies on *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR (Pt.625) 689 at 740 and *Izenkwe v. Nnadozie* 14 WACA 361 at 363 from which the former decision drew.

Learned senior counsel refers to plaintiff's claim and the reliefs being sought therefrom as well as paragraphs 7, 8, 12, 14 and 15 of the affidavit in support of plaintiff's amended originating summons and submits that a dispute is clearly shown to exist between the plaintiff and the federation. Learned plaintiff's counsel concedes that on the authorities, particularly *A.G. Kano v. A.G. Federation* (2007)

6 NWLR (Pt.1029) 164 at 182 the existence of a dispute between the federation and a state or the states *inter-se* as constituent units is an essential requirement for the invocation of the original jurisdiction of this Court.

By the reliefs the plaintiff seeks and the facts as contained in the relevant paragraphs in his supporting affidavit, plaintiff's learned senior counsel contends, the plaintiff's suit is challenging the constitutionality of the Value Added Tax Act and the illegality of the collection of tax pursuant to the Act. Plaintiff's grouse in the suit is not really about the act of the collection of these taxes by the F.I.R.S., an agency of the 1st defendant, but rather on the legality or otherwise of the legislation on which the acts of the F.I.R.S. are founded. The plaintiff, it is submitted, has no dispute with the Federal Board of Inland Revenue which remains a mere agent but with the legislative competence of the 1st defendant *vis-a-vis* the taxes collected by the Board. Were the plaintiff's quarrel to be in relation to the act of collecting this tax by 1st defendant's agent without more, it would have been impossible to bring plaintiff's claim within the purview of Section 232 (1) of the 1999 Constitution that provides for this Court's original jurisdiction.

Learned senior counsel cites the cases of *A.G. Abia State v. A.G Federation* (2007) 6 NWLR (Pt.1029) 200 and *A.G. of Benue State v. A.G of the Federation & 35 Ors.* unreported decision of this Court in Appeal No.179/2006 delivered on 25th October, 2007.

It is not the law, it is further argued, that the illegality of an act of the Federal Government cannot be challenged by a state as a constituent of the Federation by invoking the original jurisdiction of this Court pursuant to Section 232(1) of the 1999 Constitution simply because the act complained of is being performed by one of the agencies of the Federal Government. Once the constitutionality of the enactment by virtue of which the acts complained of are carried out is in issue, the dispute would come within the purview of Section 232 (1) of the 1999 Constitution. Relying on the *Attorney-General of Bendel State v. Attorney-General of the Federation* (1981) 10 SC 1 and *A.G. Abia State v. A.G. Federation & 35 Ors* (2005) 12 NWLR (Pt.940) 452.

Concluding under the issue, learned senior counsel submits that what determines proper resort to the original jurisdiction of this Court under Section 232(1) of the Constitution is who the real disputants are in the matter a fact discernable from the crux of the plaintiff's complaint. The mere fact that the act challenged is that of an agency of the 1st defendant in the case at hand without more does not take away the court's jurisdiction under Section 232 (1) of the Constitution. Plaintiff's grouse it is argued, is that it has been denied imposition and collection of taxes on the supply of goods and services because such tax are, due to the implementation of the illegal and unconstitutional VAT regime, instead, collected by the agency of the 1st defendant. The power of the National Assembly to enact the legislation is the crux of plaintiff's suit. Learned senior counsel urges that the

issue be resolved against the 1st defendant.

Under the 2nd issue, learned senior counsel cites the decisions in *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156 at 188 and *Okafor v. A.G. Anambra* (1991) 6 NWLR (Pt.200) 659 at 681 and submits that since the subject matter and the parties in the instant suit are not the same as in the suits mentioned in paragraph 15 of the affidavit in support of plaintiff's amended originating summons, the instant suit cannot be rightly held to be an abuse of the process of this Court. A scrutiny of paragraph 15 of the supporting affidavit to plaintiff's amended originating summons and the processes annexed to the summons clearly belies the assertion that the 1st defendant, the Attorney General of the Federation was a party to suit No.ID/105/01. Appeal No.CA/L/727M/2006 against same though, learned senior counsel to the plaintiff concedes, was filed by the Attorney General. The fact, learned senior counsel however argues, does not make the 1st defendant a party to suit ID/105/727m/ which gave rise to appeal CA/L/727M/2006. The fact remains, therefore, plaintiff's learned senior counsel insists, that parties previous suits and the parties in the present suit are not the same.

The validity and constitutionality of the Value Added Tax Act which is the issue in the instant suit, further argues learned senior counsel, was never the issue in the previous suits. Similarly, the issues that arose in appeal No.CA/L/428/05, it is contended, differs from those raised in the present suit. The requirement of sameness of the subject matter in the present suit with the one in the previous suits not having been met plaintiff cannot be denied his right to proceed with the instant action.

Lastly, it is submitted, 1st defendant who has failed to demonstrate what irritation or annoyance plaintiff's action has caused him cannot stop plaintiff's claim. In addition to establishing multiplicity of actions and the sameness of subject matter in and between the other suits and the present suit, the purpose and aim of the person exercising the perceived right to institute more than one action must be established.

It is pertinent to state here that the plaintiff has advanced similar responses to the arguments contained in the briefs of the 14th, 24th, 30th and 35th defendants on the arguments on their preliminary objections which are similar to those proffered in the 1st defendant's brief. It serves no useful purpose to further restate these arguments.

On the whole, learned senior counsel to the plaintiff prays that all the preliminary objections be overruled. He urges that the court assumes jurisdiction over plaintiff's suit.

It must be stressed that the jurisdiction of all courts are as provided for by the Constitution and/or the relevant legislation. Jurisdiction remains a question of law

and a necessary requirement in all proceedings. Whenever the jurisdiction of a court is challenged the well laid down position of the law is that the plaintiff's claim determines the issue. The claim of the plaintiff is carefully examined to see if it comes within the jurisdiction conferred on the court by the relevant legislation. See *Bronik Motors Ltd & Anor v. Wema Bank* (1983) NSCC 226, *Chief Danis C. Osadebay v. A.G. Bendel State* (1991) 1 SC (Pt.11) 73 and *Dr. Felix Amadi & Anor v. INEC & 2 Ors* (2012) 2 SC (Pt.1) 1. In the case at hand where the plaintiff seeks to commence his action by an originating summons, the preliminary objection is to be determined on the basis of the totality of the case he puts forward in the summons and the affidavit in support. See *Inakoju & Ors v. Senator Rashidi Ladoja & Ors* (2007) All FWLR (Pt.353) 1 at 87.

Counsel on both sides have urged that in determining the preliminary objections against the plaintiff's suit we examine the plaintiff's claim by reference only to Section 232(1) of the 1999 Constitution and Order 2 rule 29 of the Supreme Court Rules, 2002. Counsel have cited and relied on decisions of this Court where the court assumed or declined jurisdiction by examining the plaintiff's claim in the light of Section 232(1) of the 1999 Constitution alone. The court, it must be realized, at all times does the needful and the necessary.

It is a settled principle of interpretation that whenever a court is faced with the interpretation of a Constitutional provision the Constitution must be read as a whole in determining the object of the particular provision. This requirement places a duty on the court to interpret related Sections of the Constitution together. See *Nafiu Rabiu v. The State* (1980) 8 - 11 SC 130 at 148; (1980) 8 -11 SC (Reprint) 85 and *Bronik Motors & Anor v. Wema Bank Ltd (supra).* In *Hon. Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) v. A.G. Federation & 2 Ors* (2012) 2 SC (Pt.1) 145, this Court stated thus:-

> ***"The duty of the court when interpreting a provision of the Constitution is to read and construe together all provisions of the Constitution unless there is a very clear reason that a particular provision of the Constitution should not be read together. It is germane to bear it in mind the objective of the Constitution in enacting the provisions contained therein. A section must be read against the background of other Sections of the Constitution to achieve a harmonious whole. This principle of whole statute construction is important and indispensable in the construction of the Constitution so as to give effect to it."***

The determination of the preliminary objections against plaintiff's action requires the application of the principle of community construction of the provision of Section 232 (1) of the 1999 Constitution by considering all relevant provisions of the very constitution that may be helpful in the proper understanding of the particular provision in contention. See *Buhari v. Yusuf* (2003) 6 SC (Pt.11) 156 and *Associated*

Discount v. Amalgamated Trustees (No 2) (2007) 7 SC 168. I am of the firm and considered view that a resort to Section 6 (1), (5) and (6) and Section 251 (1) (a), (b) and (q) of the 1999 Constitution as well will facilitate a proper understanding of Section 232 (1) of the same Constitution that is particularly in issue in the matter at hand. All these provisions are hereunder reproduced for ease of reference.

"Section 6 - (1) The judicial powers of the federation shall be vested in the courts to which this section relates, being courts established for the federation.

(5) This section relates to –

(a) The Supreme Court of Nigeria;

(b) The Federal High Court:

(6) The judicial powers vested in accordance with the foregoing provisions of this section-

(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of the court of law,

(b) Shall extend to all matters between persons, of between government or authority and to any person in Nigeria and all actions and proceedings relating thereto: for the determination of any question as to the civil rights and obligations of that person.

Section 232(1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends.

Section 251 (1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters-

(a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party.

(b) *Connected with or pertaining to the taxation of Companies and other bodies established or carrying on business in Nigeria and all other persons subject to federal taxation."*

(q) *Subject to the provisions of this Constitution the operation and interpretation of the Constitution in so far as it affects the Federal Government or any of its agencies. (underlining supplied for emphasis).*

A community reading of the foregoing provisions reveals the establishment of the Supreme Court and the Federal High Court and their investiture with judicial powers in all actions and proceedings pertaining to all matters between persons or between government or authority and to any person in Nigeria. In particular, Section 232(1) provides for the original jurisdiction of the Supreme Court which is exclusive to it in respect of any dispute between the Federation and State or between the States inter-se, the determination of which dispute involves a resolution of any question, whether of fact or law, on which the existence or extent of the legal right being asserted in the dispute depends. By this Section, once a dispute is between the Federation and a State or between the States themselves and the determination of the dispute requires resolution of any question, whether of fact or law in relation to the claim raised, this Court and no other would have jurisdiction over such matters. The section does not empower the apex Court to hear and determine disputes between the government of the Federation and a State or the governments of the States *inter-se*. It equally does not allow for disputes between agencies of the Federal government and a State or agencies of the State governments *inter-se*.

The plaintiff lavishly contended that he has met all the conditions he requires in invoking the original jurisdiction of this Court under Section 232 (1) of the Constitution to wit:-

(a) there must be a justiciable dispute involving any question of law or fact, (b) the dispute must be (i) between the Federation and a State in its capacity as one of the constituent units of the Federation, or (ii) between the Federation and more State that are in their capacities as members of the constituent unit of the Federation; and (c) the dispute must be one on which the existence or extent of a legal right in the said capacity is involved. See *A.G., Federation v. A.G., Imo State* (1983) 4 NCLR and *A.G., Ondo State v. A.G., Fed.* (2002) 9 NWLR (Pt.772) 222 SC.

I am in complete agreement with learned senior counsel to the plaintiff that the crux and substance of the content of the affidavit in support of plaintiff's amended originating summons should inform our decision whether or not to assume jurisdiction over plaintiff's suit. It is indeed the law that the form in which plaintiffs claim has been couched should not be the overriding consideration. Time it was

when courts lean on technicalities. In the instant matter only consideration of the crux of plaintiff's claim will ensure the just resolution of the issue in dispute. See *Consotium M. C. v. NEPA* (1992) 6 NWLR (Pt.246) 132 and *Adelusola v. Akinde* (2004) 12 NWLR (Pt.887) 295.

It is not unreasonable to view plaintiff's claim, given the facts on which same rests, as indicating a complaint against the legislative competence of the National Assembly which fact, inspite of the reference to agencies of the federal government in the claim, may form the basis of this Court's assumption of jurisdiction as was done in *A.G. Bendel State v. A.G. Federation & Ors* (1981) vol 12 N.S.C.C. 314 and *A.G. Lagos State v. A.G. Federation & 35 Others*. The fact that the Attorneys General of both sides are the parties in plaintiff's case and not any of their agencies tends to further remove plaintiff's suit from the decision of this Court inter-alia in *A.G. Anambra State v. A.G. Federation & 35 Others* (2007) 12 NWLR (Pt.1047) 4 and *A.G. Abia State v. A.G. Federation* (2007) 6 NWLR (Pt.1029) 200 declining jurisdiction. Lastly and equally important is the fact that plaintiff's cause of action being justiciable also takes it out of the shackles of this Court's decision in *A.G. Kano State v. A.G. Federation* (2007) 6 NWLR (Pt.1029) 164.

Now, the most important question to answer is whether indeed the plaintiff has met the stated conditions. In answering this question we must take the exercise we embarked upon of communally interpreting the constitutional provisions under reference to its logical conclusion. This lies in finding the answer to the further question whether, given the provision of Section 251 (1) (a), (b) and (q) of the same 1999 Constitution, the Supreme Court's exclusion of other courts in the exercise of the original jurisdiction conferred on it by Section 232 (1) is total. Put differently, does Section 251 (1) (a), (b) and (q) vest the Federal High Court, which by the hierarchical arrangement under Section (6) (5) is a court of first instance equally exercising original jurisdiction into civil matters and causes, the jurisdiction in any dispute between the federation and a state or between the states themselves?

Both Sections 232 (1) and 251 (1) (a), (b) and (q) are authored by the same legislators and make up the same 1999 Constitution. It outrightly hits an effective interpreter of these Constitutional provisions that Section 251 (1) (a), (b) and (q) is not only subsequent in sequence to but more specific and special in tenor than Section 232 (1) of the Constitution. A reasonable construction of these provisions also admits the finding that the framers of the Constitution in providing for the first of the two provisions had contemplated the subsequent provision and in providing the subsequent one had not forgotten that the earlier provision had already been put in place.

The specific jurisdiction vested in the Federal High Court under Section 251 (1) (a), (b) and (q) is exercisable "notwithstanding anything to the contrary in the constitution" including the original jurisdiction conferred on the Supreme Court under the earlier Section 232 (1) of the same Constitution. The applicable principle

of interpretation in this instance remains what Bairamian J. (as he then was) in delivering the judgment of the then West African Court of Appeal in *Mrs F. Bamgboye v. Administrator-General* 14 WACA 616 at page 619 stated thus:-

> ***"It is an accepted canon of construction that where there are two provisions, one special and the other general, covering the same subject matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision. The reason behind this rule is that the legislature in making the special provisions is considering the particular case and expressing its will in regard to that case; hence the special provision forms an exception importing the negative; in other words the special case provided for in it is excepted and taken out of the general provision and its ambit: the general provision does not apply..... The above rule of construction applies equally, of course, when the special and the general provision are enacted in the same piece of legislation: see Dryden v. The Overseers of Putney (2)."*** (Underlining mine for emphasis).

This Court in its decisions too numerous to readily fathom has cited with approval the foregoing *dicta* and imbibed the principle so adroitly enunciated therein. See *The Governor of Kaduna State & Others v. Lawal Kagoma* (1982) 6 SC 87 at 107 - 108; *Kraus Thompson Organisation Ltd v. National Institute for Policy and Strategic Studies* (2004) LPELR - 1714 (SC); (2004) 9 NWLR (Pt 879) 61 and *Schroder v. Major* (1989) 2 NWLR (Pt.101) 1 and *Orubu v. NEC* (1988) 5 NWLR (Pt.94) 323.

Paragraphs 12 and 13 of the plaintiff's affidavit in support of the originating summons capture the thrust of the claim he seeks to raise by invoking the original jurisdiction of this Court under Section 232 (1) of the 1999 Constitution. The two paragraphs are hereinunder reproduced for ease of reference:-

> ***"12. I verily believe that the Lagos State Government is entitled, to the exclusion of any other body, to collect any tax charged on the supply of all goods and services within the Lagos State of Nigeria under any law passed by the Lagos State House of Assembly and no other body or Government is entitled to a share of such tax as may be collected.***
>
> ***13. The Federal Government continues, through it agents, to administer the Value Added Tax Act and to assess and collect tax thereunder with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of other States and distribute such tax in accordance with the fee sharing formula."***

Plaintiff's grouse as captured *inter-alia* in the foregoing paragraphs is about a dispute between the Federal government and the governments of the States rather than between the federation and the various states. It is also a dispute pertaining to the operation of an agency of the Federal government, Federal Inland Revenue Service (F.I.R.S.), *vis-a-vis* an agency of the plaintiff. It is not unreasonable to also assess the dispute as one which seeks the interpretation and examination of the operation of the 1999 Constitution as it affects both sides to plaintiff's suit. I do not have the slightest doubt that a dispute on all or any of these comes squarely within the purview of the jurisdiction the makers of the Constitution specifically provided the Federal High Court under Section 251 (a), (b) and (q) of the 1999 Constitution which provision tampers and conditions the original jurisdiction of this Court pursuant to Section 232 (1) of the same constitution. The plaintiff, whose claim clearly relates to the revenue of the Government of the federation, consequent upon the taxes one of its agencies levies and/or seeks the interpretation of the Constitution as to how the operation of the Constitution affects the 1st defendant or any of its agencies, is at the wrong court. This Court must decline jurisdiction. I so hold.

The 2nd ground upon which the preliminary objection predicates is on the abuse of the process of this Court by the plaintiff. The door has been shut against him. Had this Court found plaintiff's suit as coming within the purview of Section 232 (1), it would have then become necessary to consider the 2nd leg of the objection raised against the suit. It is accordingly unnecessary to delve into the ground having declined jurisdiction for the reasons already articulated.

In sum, the preliminary objections raised against the competence of plaintiff's suit having succeeded are hereby upheld. Plaintiff's suit is resultantly struck-out for want of jurisdiction. I make no order on costs.

MOHAMMED, JSC: By an Amended Originating Summons dated 10th August, 2009 and filed at the Registry of this Court on 12th August, 2009, the plaintiff Lagos State through its Attorney-General, invoked the originating jurisdiction of this Court and sued the 1st defendant, the Federation of Nigeria through the Attorney-General of the Federation and claimed that the House of Assembly of Lagos State of Nigeria is the body entitled, to the exclusion of any other Legislative Body to **enact Laws with regard to the imposition and collection of tax on the supply of all goods and services** within the Lagos State of Nigeria and that the Lagos State of Nigeria **or any agency of the State**, is the body entitled, to the exclusion of any other body, to assess and collect such tax, and that the revenue of Lagos State Government has been and continues to be affected by the enforcement of the provisions of the Value Added Tax Decree No.102 of 1993, now Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria 2004, for the determination of the following questions.

1. Whether upon the coming into effect of the Constitution of

the Federal Republic of Nigeria, 1999, the said Value Added Tax Act is an existing law within the meaning of Section 315 of the said Constitution, being a Federal Legislation which is deemed to be an Act of the National Assembly?

2. **If the answer is in the affirmative whether the combination of the provisions of Section 2, 4, 6 and 7 of the said Value Added Tax Act which empowered a Federal organ to impose and collect taxes on the supply of all goods and services other than those goods and services listed in the First Schedule to the said Act amount to an imposition of tax on the supply of all goods and services within the Lagos State of Nigeria and within other States of the Federation?**

3. **If the answer to question 2 is in the affirmative, whether Sections 2, 3, 4, 5, 6 and 7 of the said Value Added Tax Act are within the contemplation and competence of the powers conferred on the National Assembly under Section 4 of the 1999 Constitution.**

Upon the determination of the above questions, the plaintiff claimed against the 1st defendant the following reliefs -

a. **A declaration that the Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria, 2004 is, to the extent that it provides for the imposition and collection of taxes or goods and services in Lagos State (and other States of the Federation), outside the Legislative competence of the National Assembly and is therefore unconstitutional, null and void and of no effect whatsoever.**

b. **A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provisions of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria.**

In support of the Originating Summons, the plaintiff had filed a 19 paragraph affidavit to which various processes of pending or determined cases between the plaintiff and several agencies of the Federal Government of Nigeria were exhibited.

The 1st defendant entered appearance and filed a 6 paragraph counter affidavit and a Notice of Preliminary objection to the plaintiff's action asking this Court to strike out or dismiss the action for lack of jurisdiction or for being an abuse of the process of this Court. The plaintiff also filed a brief of argument in support of its case on 12th

August, 2009 but deemed filed on 22nd April, 2010 on the order of this Court. A number of Reply briefs of argument were also filed by the plaintiff in response to the 1st, 29th and 30th defendants briefs of argument and the 1st defendant's Notice of Preliminary Objection. The last of these Reply briefs was filed by the plaintiff on 18th October, 2013. The counter-affidavit and the Notice of Preliminary Objection by the 1st defendant were filed on 3rd February, 2010. In addition to the 1st defendant's amended brief of argument filed on 3rd February, 2010, a separate brief of argument was also filed for the 1st defendant in support of its Notice of Preliminary Objection on the same date. Relevant processes comprising counter-affidavits and briefs of argument in support of the plaintiff's case or in support of the defence of the 1st defendant have been variously filed by the 2nd to the 36th defendants before this case was heard on 4th February, 2014.

When a preliminary objection is raised in an action such as the present one commenced by Originating Summons, it is always better to take the Preliminary Objection with the substantive so that if the objection to the action succeeds, the case or action is terminated *in-limine*. If the objection fails however, then the Court will proceed to determine the substantive action on its merit. See *Dapianlong v. Dariye* (2007) 8 N.W.L.R. (Pt.1036) 332 and *Amadi v. N.N.P.C.* (2000) 10 N.W.L.R. (Pt.674) 75 at 100. In line with the requirement of the law and the practice of this Court, I shall proceed to consider the Preliminary Objection raised by the 1st defendant to the plaintiffs action filed against it. The duty of this Court and indeed any other Court where Preliminary Objection has been raised to the competence of an action, is to determine the objection first before looking into the substantive matter. See *Onyekwuluje v. Animashaun & Ors* (1996) 3 N.W.L.R. (Pt.439) 637 at 644.

I shall therefore proceed to look into the 1st defendant's Preliminary Objection to the present case which is predicated on the following grounds.

"GROUND 1

The plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking this Honourable Court's original Jurisdiction to entertain this suit.

PARTICULARS

1. In Paragraph 8 of the Affidavit in support of the Amended Originating summons the plaintiff admits as follows:

"An organ of the Federal Government of Nigeria was authorized to assess, collect, administer and manage the tax."

In Paragraph 13 as follows:

> **"The Federal Government continues, through its agents, to administer the Value Added Tax and to assess and collect tax there under with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of the other States and distribute such tax in accordance with the fee sharing formula."**

And in Paragraph 19 as follows:

> **"Unless restrained by this Honourable Court I verily believe that the Federal Government will, through its agents, continue to implement the provisions of the Value Added Tax Act to the Detriment of the Lagos State Government."**

2. **The Federal Inland Revenue Service (F.I.R.S) is the Federal Government Organ and Agent charged and authorized to assess, collect, administer and manage the Value Added Tax. Consequently, the Federal Inland Revenue Service is a necessary party in the matter as all complaints of the plaintiff relate to acts of the Federal Inland Revenue Service.**

3. **Where an agency of the Federal Republic of Nigeria is or ought to be a party in a matter, the original jurisdiction of the Supreme Court cannot be invoked.**

GROUND 2

The entire suit constitutes an abuse of Court process and should be struck out.

PARTICULARS

1. In Paragraph 15 of the affidavit in support of the plaintiff's Amended Originating Summons, the **plaintiff admits that plaintiff has been involved and is currently engaged in the following pending suits and/or appeals**:

   (a.) CA/L/23/04 *M.A.N. v. A.G Lagos State*

   (b.) CA/L/428/05 *A.G. Lagos State v. Eko Hotels*

   (c.) CA/L/727M/06 *A.G. Lagos State v. M.A.N*

(d.) ID/451/2002 (now CA/L/430/06)

(e.) ID/454/2002

(f.) ID/450/2002 (now CA/L/431/06)

(g.) ID/453/3002

2. The suits stated above are grounded on the same subject matter as this present suit and the plaintiff ought to pursue these suits to their logical conclusion.

3. The plaintiff in Paragraph 17 of the Affidavit in support of the Amended Originating Summons admits that suits No.ID/450/02 and ID/451/02 are currently on appeal.

4. The plaintiff's appeal in APPEAL No.CA/L/438/05 which touches on the same subject matter in this suit was dismissed and the plaintiff has not lodged any appeal against the said judgment.

5. The Court of Appeal in its judgment in Appeal No. CA/L/428/05 declared the plaintiff's Sales Tax Law as null and void and on all matters on which the National Assembly has legislated.

6. That the Court of Appeal judgment in Appeal No.CA/L/428/05 was delivered on 13th July, 2007 and the plaintiff admits this fact but filed this fresh matter before the Supreme Court in 2008.

7. The cause of action (if any) as disclosed in this suit can be properly determined in the above pending suits and/or appeals."

In support of its Preliminary Objection, the 1st defendant filed a brief of argument on 3rd February, 2010 which was duly adopted and relied upon by the learned senior counsel for the defendant at the hearing of this case on 4th February, 2014. The first ground of the Preliminary Objection is that the plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking the Original Jurisdiction of this Court to entertain the suit, while the second ground of the objection is that the entire action constitutes an abuse of Court process and should be struck out.

In the brief of argument, three issues were formulated for the determination of the 1st defendants Preliminary Objection. The issues are –

"1. Whether the Supreme Court's Original Jurisdiction can be invoked where the acts and allegations constituting the

main dispute are acts of an agency of the Federal Government.

2. Whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute an abuse of Court process.

3. Whether the Supreme Court Original Jurisdiction can be invoked where the acts and allegations constituting the main dispute are acts of an Agency of the Federal Government."

In the argument in support of the first issue, learned counsel after quoting the provisions of Section 232(1) of the 1999 Constitution outlining the Original Jurisdiction of this Court, submitted that for the Original Jurisdiction of this Court to be invoked successfully, there must be disclosed and exist a dispute between the Federal Government and the State. The cases of *A.G. Bendel State v. A.G. Federation* (1982) 3 N.C.L.R.1, *A.G. Federation v. A.G. Abia State* (2001) 11 N.W.L.R. (Pt.625) 689 at 728 and *A.G. Kano State v. A.G. Federation* (2007) 3 S.C. 59 at 1 were cited and relied upon in support of argument that the Original Jurisdiction of this Court cannot be invoked in respect of the dispute between the parties in the present action as disclosed in paragraphs 7, 8, 13, 15 and 19 of the plaintiff's affidavit in support of the Originating Summons. Learned senior counsel observed that from those paragraphs of the affidavit of the plaintiff, it is clear that the essence of the plaintiff's complaint is that the collection of Tax on supply of goods and services by Federal Inland Revenue Service in Lagos State, has made it difficult and impossible for plaintiff to collect tax on the supply of goods and services in Lagos State; that in the absence of any claim against any of the States, it is clear from the plaintiff's affidavit that the dispute in this case is between the plaintiff and the Federal Inland Revenue Service, an agency of the Federal Government which cannot be resolved under Section 232(1) of the 1999 Constitution which provides for resolution of disputes between the Federation as a Unit and a State or between States as Units of the Federation.

As for the plaintiff in the brief of argument in respect of the objection, there are only two issues for the determination of the 1st defendant's Preliminary Objection. The issues as identified by the plaintiff are –

"1. Whether there is a Dispute between the Lagos State Government and the Federation in respect of the constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other States of the Federation) over which the Supreme Court may exercise adjudicative Original Jurisdiction?

2. Does the present action instituted by the plaintiff amount to an abuse of process of this Honourable Court?"

Arguing the first issue as identified in the plaintiff's brief of argument, which issue is virtually the same as the 1st defendant's issue 1, learned senior counsel to the plaintiff stressed that the law is trite that the claim of the plaintiff determines the jurisdiction of the Court as restated in *A.G. Federation v. A.G. Abia State* (2001) 11 N.W.L.R. (Pt.525) 689) 689 at 740 and *Izenkwe v. Nnadozie* 14 W.A.C.A 361 at 363; that looking at the questions for determination and reliefs sought by the plaintiff against the 1st defendant in the Originating Summons for declaration that the Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria, 2004 which provided for the imposition and collection of taxes on goods and services in Lagos State (and other States of the Federation) outside the legislative competence of the National Assembly, is unconstitutional, null and void and of no effect whatsoever and the injunctive relief sought against the Federal Government of Nigeria restraining it from giving effect to the provisions of Sections 2, 4, 5, 6 and 7 of the Value Added Tax Act, has disclosed a conflict between the parties which comes squarely within the Original Jurisdiction of the Supreme Court by virtue of Section 232(1) of the 1999 Constitution and the case of *A.G. Kano v. A.G. Federation* (2007) 6 N.W.L.R. (Pt.1029) 164 at 182.

Learned senior counsel to the plaintiff referred to paragraphs 7, 8, 9, 10, 11, 12 to 15 of the affidavit in support of the Originating Summons and stressed that justiciable dispute between the plaintiff and the 1st defendant on the promulgation and application of the Value Added Tax Act in Lagos State touching on the legality or otherwise of the continued existence of the Value Added Tax as a law made by the National Assembly and the legality or otherwise of the continued collection of taxes by the Federal Government pursuant to the Value Added Tax Act, coupled with the unjust denial by the Federal Government of the exclusive right of the plaintiff, Lagos State Government to receive proceeds of tax charged on the supply of all goods and services within Lagos State, leaves no one in doubt of the existence of a dispute capable of being entertained and resolved by this Court in exercise of its original jurisdiction under Section 232(1) of the 1999 Constitution and the cases of *A.G. Federation v. A.G. Abia State* (2001) 11 N.W.L.R. (Pt.725) 689 at 728 and *A.G. Bendel State v. A.G. Federation & Ors*. (1981) 10 S.C.1.

The second ground upon which the 1st defendant challenged the jurisdiction of this Court to entertain the plaintiff's case is the fact that the reliefs claimed by the plaintiff in its action invoking the Original Jurisdiction of this Court under Section 232(1) of the 1999 Constitution have already been litigated upon by the plaintiff in various High Courts and the Court of Appeal in which various decisions have been reached for and against the plaintiff, the present action in the Supreme Court is an abuse of the process of the Court. It was pointed out by the learned senior counsel for the plaintiff however, that since the claims of the plaintiff "in respect of" issues in the cases outlined in its affidavit in support of the Originating Summons are not

the same as those in the present case, and the parties not being the same as the parties in the present case, the complaint of the 1st defendant of an abuse of process of Court can hardly arise in this case to justify this court to decline jurisdiction to entertain and determine the present case between the parties. Learned senior counsel to the plaintiff after very closely analysing the cases referred to in the affidavit of the plaintiff in support of the Originating Summons and the principles of law laid down by this Court in the cases of *Saraki v. Kotoye* (1992) 9 N.W.L.R. (Pt.264) 156 at 188, *Okafor v. A. G. Anambra* (1991) 3 N.W.L.R. (Pt.200) 659, *Umeh & Anor. v. Iwu & Ors*. (2008) 8 N.W.L.R. (Pt.1089) 225 at 243; *Akilu v. Fawehinmi and Togun* (No.2) (1989) 2 N.W.L.R. (Pt.102) 122 at 167, the parties and issues in the plaintiff's pending cases of the High Court and the Court of Appeal, not being the same as those in the present case, the complaint of the existence of abuse of process of Court is not apparent at all in the present case to affect the Original Jurisdiction of this Court to entertain the present case. Learned senior counsel therefore urged this Court to dismiss the 1st defendants Preliminary Objection and for the same reasons given, to also dismiss similar Preliminary Objections raised by the 1st, 14th, 24th, 30th and 35th defendants.

Dealing with the first ground of the 1st defendants Preliminary Objection to the invocation of the Originating Jurisdiction of the Court, the first port of the call is to look at the provision of Section 232(1) of the 1999 Constitution which conferred the jurisdiction on this Court. That Section states –

> **"232(1) The Supreme Court shall, to the exclusion of any other Court, have Original Jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."**

The rules governing the interpretation of Constitutional provisions such as the above provision, is that the Courts are enjoined to approach the construction of the provision liberally. By this, it is meant to construe, where the question is as to whether the expression used in the Constitution should be applied in the wider or narrower sense, the Court should, whenever, possible and in the interest of justice lean to the broader interpretation, unless there is something in the text or the rest of the Constitution indicating that the narrower interpretation will best carry on the object and purposes of the Constitution. See *Rabiu v. The State* (1980) 8 - 11 S.C. 130. The above provisions of Section 232(1) of the 1999 Constitution of the Federal Republic of Nigeria are in *pari-materia* with the provisions of Section 212 of the 1979 Constitution of Nigeria which have been dealt with by this Court in many cases dealing with the invocation of the Original Jurisdiction of this Court. The criteria as stated in those cases before the Original Jurisdiction of this Court is invoked are that –

(a) There must be a justiciable dispute involving any question of law or fact.

(b) The dispute must be -

(i) Between the Federation and a State in its capacity as one of the Federating Constituent Units of the Federation; or

(ii) between the Federation and more States that are in their capacity as members of the Constituent Units of the Federation; or

(iii) between the States in their capacities as members of the Constituent Units of the Federation.

See *Attorney General of Bendel State v. A.G. Federation & Ors*. (1981) 10 S.C. 1 at 32 - 33 where Bello JSC (as he then was) stated the position –

"..... To my mind from the papers filed and the submissions of learned counsel, there is certainly dispute between the plaintiff (Bendel State) which says the Act in dispute is invalid while the two institutions of the Federation, the Executive and the National Assembly assert its validity, and the Executive is duty bound to act upon it unless the Court declares it invalid. The dispute is real and has been hotly contested."

With regard to the nature of the dispute and the type of parties that may activate the Original Jurisdiction of this Court under Section 232(1) of the 1999 Constitution which is in *pari-materia* with Section 212 of the 1979 Constitution, the cases of *A.G. of Kano State v. A.G. of the Federation* (2007) 6 N.W.L.R. (Pt.1029) 164 at 182 - 183 and *A.G. of Anambra State v. A.G of the Federation* (2007) 12 N.W.L.R. (Pt.1047) 4 at 42 - 43, are also relevant. From the interpretation of the provisions of Section 232(1) of the 1999 Constitution in the relevant cases referred to earlier in this judgment, it is quite clear that for this Court to exercise its Original Jurisdiction under that section, the plaintiff's action against the 1st defendant, this Court has to be satisfied that the dispute for adjudication in the action is one between the plaintiff Lagos State of Nigeria as a constituent unit of the Federation of Nigeria and the Federation of Nigeria also as a distinct unit under the Constitution. The words used in Section 232(1) of the Constitution describing the parties are "the Federation," "a State", and "States." In otherwords, the dispute must be between the Federation and a State or between the Federation and more than one State or between a State or States in their capacities as members of the Federating Units of the Federation of Nigeria. The Section in my view is not expected to provide avenue for the resolution of disputes between the Federal Government of

Nigeria and a State Government of Nigeria or between Government and another State Government of all of which are only products of elections. Therefore since the reliefs claimed by the plaintiff particularly the injunctive relief is against the Federal Government of Nigeria, its servants and its agencies, the relief not being against the Federation of Nigeria or any State or States of the Federation as constituent units of the Federation, is not within the purview of Section 232(1) of the 1999 Constitution to confer Original Jurisdiction on this Court. It is for this reason that I agree with my learned brother Musa Dattijo Muhammad JSC in his lead Ruling that the nature of the dispute disclosed in the identified paragraphs of the plaintiffs affidavit in support of the Originating Summons, are such that the jurisdiction of this Court under Section 232(1) of the 1999 Constitution, cannot be properly invoked.

As for the second ground upon which the 1st defendant challenged the jurisdiction of this Court to entertain the plaintiff's action namely - that the action itself is an abuse of the process of this Court, the circumstances giving rise to the filing of the action in this Court as contained in the affidavit in support of the Originating Summons particularly paragraph 15, and 17 thereof, are not at all in dispute. What the 1st defendant is saying under this second head of its preliminary objection to the jurisdiction of this Court is that with the pending cases and appeals at the trial High Court and the Court of Appeal on the same subject of the validity of the Value Added Tax Act between the same parties, the present action by the plaintiff at the Supreme Court on the same subject raising the same issues is an abuse of the process of this Court. Although my learned brother Musa Dattijo Muhammad JSC in the lead Ruling is of the view that the Preliminary Objection having succeeded on the first ground on jurisdiction there is no need to look into the second ground on abuse of the process of Court, it is my view that there is the need to look into it even briefly in order to say whether or not the Preliminary Objection on that ground having been strongly argued by the parties, also succeeded so as to leave the success of the objection on the issue of jurisdiction to determine the final order. The law is indeed well settled that the effect of a Court finding that it has no jurisdiction to entertain a matter the proper order to make is one striking out the matter. See *Okoye v. N. C. & F. Company Ltd.* (1991) 6 N.W.L.R. (Pt.199) 501 at 534.

The law is trite that the employment of judicial process is only regarded generally as an abuse of process when a party improperly uses the issue of judicial process to the irritation and annoyance of his opponents, and the multiplicity of actions on the same subject matter against the same opponent on the same issue. See *Saraki v. Kotoye* (1912) 9 N.W.L.R. (Pt.264) 156 at 188 and *Okafor v. A. G. Anambra State* (1991) 6 N.W.L.R. (Pt.200) 659 at 681. However, the case directly relevant to the present situation we have in this case is the case of *A.G. Ondo State v. A.G. Ekiti State* (2001) 17 N.W.L.R. (Pt.743) 706 at 771 where Karibi-Whyte JSC hit the nail on the head when he said –

> "I agree with Mr. Adewale - Hon. Attorney General of Ekiti State, that the action seeking in this Court for a relief already before another Court in a pending action between the parties is without doubt an abuse of the judicial process. Plaintiff did not have an answer to the allegation - See *Doma v. Adamu* (1999) 4 N.W.L.R. (Pt. 598) 311 and *Bena Plastic Industries v. Vasilyev* (1999) 10 N.W.L.R. (Pt.624) 620."

From the undisputed facts on the pending matters the plaintiff has at the High Court and the Court of Appeal listed in paragraphs 15 and 17 of the affidavit in support of the Originating Summons seeking the declaratory reliefs touching on the power of the National Assembly to legislate on certain provisions of the Value Added Tax Act, some which reliefs had been already granted or refused by those Courts resulting in pending appeals at the Court of Appeal, the action of the plaintiff in refusing to appeal against that judgment of the Court of Appeal of 13th July, 2007 affirming the decision of the Federal High Court on the validity or otherwise of the provisions of the Value Added Tax Act complained of, only to file a fresh action in this Court after more than one year of the delivery of judgment by the Court of Appeal seeking the same reliefs sought at the High Court and the Court of Appeal, is certainly an abuse of the process of this Court and I so hold.

In the final analysis, I am of the strong view that the Preliminary Objection of the 1st defendant must succeed on both grounds deserving to be upheld and accordingly I hereby uphold the same. Thus, the preliminary Objection having first succeeded on the issue of jurisdiction in addition to its success on the ground of abuse of process of Court, the most appropriate order to make upon upholding the preliminary Objection raised by the 1st defendant in this action, is an order striking out the action for lack of jurisdiction to entertain it. Accordingly the plaintiff's action against the 1st defendant brought by Originating Summons dated 18th February, 2008 and filed on 20th February, 2008 which was subsequently amended by the leave of this Court resulting in the filing of an amended Originating Summons on 12th August, 2009, is hereby struck out with no order on costs.

FABIYI, JSC: I have had a preview of the Ruling just handed out by my learned brother - M. D. MUHAMMAD, JSC. I agree with the reasons therein advanced as well as the conclusion arrived at by him that the original jurisdiction of this court, as it pertains to this matter; cannot be invoked.

For the importance attached to this matter, I take liberty to express my own opinion in support; even though briefly. The plaintiff in his Originating Summons seeks the following reliefs against the 1st defendant:-

> "1. A declaration that the Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria 2004 is, to the extent that it provides for imposition and collection of taxes on goods and services in Lagos State (and other States of the Federation), outside the

Legislative competence of the National Assembly and is therefore unconstitutional, null and void and of no effect whatsoever.

2. A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provisions of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria."

The Originating Summons was supported by a 19 paragraph affidavit to which was attached various exhibits.

A further affidavit deposed to on 14/3/2008 was filed by the plaintiff.

The 1st defendant filed a counter affidavit of 9 paragraphs dated 3/2/2010. A certified copy of a judgment of the Court of Appeal, Lagos Division in Appeal No.CA/L/428/05: *A.G LAGOS STATE v. EKO HOTELS LTD. & ANOR* marked HAG 1 was attached. The said judgment delivered on 13/7/2007 was delivered against the plaintiff. The 1st defendant contends that the subject matter therein, is the same as in this suit.

It should be stated that the 2nd - 36th defendants were earlier joined to protect their respective interests; as it were. On 3/2/2010, the 1st defendant filed a notice of preliminary objection pursuant to Order 2 Rule 29 of the Supreme Court Rules, 2002 wherein he prayed for an order striking out and /or dismissing the case *in limine*. The two grounds of the objection, without their particulars, read as follows:-

"Ground 1: The plaintiff's cause of action relates to act of a Federal organ and cannot form the basis of invoking this Honourable Court's Original jurisdiction to entertain this suit.

Ground 2: The entire suit constitutes an abuse of court process and should be struck out.

In support of the 1st defendant's brief of argument in respect of the preliminary objection, two issues decoded for determination read as follows:-

"1. Whether the Supreme Court's original jurisdiction can be invoked when the acts and allegations constituting the main dispute are acts of an agency of the Federal Government.

2. Whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute an abuse of court process."

The two issues distilled on behalf of the plaintiff for due determination, read as follows:-

"1. Whether there is a dispute between the Lagos State Government and the Federation in respect of the constitutionality of the Value Added Tax as it applies to Lagos State (as well as other States of the Federation) over which the Supreme Court may exercise exclusive jurisdiction.

2. Does the present action instituted by the plaintiff amount to an abuse of process of this Honourable Court?"

It is basic that jurisdiction is very fundamental in adjudicatory process. Whenever it is raised, as herein, it should be determined at the earliest opportunity. If a court has no jurisdiction to hear and determine a case, the proceedings remain a nullity *ab initio* no matter how well conducted and decided. A defect in competence is not only intrinsic, but extrinsic to the entire process of adjudication. See: *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Oloba v. Akereja* (1988) 3 NWLR (Pt.84) 508.

It is apt at this point to reiterate some basic principles touching on Constitution at and/or Statutory interpretation.

It must be stated that broad interpretation; or liberal approach as often referred to, must be the watch-words. See: *Rabiu v. The State* (1980) 8 - 11 SC 130 at 151, 195. Related sections of the Constitution ought to be interpreted together to produce a harmonious result. See: *Senator Abraham Adesanya v. President of the Federal Republic & Anor* (1981) 5 SC 112 at 134, 321; *Akaighe v. Idama* (1964) All NLR 322. The express mention of one thing in a Statutory provision automatically excludes any other stipulation which would otherwise have been applied by implication. See: *Ogbunyiya v. Okudo* (1979) 6-9 SC 32. It is the *Expressio unius est exclusio alterius* Rule which means that the express mention of one thing in a Statutory provision automatically excludes any other which otherwise would have been excluded by implication. See: *P.D.P v. INEC* (1999) 11 NWLR (Pt.626) 2000; *Buhari v. Dikko Yusuf* (2003) 14 NWLR (Pt.841) 466; *Udoh v. Orthopaedic Hospital Management Board* (1993) 7 NWLR (Pt.304) 139; Halsbury's Laws of England 4th Edition, paragraph 876. Finally, specific provisions, are, by implication excluded from general provisions. See: *Government of Kaduna State v. Kagoma* (1982) 6 SC 87.

I now move to the consideration of the purport and essence of the provision of Section 232 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) which mandates the Original jurisdiction of this court. It provides as follows:-

"232 (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and, a State or between States if and in so far as that dispute

involves any question (whether of law or fact) on which the existence or extent of a legal right depends."

It is now beyond dispute that the Federation of Nigeria is distinct and separate from the Federal Government of Nigeria which often, is a product of election. On the other hand, the Federation of Nigeria remains intact for all times; all things being equal. The two are not synonymous at all. To invoke the jurisdiction of this court under the above stated Section 232 (1) of the Constitution, there must be a dispute between the Federation and/or more States as component parts of the Federation or between States inter se. Since the Federal Government of Nigeria is not expressly mentioned in the said section it is excluded by implication- See: *A.G Kano State v. A.G Federation* (2007) 3 SC (Pt.1) 59; *A.G Federation v. A.G Imo State* (1993) 4 NCLR 178; *A.G Benue State v. A.G Federation & Ors.* unreported suit No. SC. 179/2006 delivered on 25th October, 2007 by a full panel of this court.

The plaintiff who prayed for an order of 'perpetual injunction restraining the Federal Government of Nigeria by itself, it servants or any of its agencies from continuing to give effect to the provisions of the said Value Added Tax Act to impose and collect taxes on goods and services within Lagos State of Nigeria' has approached the wrong court.

On behalf of the 1st defendant, it was submitted that the proper court to entertain the suit is the Federal High Court. It is apt to consider the provision of Section 251 (1) (a) (b) and (q) of the same Constitution for a harmonious interpretation of same along with Section 232 (1). It provides as follows:-

"251(1): Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes or matters –

(a) relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party;

(b) connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria and all other persons subject to Federal taxation;

(c) subject to the provisions of this Constitution the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies."

From the above, it is beyond doubt that it is the Federal High Court that is imbued with jurisdiction to the exclusion of any other court in civil causes and matters relating to the revenue of the Government; connected with or pertaining to taxation of companies and other bodies; the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies. It is clear that the exclusive jurisdiction conferred on the Federal High Court in Section 251 (1); excludes the original jurisdiction of this court generally provided in Section 232 (1) of the Constitution. I feel tempted to say that it is 'Division of Labour', to employ the Economist's terminology that the Legislature had in mind. One cannot foray into the original jurisdiction realm of the other; as it were.

I agree that this court must decline the exercise of jurisdiction in this suit. This suit is hereby struck out for this reason.

The 2nd issue is whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute abuse of court process. I wish to touch this issue only in passing. Parties are *ad idem* (at one) that the issues raised in this suit are the same issues in several pending cases between the parties and/or agents. The most glaring one is the appeal in CA/L/428/05 in which the plaintiff's appeal on the same subject matter was dismissed in July, 2007. Instead of appealing to this court, the plaintiff kept his peace on same.

In 2008, the plaintiff initiated this suit on the same subject matter herein. Same, to my mind has the semblance of forum shopping which no court of record should encourage or tolerate. This suit militates against the smooth administration of justice. Undoubtedly, this suit constitutes an abuse of court process in the extreme. Apart from further depicting the futility of the plaintiff's stance, I do not wish to go further in the academic exercise.

It is for the above and of course the comprehensive reasons adumbrated in the lead Ruling that I too feel that this suit should be struck out for want of jurisdiction. I order accordingly. Each party should bear his costs in the suit.

NGWUTA, JSC: I have read in draft the lead judgment just delivered by my learned brother, Muhammad, JSC and I agree with the reasoning as well as the conclusion reached therein.

However, I desire to chip in a few words by way of comments and support.

The relevant facts, including the question raised in the Originating Summons and the claims predicated on the answers to the said questions have been set out with clarity in the lead judgment and it will serve no useful purpose to repeat them. I will proceed to deal with the preliminary objection of the 1st defendant.

Upon service of the originating process on the 1st defendant, its learned counsel, A. O. Alegeh SAN from whom Daudu SAN took over as lead counsel for the 1st defendant, raised a preliminary objection to the suit. Pursuant to Order 2 Rule 29 of the Supreme Court Rules, 2002 this Court was urged to terminate the case *in limine* on the two grounds hereafter reproduced shorn of their particulars:

> "Ground 1: The plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking this Honourable Court's original jurisdiction to entertain this suit.
>
> Ground 2: The entire suit constitutes an abuse of Court process and should be struck out."

In the 1st defendant's brief of argument in the preliminary objection, the following two issues were raised for determination by this Court:

> "1. Whether the Supreme Court's original jurisdiction can be invoked when the acts and allegations constituting the main dispute are acts of an agency of the Federal Government.
>
> 2. Whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute an abuse of Court process."

In his response, learned counsel for the plaintiff raised the following two issues for determination:

> "1. Whether there is a dispute between the Lagos State Government and the Federation in respect of the constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other States of the Federation) over which the Supreme Court may exercise exclusive jurisdiction.
>
> 2. Does the present action instituted by the plaintiff amount to an abuse of process of this Honourable Court?"

Issues in both briefs are similar but I would prefer 1st defendant's issue 1 which questions whether there is a dispute between the Lagos State Government and the Federation in respect of the constitutionality *vel non* of the Value Added Tax Act to the plaintiffs issue 1.

I will adopt the two issues presented by the 1st defendant in its brief of argument. To deal with the two issues, I need to consider the claims of the plaintiff against the 1st defendant, hereunder reproduced for ease of reference:

1. A declaration that the Value Added Tax Act, Cap V1, Laws of the Federal Republic of Nigeria, 2004 is, to the extent that it provides for the imposition and collection of taxes on goods and services in Lagos State (and other States of the Federation) outside the legislative competence of the National Assembly and is therefore unconstitutional, null and void and of no effect whatsoever.

2. A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provision of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria."

My noble Lords, while it is a given and admits of no argument to the contrary, that the Federal Government of Nigeria can, and does, act by its agencies such as the Board of Inland Revenue Service, the plaintiff appears to equate the Federal Government of Nigeria with the Federation of Nigeria. In my humble view, the Federal Republic of Nigeria is different and distinct from the Federal Government of Nigeria.

Section 2 (1) of the Constitution of the Federal Republic of Nigeria provides:

"S.2 (1): Nigeria is one indivisible and indissoluble sovereign State to be known by the name of the Federal Republic of Nigeria."

S.2(2) Nigeria shall be a Federation consisting of the States and a Federal Capital Territory."

On the other hand, with respect to the Government, be it the Federal Government or State Government, Section 14 (2) of the Constitution (supra) provides:

"S.14(2): It is hereby, accordingly, declared that –

(a) sovereignty belongs to the People of Nigeria from whom government through this Constitution derives all its powers and authority."

The Federal Republic of Nigeria (or the Federation) is the repository of the sovereignty of the people of Nigeria whereas the Federal or State Governments, in contradistinction, are donees of the powers and authority of the people. A Government is a trustee of the power and authority of the people given through elections. Under the Constitution, the government at Federal and state levels comes and goes. Every four years the mandate is renewed or lost at the elections, but the Federation enures in perpetuity.

From the claims in the Originating Summons, it is beyond doubt that the plaintiff sued the Federal Government of Nigeria and not the Federation. The question is: can a claim against the Federal Government or its agency ignite the original jurisdiction of the Supreme Court?

Section 232 of the Constitution (supra) is hereunder reproduced:

> "S.232:
>
> (1) The Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal depends.
>
> (2) In addition to the jurisdiction conferred upon it by subsection (1) of this Section, the Supreme Court shall have such original jurisdiction as may be conferred upon it by any Act of the National Assembly."

The dispute herein is not between the Federation and the plaintiff. It is between the plaintiff and the Federal Government of Nigeria. See relief No.2 by which the plaintiff sought injunction not against the Federation but against the Federal Government of Nigeria, an entity not subject to the original jurisdiction of this Court. No Act of the National Assembly has expanded the original jurisdiction of this Court to include disputes involving the Federal Government of Nigeria pursuant to subsection 2 of Section 1 of Section 232 of the Constitution (supra).

I think that the plaintiff had the mistaken idea that the Federal Government of Nigeria is synonymous with the Federation or Federal Republic of Nigeria. The dispute is not within the purview of Section 232 of the Constitution (supra). I am fortified in this view by the judgment of this Court in *Attorney-General Kano State v. Attorney-General Federation* (2007) 3 SC (Pt. 1) 59 wherein it was held, *inter alia*:

> "It is quite clear from the numerous decisions of the Supreme Court that in order to invoke the original jurisdiction of the Supreme Court under Section 232(1) of the 199 Constitute, there must be a dispute between the Federation and one or more States as component part of the Federation or between States themselves..."

To ignite the original jurisdiction of the Supreme court under Section 232(1) of the 1999 Constitution (as amended), the dispute must be between the whole (Federation) as it were and part or parts thereof, i.e. States as component parts of the whole (Federation) or between States as component parts of the Federation. The preliminary objection on ground one is well taken.

Ground Two on abuse of Court process: Abuse of process of Court consists of an improper use of the issue of judicial process or process already issued to the irritation or annoyance of the opponent. Multiplicity of actions which involve the same subject matter amount to abuse of Court and the Court has a duty to stop such abuse. See *Okorodudu v. Okoromadu* (1977) 6 NWLR (Pt.2001) 659 at 681; *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156 at 188.

The list of what constitutes abuse of process of Court is open-ended. It includes raising same issues as in other actions or indeed raising in a subsequent action matters which should have been litigated in the earlier action. See *Thames Launettes Ltd v. Corporation of the Trinity Home of Deptford Strand* (1961) All ER 26 at 32, 33; *Akandipe v. Coptors* (2000) 78 LRCN 1692 at 1699. It involves lack of good faith in the action. See *Federal Republic of Nigeria v. M. K. O. Abiola* (1997) 2 NLCR 44.

Relating the above to the case at hand, it is admitted by the plaintiff that it is currently engaged in the following cases:

(1) CA/L/23/04 *M.A.N. v. A.G. Lagos State.*

(2) CA/L/428/05 *A.G. Lagos State v. Eko Hotels.*

(3) CA/L/727M/06 *A.G. Lagos State v. M.A.N.*

(4) CA/L/430/06

(5) ID/454/2002

(6) CA/L/431/06

(7) ID/453/2002

Either these cases are on the same subject matter, touch the same subject matter or involve matters which should have been disposed of in earlier cases or which can be settled in a later case. See *The Thames* case *(supra).*

Moreover, in Appeal No.CA/428/05, the Court of Appeal, Lagos Division, dismissed the plaintiff's appeal on its Sales Tax Law, a matter directly an issue in this case. The Court of Appeal delivered its judgment on 13th July, 2007. The plaintiff as the appellant in the appeal has not deemed it necessary to appeal the judgment, and so the matter is Sales Tax Law being null and void is deemed been settled between the parties. See *Omoregbe v. Lawani* (1980) 3-4 SC 108.

It amounts to abuse of process of Court for the plaintiff to bring the matter afresh before this Court by resort to forum shopping. In my view, the said ground of the

preliminary objection is also well-taken.

Notwithstanding what is said in issue 2, the said issue has been rendered academic by the resolution of issue 1 in favour of the 1st defendant. The preliminary objection is sustained on the 1st defendant's issue 1.

For the above and the fuller reasons in the lead judgment, I agree that the case of the plaintiff ought to be, and is hereby struck out. Parties shall bear their respective costs.

PETER-ODILI, JSC: I agree with the judgment just delivered by my learned brother, Musa Dattijo Muhammad JSC and just for emphasis in support of the reasoning I shall make some comments.

The plaintiff in seeking to invoke the original jurisdiction of this court took out an Originating Summons for a declaratory judgment on the 25th February, 2008 and on the 12th day of August, 2009 filed an Amended Originating Summons which asked the following questions and made claims both of which are stated hereunder, viz:

1. Whether upon the coming into effect of the Constitution of the Federal Republic of Nigeria 1999, the said Value Added Tax Act is an existing law within the meaning of Section 315 of the said Constitution, being a Federal Legislation which is deemed to be an act of the National Assembly.

2. If the answer is in the affirmative, whether the combination of the provisions of Section 2, 4, 6, and 7 of the said Value Added Tax Act which empower a Federal organ to impose and collect taxes on the supply of all goods and services other than those goods and services listed in the First Schedule to the said Act amount to an imposition of tax on the supply of all goods and services within the Lagos State of Nigeria and within other States of the Federation. From here on, these are the facts the plaintiff relied on for the foregoing claims.

3. If the answer to question 2 is in the affirmative, whether Sections 2, 4, 6, and 7 of the said Value Added Tax Act are within the contemplation and competence of the powers conferred on the National Assembly under section 4 of the 1999 constitution.

By this summons the plaintiff claims against the 1st defendant:

1. A declaration that the Value Added Tax Act Cap V1 Laws of

the Federal Republic of Nigeria 2004 is, to the extent that it provides for the imposition and collection of taxes on goods and services in Lagos State (and other states of the Federation), outside the legislative competence of the National Assembly and is therefore unconstitutional, null and void and of no effect whatsoever.

2. A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provisions of the said value added tax act to impose and collect taxes on goods and services within the Lagos State of Nigeria.

3. The plaintiff is the Chief Law Officer of the Lagos State Government which said Government, through its House of Assembly, is authorized to make laws (including tax and revenue laws) for the peace, order and good government of the state with regard to:

(a) Matters not included in the Exclusive Legislative List set out in the first column of part I of the Second Schedule the Constitution of the Federal Republic of Nigeria 1999;

(b) Matters included in the Concurrent Legislative List set out in the first column of the Part II of the Second Schedule to the said Constitution to the extent prescribed in the second column opposite thereto; and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of the said constitution.

4. The 1st defendant is the Chief Law Officer of the Government of the Federal Republic of Nigeria which said government, through the National Assembly, is authorized to make laws (including tax and revenue laws) for peace, order and good government of the Federation or any part thereof with regard to:

(a) Matters included in the Exclusive Legislative List set out in part I of the Second Schedule to said Constitution, save as otherwise provided in the said constitution, to the exclusion of Houses of Assembly

of the States;

(b) Matters included in the Concurrent Legislative List set out in the first column of Part II of the Second schedule to the said Constitution to the extent prescribed in the second column opposite thereto; and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of the said Constitution.

5. The 2nd of the 36th defendants are the Chief Law Officers of their respective State Governments which said governments, through their respective Houses of Assembly, are authorized to make laws (including tax and revenue laws) for the peace, order and good government of their respective states with regard to:

(a) Matters not included in the Exclusive Legislative List set out in the first column of part I of the Second Schedule the Constitution of the Federal Republic of Nigeria 1999;

(b) Matters included in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to the said Constitution to the extent prescribed in the second column opposite thereto; and

(c) Any other matter with respect to which it is empowered to make laws in accordance with the provisions of the said Constitution.

6. The said 2nd to the 36th defendants are persons whose State Governments are likely to be affected by any judgment that may be delivered in this case.

7. Sometime in 1993 the Federal Military Government of Nigeria (as it then was) promulgated a Decree, the Value Added Tax Decree No. 102 of 1993, to impose and charge Value Added Tax on certain goods and services and to provide for the administration of the tax and matters related thereto. The decree came into effect on the 1st day of December 1993.

8. **An organ of the Federal Government of Nigeria was authorized to assess, collect, administer and manage the tax.**

9. **Any such tax collected was distributed amongst the three tiers of government, federal, and state and local government as per the distribution formula in force at the given time and from the 1st day of January 1999 to date the formula has been as follows:**

(a) **To the Federal Government 15%**

(b) **To the State Governments and the Federal Capital Territory 50%; and**

(c) **To the Local Governments 35%**

10. **With effect from the 16th day of April, 2007, however:**

(a) **The 50% for distribution to the State Government and the Federal Capital Territory was to reflect the principle of derivation of not less than 20%; and**

(b) **Similarly, the 35% for distribution to the Local Government was to reflect the principle of derivation of not less than 20%**

11. **The Value Added Tax Decree remains on the statute books as the Value Added Tax Act Cap. VI Laws of the Federal Republic of Nigeria 2004.**

12. **I verily believe that the Lagos State Government is entitled, to the exclusion of any other body, to collect any tax charged on the supply of all goods and services within the Lagos State of Nigeria under any law passed by the Lagos State House of Assembly and no other body or Government is entitled to a share of such tax as may be collected.**

13. **The Federal Governments continues, through its agents, to administer the Value Added Tax Act and to assess and collect tax thereunder with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of other States and distribute such tax in accordance with the fee sharing formula.**

14. I verily believe that the administration of the Value Added Tax Act and the assessment and collection of tax thereunder with regard to the supply of goods and services with the Lagos State of Nigeria and within the territories of other State and the distribution of such tax in accordance with the fee sharing formula since the 29th day of May, 1999 is illegal and it represents a wrong and unjust denial by the Federal Government of the right of the Lagos State Government to receive the proceeds of such tax with regard to the supply of gods and services within the Lagos State of Nigeria.

15. The Lagos State Government is encountering tremendous difficulty in enforcing its right to collect tax on the supply of all goods and services within the territory of Lagos State as many taxable persons have resisted or are resisting such attempt in the belief that the Federal Government of Nigeria is the body authorized to collect such tax. This is evinced by the following cases some of which are pending whilst others have been concluded. The cases include:

(a) ID/105/01 in which judgment was delivered on the 14th day of November, 2003 in favour of the plaintiff herein.

(b) CA/L/23/04 a pending appeal from the judgment in (a):

(c) CA/L/727M/06 another pending appeal from the judgment in (a);

(d) FHC/L/205/04 in which judgment was delivered on the 24th day of December, 2004 against the plaintiff herein.

(e) CA/L/428/05 in which the appeal against the judgment in (d) was dismissed on the 13th day of July, 2007.

(f) ID/REV/1/2003 in which judgment was delivered on the 18th day of April 2007;

(g) ID/451/2002;

(h) ID/454/2002 which is still pending.

(i) ID/450/2003 which is still pending;

(j) ID/453/2002 which is still pending;

16. Now shown to me annexed herewith and marked Exhibits A, A1, B, C, D, and E respectively are true copies of the processes referred to in sub-paragraphs (a), (c), (d), (f) and (i) of paragraph 15 foregoing.

17. I am aware that the decisions in suits No.ID/451/02 - *P. Z. Industries & Anor v. Lagos State Board of Internal Revenue* and ID/450/000 - *Dunlop Nigeria Plc & Anor v. Lagos State Board of Internal Revenue* above have been appealed. Now shown to me as exhibit G & H respectively are exhibited true copies of Notices of Appeal suit No CA/L/431/06 and CA/L/430/06 against the decisions in Suit No.ID/451/02 and ID/450/02 respectively. The said appeals are pending in the Court of Appeal. The said appeals are pending in the Court Appeal.

18. I state that on the 13th July, 2007, judgment was delivered on the Court of Appeal against the appeal filed by the plaintiff against the judgment delivered in suit No.FHC/L/CS/205/04 by the Federal High Court, Lagos. Now shown to me annexed as exhibit J is a certified true copy of the judgment of the Court of Appeal.

19. Unless restrained by this Honourable Court I verily believe that the Federal Government of Nigeria will, through its agents, continue to implement the provisions of the Value Added Tax Act to the detriment of the Lagos State Government. Paragraph 3 - 16 are all the facts in support of the two claims above.

1st defendant raised a preliminary Objection on the 3rd day of February, 2010 and the Brief of Argument hereto deemed properly filed on the 3/2/10.

Some defendants went along the position of the 1st defendant in opposition to the suit, while some others were in favour of the stance of the plaintiff. In that line of divide the various Briefs of Arguments were adopted by respective counsel on their behalf.

As the situation is, there is no beating about the bush that the Preliminary Objection of the 1st defendant and so attacked by the plaintiff and those in their side of the divide would be confronted firstly in order to see if the court has the *vires* to go into

the merits of the Originating summons suit.

The 1st defendant prays in the preliminary Objection for this court to strike out and/or dismiss this suit on the grounds set out in the schedule which are shown hereunder, *viz*:

SCHEDULE ABOVE REFERRED

GROUND 1

The plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking this Honorable Court's Original jurisdiction to entertain the suit.

PARTICULARS

1. In Paragraph 8 of the Affidavit in support of the Amended Originating summons, the plaintiff admits as follows:

"An organ of the Federal Government of Nigeria was authorized to assess, collect, administer and manage the tax.

In paragraph 13 as follows:

"The Federal Government continues, through its agents, to administer the Value Added Tax Act and to assess and collect tax thereunder with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of other States and distribute such tax in accordance with the fee sharing formula"

And in Paragraph 19 as follows:

"Unless restrained by this Honourable Court I verily believe that the Federal Government of Nigeria will, through its agents, continue to implement the provisions of the Value Added Tax Act to the detriment of the Lagos State Government".

2. The Federal Inland Revenue Service (FIRS) is the Federal Government Organ and Agent charged and authorized to assess, collect and administer and manage the Value Added Tax. Consequently, the Federal Inland Revenue Service is a necessary party in the matter as all complaints of the plaintiff relate to acts of the Federal Inland Revenue Service.

3. Where an agency of the Federal Republic of Nigeria is or ought to be a party in a matter, the original jurisdiction of the Supreme Court cannot be invoked.

GROUND 2

The entire suit constitutes an abuse of court process and should be struck out.

PARTICULARS

1. In Paragraph 15 of the affidavit in support of the plaintiffs Amended Originating Summons the plaintiff admits that plaintiff has been involved and is currently engaged in the following pending suits and/or appeals:

(a) CA/L/24/04 *M. A. N. v. A.G. LAGOS STATE*

(b) CA/L/428/05 *A.G. LAGOS STATE v. EKO HOTELS*

(c) CA/L/727M/06 *LAGOS STATE v. M.A.N.*

(d) ID/451/2002 (now CA/L/430/06)

(e) ID/454/2002

(f) ID/450/2002 (now CA/L/431/06)

(g) ID/453/2002

2. The suits stated above are grounded on the same subject matter as this present suit and the plaintiff ought to pursue these suits to their logical conclusion.

3. The plaintiff in paragraph 17 of the affidavit in support of the Amended Originating Summons admits that Suits No.ID/450/2002 and ID/451/2002 are currently on appeal.

4. The plaintiffs appeal in Appeal No.CA/L/428/05 which touches on the same subject matter in this suit was dismissed and the plaintiff has not lodged any appeal against the said judgment.

5. The Court of Appeal in its judgment in Appeal CA/L/428/05 declared the plaintiffs Sales Tax Law as null and void on all

matters on which the National Assembly has legislated.

6. That the Court of Appeal judgment in Appeal No. CA/L/428/05 was delivered on 13th July, 2007 and the plaintiff admits this fact but filed this fresh matter before the Supreme Court in 2008.

7. The cause of action (if any) as disclosed in this suit can be properly determined in the above pending suits and/or appeals

On the 4th day of February, 2014 date of hearing, learned Senior Advocate, J. B. Daudu set off the arguments by firstly adopting the Brief of Argument settled by Augustine O. Alegeh SAN and in which were raised two issues for determination stated as follows:

1. Whether there is a dispute between the Lagos State Government and the Federation in respect of the Constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other states of the Federation) over which the Supreme Court may exercise exclusive jurisdiction?

2. Does the present action instituted by the plaintiff amount to an abuse of process of this Honourable Court?

Learned counsel for the plaintiff adopted their Brief of Argument in response to the Preliminary Objection which response was filed on 19/4/10 and he utilized the two issues as crafted by the 1st defendant's counsel.

ISSUE NO 1

Whether the Supreme Court's original jurisdiction can be invoked where the acts and allegations constituting the main dispute are acts of an agency of the Federal Government.

Learned counsel for the 1st defendant, J. B. Daudu SAN submitted that the original jurisdiction of the Supreme Court is provided for in Section 232(1) of the Constitution of the Federal Republic of Nigeria. That the Supreme Court's additional jurisdiction provided for in Section 20 of the Supreme Court Act, Cap 424, Law of the Federation, 1990 (Cap S15 LFN 2004) as well as the Supreme Court (Additional Original Jurisdiction Act) Cap S16 Laws of the Federation of Nigeria, 2004 are not relevant in these proceedings. That for the Supreme Court's original jurisdiction to be successfully invoked there must be disclosed and exist a dispute between the Federal Government and the State. He cited the cases of *A.G. Bendel State v. A.*

G. Federation (1982) 3 NCLR 1; *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR (Pt.625) 689 at 728; *A.G. Kano State v. A.G. Federation* (2007) 3 SC 59.

For the 1st defendant was further stated that the essence of plaintiffs complaint is that the collection of Tax on supply of goods and services by FIRS in Lagos State, has made it difficult and almost impossible for plaintiff to collect tax on the supply of goods and services in Lagos State. He said in this instance where the acts and allegations complained about by the plaintiff are acts of a Federal Government Agency, the original jurisdiction of this court cannot be invoked pursuant to Section 232 (1) of the 1999 constitution. He said the ignition of such original jurisdiction has to do with a dispute between the Federation and States or between States *inter se* which is not the situation on ground which is a dispute between the plaintiff and the Federal Inland Revenue Service (FIRS), a Federal Government Agency and the proper court for such a dispute being the Federation High Court. He stated that the issue has been laid to rest recently by this court on the 25th October, 2007 in suit No SC.179/2006; *Attorney General Benue State v. Attorney General of Federation and 35 Ors.*

In reaction learned counsel for the plaintiff submitted that it is the claim of the plaintiff that determines the jurisdiction of the court. He cited *A.G. Federation v A.G. Abia State* (2001) 11 (Pt.625) 689 at 740; *Izenkwe v. Nnadozie* 14 WACA 361 at 363.

He stated after referring to paragraphs 7, 8, and 12 of the supporting affidavit of the plaintiff that there is a dispute between plaintiff and the Federation. That the gravamen of the claim of plaintiff is the unconstitutionality of the Value Added Tax Act and the illegality of the collection of tax pursuant to the said Act which tax is being collected by an agency of the Federal Government. That the plaintiff is challenging the constitutionality of the Act and the continued giving effect to it by the 1st defendant to the detriment of the plaintiff.

Learned counsel for the plaintiff further contended that the plaintiff has no dispute with the Federal Inland Revenue Service which 1st defendants said carried out the acts complained of. That the plaintiff did not mention the Federal Inland Revenue Service which is a mere agent. He cited *A.G. Lagos State v. A.G. Federation & Ors* (2003) 12 NWLR (Pt.833) 1 etc distinguishing them with the case in hand and referring to *A.G. Abia State v. A.G. Federation* (2007) 6 NWLR (Pt.1029) 200 etc as those where the Supreme Court assumed original jurisdiction.

It was submitted for the plaintiff that an examination of the cases in which this court declined original jurisdiction and those in which it assumed the original jurisdiction is that in deciding which way to go what matters is who the real disputants are which will be ascertained from the crux of the complaint. In that wise therefore the mere fact that the act challenged is that of an agency does not, without more, mean that the Supreme Court has no original jurisdiction.

For the plaintiff was contended that the essence of their complaint is that the collection of tax on the supply of goods and services by the FIRS in Lagos State has made it difficult and near impossible for the plaintiff to collect tax on the supply of goods and services in Lagos State. That a proper examination of the complaint of the plaintiff is the competence of the National Assembly to make the Value Added Tax Act and the validity of that Act. Learned counsel went on to state that any complaint about the collection of tax on the supply of goods and services in Lagos State, not in any event by FIRS but by the Federal Board of Inland revenue, to the detriment of the plaintiff is merely to show the injury the plaintiff has suffered by the implementation of the legislation, the validity of which it was challenging with a view to showing that it has the *locus standi* to challenge the validity of the Act. That it is well established that, to maintain a cause of action, a plaintiff is expected to show the injury suffered or that may be suffered by the implementation of the act complained of. He relied on *Owodunni v Registered Trustees of Celestial Church of Christ & Ors* (2000) 10 NWLR (Pt.675) 315; *A.G. Anambra State & Ors v. A.G. of the Federation & Ors* (2005) 18 NWLR (Pt.958) 581.

To refresh the mind on the background facts seems necessary here and these are stated thus:

The VAT Act was enacted in 1993 and the Federal Inland Revenue Service (FIRS), a Federal Government Agency, was authorized to assess, collect, administer and manage the tax. The tax was levied on all sales and supply of goods and services in the federation excluding the goods and services set out in the First Schedule to the VAT Act.

The FIRS has been performing this function and the tax collected shared amongst all the states of the federation, including the plaintiff in the manner set out in the VAT Act. The sharing formula was reviewed in 2007 and the plaintiff has been participating in the sharing from the VAT proceeds collected by FIRS under the VAT Act.

The plaintiff subsequently enacted and sought to enforce a Sales [Tax] Law in Lagos State in respect of the sales and supply of goods and services covered by the VAT Act being administered and managed by the FIRS. This Lagos State Tax Law was resisted thereby creating a conflict between the plaintiff and the FIRS which is the federal government agency, managing and administering the VAT Act. This conflict brought about the initiation of several suits touching on the constitutionality of the VAT Act between the plaintiffs, the Lagos State Board of Inland Revenue against the Federal Government and its Agency and agents in various configurations. Some of these suits have been concluded while some others are still pending in various courts between the same parties as in the present action.

It is on record that the plaintiff herein lost in some of these suits aforesaid at the Federal High Court and the Court of Appeal and it was during the pendency of the suits stated above that this action was filed by the plaintiff directly to the Supreme Court against the defendants, invoking the original jurisdiction of the Apex Court.

I shall cite Section 232 (1) of the Constitution of the Federal Republic of Nigeria upon which this original jurisdiction may be activated.

> **"232 - (1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends".**

The plaintiffs have come here in this guise contending that their grouse is within the ambit of Section 232(1) of the 1999 Constitution quoted above. The 1st defendant and some others reject that view and for effect have brought the preliminary objection which is now being considered.

Mr. Daudu SAN for the 1st defendant submitted that for this original jurisdiction of the Supreme Court to be invoked as it is being sought now, there must be disclosed and exist a dispute between the federal government and the state. He cited *A.G. Bendel State v A.G. Federation* (1982) 3 NCLR 1; *A.G. Federation v A.G. Abia State* (2001) 11 NWLR (Pt. 625) 689 728; *A.G. Kano State v. A.G. Federation* (2007) 3 SC 59 at 1.

He stated that the allegation and acts constituting the dispute subject matter of this appeal can be gleaned from paragraphs of the plaintiff's affidavit in support of the originating summons specifically paragraphs 7, 8, 13, 15, 19 which show that the essence of the plaintiff's complaint is that the collection of tax on the supply of goods and services by FIRS in Lagos State has made it difficult for the plaintiff to collect tax on the supply of goods and services in Lagos State. That this translates to a complaint against acts of a Federal Government Agency which is different from the Federal Government itself or the Federation and so the proper court to attend to such a dispute is the Federal High Court and not the Supreme Court directly. He cited *Attorney General Benue State v. Attorney General of Federation and 35 Ors*. in suit No.SC.179/2006.

Responding, learned counsel for the plaintiff, Mr. Sofunde SAN contended, that it is settled law that it is the claim of the plaintiff that determines the jurisdiction of the court and they are in good standing here. He cited *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR (Pt.625) 689 at 740; *Izenkwe v. Nnadozie* 14 WACA 361 at 363.

It seems to me that the case of Attorney General Benue State v Attorney General of Federation and 35 Ors (unreported) in Suit No.SC.179/2006 is apposite to the present situation and the decision of this court in a lead ruling delivered by Dahiru Musdapher JSC (as he then was) appropriate for what we are faced with here and now. I shall quote the relevant partitions hereunder, *viz*:

> **"It is clear from the claims that no dispute was shown to arise between the plaintiff and the defendant i.e. the Federal Government. The allegations and claims arose from acts of EFCC and strictly it is not a dispute between the Federal Government and Benue State Government. The reliefs sought could be entertained at the Federal High Court. The provisions relating to the original jurisdiction of this court is clearly limited to disputes between the Federation and States or between States *inter se*, it is not correct to bring a general claim by merely inserting the names of the parties when the claims do not explicitly indicate so. The substantive claims must be properly examined to see whether they meet with the constitutional requirement or not..."**

The above cited *Attorney General of Benue State v. Attorney General of Federation (supra)* cannot be equated to the authorities cited by the plaintiff which do not go to the answering of whether or not the original jurisdiction of this court can be validly agitated in circumstances involving the State Government of Lagos and the Federal Government on the right of the Federal Inland revenue as against the Lagos State Board of Inland Revenue to collect VAT for goods and services within the territory of Lagos State. The plaintiff had cited *A.G. Bendel State v A.G. Federation & Ors* (1981) 12 NSCC 314 and some other cases. However going into the *Attorney General of Benue State v. Attorney General of Federation (supra).* The *ratio decidendi* was *estoppel* and whether or not the legislative process was followed by the National Assembly in the passing of the Allocation of the Revenue (Federation Account etc) 1991, the Act was valid or not which is different from whether the invocation of the original jurisdiction of the Supreme Court could rightly be made in that circumstance in 1981. I agree there is a semblance of a thin line in the facts of the earlier case taken alongside the present. That is not tantamount to the *A.G. Bendel State* case *(supra)* being an authority or guide for the matter in hand. The two situations are clearly different whatever may present as a resemblance.

In the case in hand, going into the claims which are usually the beacon of guide as to jurisdiction or what the cause of action is, what I see clearly are claims that cannot be described as dispute between the Lagos State and the Federation. It is rather a dispute between the Lagos State and an agency of the Federal Government that is the Federal Inland Revenue Service (FIRS) in its management and operation of the Value Added Tax (VAT). Therefore the matter cannot by a long shot be programmed for one of those instances where the original jurisdiction of the

Supreme Court can be set in motion, under the ambit of Section 232 (1) of the 1999 Constitution. This position is strengthened by a long line of cases of this court including *A.G. Kano State v. A.G. Federation* (2007) 3 SC 59 where this court put forward the purport and meaning of the said Constitutional provision of Section 232 (1) as follows:

> **"(1) A justiciable dispute involving any dispute of law;**
>
> **(2) The dispute must be between the Federation and a state in its capacity as one of the constituent units of the Federation:**
>
> **(3) Disputes between the Federation and one or more States that are in their capacities as members of the constituent units of the Federation or**
>
> **(4) Disputes between States in their aforesaid capacities and the dispute must be one on which the existence or extent of a legal right in the aforesaid capacity is involved"**

Mohammed JSC went further in amplification and stated thus:

> **"It is quite clear from the numerous decisions of this court that in order to invoke the original jurisdiction of this court under Section 232 (1) of the 1999 Constitution, there must be a dispute between the federation and one or more States as component part of the Federation or between the States themselves."**

See also *A.G. Federation v. A.G. Imo State* (1993) 4 NCLR 178.

From the above in context with the claims of the plaintiffs within paragraphs 7, 8, 13, 15 and 19 stated with clarity their grouse and in so showing have placed on the table without realizing upon whom their displeasure rests which I see to be the Federal Inland Revenue Service (FIRS), though an agency of the federal government but is not the federal government or even the Federation *simpliciter*. Therefore coming to this court as of first instance is akin to an expression which I cannot resist utilizing, which is "knocking at the wrong door". The appropriate first port of call being the Federal High Court from where the matter could climb up to the Supreme Court.

The Issue 1 is without question resolved against the plaintiff and in favour of the 1st defendant, and it is that the original jurisdiction of the Supreme Court cannot be agitated in this matter which is now validly before the Court of Appeal which has assumed jurisdiction in CA/L/727/M/06. The only option open to this court as at now since it lacks jurisdiction to entertain this suit in its original power is a striking out. Therefore in the light of the reasons above and well adumbrated reasoning of

my brother, M. D. Muhammad JSC, I strike out the suit. I abide by the consequential orders already made by him.

KEKERE-EKUN, JSC: By an amended originating summons filed on 12/8/2009 but deemed properly filed on 4/2/2010, the Hon. Attorney General of Lagos State as plaintiff claims against the Hon. Attorney General of the Federation (1st defendant) as follows:

> *"That the House of Assembly of the Lagos State of Nigeria is the body entitled, to the exclusion of any other legislative body; to enact laws with regard to the imposition and collection of tax on the supply of all goods and services within the Lagos State of Nigeria and that the Lagos State of Nigeria, or any agency of the State, is the body entitled, to the exclusion of any other body, to assess and collect such tax, and that the revenue of the Lagos State Government has been and continues to be affected by the enforcement of the provisions of the Value Added Tax Decree No. 102 of 1993, now Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria 2004, for the determination of the following questions.*
>
> 1. *Whether upon the coming into effect of the Constitution of the Federal Republic of Nigeria 1999, the said Value Added Tax Act is an existing Law within the meaning of Section 315 of the said Constitution, being a Federal Legislation which is deemed to be an act of the National Assembly?*
> 2. *If the answer is in the affirmative, whether the combination of the provisions of Sections 2, 4, 6 and 7 of the said Value Added Tax Act which empower a federal organ to impose and collect taxes on the supply of all goods and services other than those goods and services listed in the First Schedule to the said Act amount to an imposition of tax on the supply of all goods and services within the Lagos State of Nigeria and within other States of the Federation?*
> 3. *If the answer to question 2 is the affirmative, whether Section 2, 3, 4, 5, 6, and 7 of the said Value Added Tax Act are within the contemplation and competence of the powers conferred on the National Assembly under Section 4 of the 1999 Constitution."*

The plaintiff therefore seeks the following reliefs against the 1st defendant:

> 1. *"A declaration that the Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria 2004 is, to the extent that it provides for the imposition and collection of taxes on goods and services in Lagos State (and other states of the Federation),* ***outside the***

legislative competence of the National Assembly *and is therefore unconstitutional, null and void and of no effect whatsoever.*

2. *A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provisions of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria."*

The 2nd - 36th defendants, Attorneys General of the remaining states of the Federation were made parties to the suit, as they are likely to be affected by the outcome of the action.

In support of the originating summons is a 19-paragraph affidavit with various exhibits annexed thereto, including copies of proceedings that are either pending or have been concluded in various courts involving the plaintiff and various parties in respect of its power to impose and collect taxes on the supply of all goods and services within Lagos State. Also in support is a further affidavit deposed to on 14/3/2008.

The 1st defendant filed a 9-paragraph counter affidavit dated 3/2/2010 with one exhibit annexed thereto marked HAG 1. It is a certified copy of a judgment of the Court of Appeal, Lagos Division in Appeal No. CA/L/428/05: *A.G. Lagos State v. Eko Hotels Ltd. & Anor*. delivered on 13/7/2007 against the plaintiff, which the 1st defendant contends is on the same subject matter as the instant suit. On the same date, i.e. 3/2/2010 the 1st defendant filed a notice of preliminary objection to the suit seeking an order striking out and/or dismissing it. The grounds for the objection are as follows:

"GROUND 1

The plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking this Honourable Court's original jurisdiction to entertain this suit.

PARTICULARS

1. In Paragraph 8 of the Affidavit in support of the Amended originating summons the plaintiff admits as follows:

"An organ of the Federal Government of Nigeria was authorized to assess, collect, administer and manage the tax."

In paragraph 13 as follows:

"The Federal Government continues, through its agents, to administer the Value Added Tax and to assess and collect tax thereunder with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of the other States and distribute such tax in accordance with the fee sharing formula"

And in paragraph 19 as follows:

"Unless restrained by This Honourable Court I verily believe that the Federal Government will, through its agents, continue to implement the provisions of the Value Added Tax Act to the detriment of the Lagos State Government"

2. Federal Inland Revenue Service (FIRS) is the Federal Government Organ and Agent charged and authorized to assess, collect, administer and manage the Value Added Tax. Consequently, The Federal Inland Revenue Service is a necessary party in the matter as all complaints of the plaintiff relate to acts of The Federal Inland Revenue Service.

3. Where an agency of The Federal Republic of Nigeria is or ought to be a party in a matter, the original jurisdiction of the Supreme Court cannot be invoked.

GROUND 2

The entire suit constitutes an abuse of court process and should be struck out.

PARTICULARS

1. In Paragraph 15 of the Affidavit in support of the plaintiff's Amended Originating Summons, the plaintiff admits that plaintiff has been involved and is currently engaged in the following pending suits and/or appeals:

   (a) CA/L/23/04 *M.A.N v. A.G. Lagos State*

   (b) CA/L/428/05 *A.G. Lagos State v. Eko Hotels*

   (c) CA/L/727M/06 *A.G. Lagos State v. M.A.N*

   (d) ID/451/2002 (now CA/L/430/06)

   (e) ID/454/2002

(f) ID/450/2002 (now CA/L/431/06)

(g) ID/453/2002

2. The Suits stated above are grounded on the same subject matters as this present suit and the plaintiff ought to pursue these suits to their logical conclusion.

3. The plaintiff in paragraph 17 of the affidavit in support of the Amended Originating Summons admits that Suits No.ID/450/02 and ID/451/02 are currently on appeal.

4. The plaintiff's appeal in Appeal No.CA/L/428/05 which touches on the same subject matter in this suit was dismissed and the plaintiff has not lodged any appeal against the said judgment.

5. The Court of Appeal in its judgment in Appeal No.CA/L/428/05 declared the plaintiff's Sale Tax Law as null and void on all matters on which The National Assembly has legislated.

6. That the Court of Appeal judgment in Appeal No.CA/L/428/05 was delivered on 13th July, 2007 and the plaintiff admits this fact but filed this fresh matter before the Supreme Court in 2008.

7. The cause of action (if any) as disclosed in this suit can be properly determined in the above pending suits and/or appeals."

Some of the defendants aligned themselves with the 1st defendant's preliminary objection and adopted the 1st defendants arguments in respect thereof. The parties filed and exchanged briefs of argument in compliance with the rules of this court in respect of the main claim and in respect of the preliminary objections (where applicable). At the hearing of the suit on 4/2/2014, learned senior counsel, J. B. DAUDU, SAN, drew the court's attention to the preliminary objection filed on behalf of the 1st defendant. Thereafter the various parties adopted and relied on their respective briefs of argument and urged their respective positions on the court. The preliminary objections were taken along with the originating summons. The courts have always been enjoined to consider and resolve a preliminary objection, where raised, before delving into the merits or otherwise of the substantive case. This is because a preliminary objection to the hearing of the substantive matter, if successful, would determine the case *in limine*. Where the objection challenges the jurisdiction of the court and it is upheld, that would be the end of the matter. Jurisdiction has been held to be the life blood of any adjudication, without which, the court lacks the competence to adjudicate in the cause or matter before it. See: *A.G. Lagos State v. Dosunmu* (1989) 3 NWLR (Pt.111) 552 @ 566; *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Ebodagbe v. Okoye* (2004)

18 NWLR (Pt.905) 472; *Dapianlong v. Dariye* (2007) 8 NWLR (Pt.1036) 332.

It is therefore prudent, in the instant case to consider and resolve the preliminary objection first. The 1st defendant distilled two issues for determination. They are:

1. Whether the Supreme Court's original jurisdiction can be invoked where the acts and allegations constituting the main dispute are acts of an agency of the Federal Government.

2. Whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute an abuse of court process.

The plaintiff also distilled two issues for the determination of the objection:

1. Whether there is a dispute between the Lagos State Government and the Federation in respect of the Constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other States of the Federation) over which the Supreme Court may exercise adjudicative Original Jurisdiction?

2. Does the present action instituted by the plaintiff amount to an abuse of the process of this Honourable Court?

With regard to the first issue, learned senior counsel for the 1st defendant, J. B. DAUDU, SAN, referred to Section 232 (1) of the 1999 Constitution, which confers original jurisdiction on the Supreme Court. He argued that for the original jurisdiction to be successfully invoked there must be disclosed and exist a dispute between the Federal Government and the State. He referred to several decisions of this court to that effect: *A.G. Bendel State v. A.G. Federation* (1982) 3 NCR 1; (1981) 10 SC 2; *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR (Pt.725) 689 @ 728; *A.G. Kano State v. A.G. Federation* (2007) 3 SC (Pt.1) 59 @ 85; *A.G. Federation v. A.G. Imo State* (1993) 4 NCLR 178. Referring to paragraphs 7, 8, 13, 15, and 19 of the originating summons, he contended that the essence of the plaintiff's complaint is that the collection of tax on the supply of goods and services by the Federal Inland Revenue Service (FIRS) in Lagos State has made it difficult and almost impossible for the plaintiff to collect tax on the supply of goods and services in the State. He submitted that the acts complained of by the plaintiff are acts of a Federal Government Agency and therefore the proper court to entertain the dispute is the Federal High Court. He referred to a recent decision of this court in: *A.G. Benue State v. A.G. Federation* (unreported) in SC.179/2006 delivered on 25/10/2007, which, in his view, has laid the matter to rest. He submitted in conclusion that the position stated in *A.G. Benue State v. A.G. Federation (supra)* represents the present state of the law on the subject and urged the court to resolve the preliminary objection in the 1st defendant's favour.

In reply to the above submissions, learned senior counsel for the plaintiff, E. O. SOFUNDE, SAN, referred to the long-settled position of the law that it is the plaintiff's claim that determines the jurisdiction of the court. He referred to paragraphs 7, 8, 12, 14 and 15 of the affidavit in support of the originating summons. Relying on the case of *A.G. Kano State v. A.G. Federation* (2007) 6 NWLR (Pt.1029) 164 CD 182 E - H, he enumerated the essential requirements for the invocation of the original jurisdiction of the Supreme Court and submitted that the issues raised in the originating summons amount to a dispute as envisaged by Section 232 (1) of the 1999 Constitution. He referred to *A.G. Bendel State v. A.G. Federation* (1981) 10 SC 1 @ 32 - 33 & 47, cited in: *A.G. Federation v. A.G. Abia State* (2001) 11 NWLR (Pt.725) 689 @ 728 - 729 H - A; *A.G. Kano State v. A.G. Federation (supra)* at 192 - 193 H - B; 197 - 198 F - F; *A.G. Anambra State v. A.G. Federation* (2007) 12 NWLR (Pt.1047) 4 @ 82 A - D.

Learned senior counsel argued that, contrary to the submission of learned senior counsel for the 1st defendant, the *gravamen* of the plaintiff's claim is the unconstitutionality of the Value Added Tax Act and the illegality of the collection of tax pursuant to the said Act, which tax is being collected by an agency of the Federal Government. He referred to the case of: *Attorney-General of Lagos State v. Attorney-General of the Federation & Ors* (2003) 12 NWLR (Pt.833) 1, and submitted that this court assumed jurisdiction in the case because the crux of the complaint was the capacity of the Federal Government to legislate with regard to the enactments in question and that acts done under these enactments would derive validity or otherwise from the competence of the National Assembly to make those laws. He distinguished the case of *A.G. Benue State v. A.G, Federation (supra)* relied upon by learned counsel for the 1st defendant from the facts of this case on the ground that in that case the complaints of the plaintiff therein were against the acts of the Economic and Financial Crimes Commission and not those of the Federal Government of Nigeria and further that there was no challenge to the law making capacity of the National Assembly. He submitted that in this case the plaintiff complains of the constitutionality of the Value Added Tax Act pursuant to which the Federal Government through its agencies is collecting taxes that should rightly be collected by the plaintiff through its own agencies.

It is contended on behalf of the plaintiff that the FIRS is a mere collecting agent of the Government of the Federation for the purposes of giving effect to the Value Added Tax Act and that any acts of the Board are acts of its principal, the Government of the Federal Republic of Nigeria. He submitted that in the circumstances, a claim has properly been brought against the Government of the Federation and the proper person to sue is the Attorney General of the Federation. He referred to: *A.G. Kano v. A.G. Federation (supra)* at 192 B.

It has been emphasized in many decisions of this court that in interpreting provisions of the Constitution, a wide and liberal approach should be adopted unless there is express provision to the contrary or there is something in the rest of the Constitution

to indicate that the narrower interpretation is necessary to carry out and give effect to the intention of the lawmakers. This court has also held that a Section must be read against the background of other Sections to achieve a harmonious whole. See: *Elelu-Habeeb v. A.G. Federation* (2012) 13 NWLR (Pt.1318) 423 @ 520 - 521 H - E; *A.G. Lagos State v. A.G. Federation* (2003) 12 NWLR (833) 1 @ 117 G - H & 159 D- E: *Nafiu Rabiu v. The State* (1980) 8 - 11 SC (Reprint) 130; *Tukur v. Govt. of Gongola State* (1989) 4 NWLR (Pt.117) 517; *Abdulkarim v. Incar (Nig.) Ltd.* (1992) 7 NWLR (Pt.251) 1.

A fundamental principle of interpretation is that where the words used are clear and unambiguous, they should be given their natural and ordinary meaning. See: *Ibrahim v. Barde* (1996) 9 NWLR (Pt.474) 513 at 577 BC; *Ahmed v. Kassim* (1958) SCNLR 58; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377 at 402 F-H.

Sections 4 (8), 6 (6) (a) & (b) and 232 (1) of the 1999 Constitution (as amended), which are germane to the resolution of the first issue provide as follows:

> **"4 (8):** Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law.....
>
> **6 (6):** The judicial powers vested by in accordance with the forgoing provisions of this section –
>
> (a) shall extend, notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law;
>
> (b) shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto for the determination of any question as to the civil rights and obligations of that person.
>
> **232 (1): The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."**

The above-mentioned Sections are *in pari materia* with the provisions of Sections 4 (8), 6 (6) and 212 (1) of the 1979 Constitution, which were considered in the case of *A.G. Bendel State v. A.G. Federation* (1981) 10 SC (Reprint) 1. Therein this

court held as follows at page 32 lines 20 - 26:

> *"It is clear from the provisions of Section 212 (1) of our Constitution that a dispute within the ambit of the section must be a justiciable one. The section clearly qualifies the character of the dispute as that which involves any question, whether of law or fact, on which the existence or extent of a legal right depends. To invoke the original jurisdiction of the court* ***there must be a dispute as so qualified between the Federation and a State or between States."*** (Emphasis supplied)

In order to determine the jurisdiction of the court to entertain a cause or matter, the court considers only the writ of summons and statement of claim or the originating summons and supporting affidavit as the case may be. In other words, it is the originating processes filed by the plaintiff that determine whether or not the court has jurisdiction to entertain the matter. See: *Adeyemi v. Opeyori* (1976) 9 - 10 SC 31; *A.G. Anambra State v. A.G. Federation* (1993) 6 NWLR (Pt.302) 692; *A.G. Kano State v. A.G. Federation (supra).* A careful examination of the questions raised in the amended originating summons and the reliefs sought, reveal a dispute in respect of the legislative competence of the National Assembly to enact certain sections of the Value Added Tax Act and the right or power of the Federal Government by itself or any of its agencies to give effect to the said provisions. However, when one examines the averment in support of the amended originating summons, it is clear that the plaintiff's grouse is with the legislative competence of the National Assembly and the agency of the Federal Government saddled with the collection of taxes, which is the Federal Inland Revenue Service (FIRS). The issue is whether the dispute so disclosed is between the plaintiff and the Federal Republic of Nigeria to warrant the invocation of the original jurisdiction of this court. In *A.G. Kano State v. A.G. Federation (supra)* referred to by both the plaintiff and the 1st defendant, this court referred to the dictum of Tobi, JSC in *A.G. Lagos State v. A.G. Federation* (2004) 18 NWLR (Pt 904) 1 @ 125 - 126 G - A to the following effect:

> *"In Attorney-General of the Federation v. Attorney General of Imo State (1983) 4 NCLR 178 it was held that before the original jurisdiction of the Supreme Court can be invoked under Section 212 of the 1979 Constitution, the following criteria must be satisfied:*
>
> *"(1) There must be a justiciable dispute involving any question of law or fact*
>
> *(2) The dispute must be: -*
>
> *(a) between the Federation and a State in its capacity as one of the constituent units of the Federation; or*

(b) between the Federation and more States than (sic) are in their capacities as members of the constituent units of the Federation; or

(c) between States in their aforesaid capacities, and the dispute must be one on which the existence or extent of a legal right in the aforesaid capacity is involved."

Section 318 (1) of the 1999 Constitution (as amended) defines "Federation" as follows:

"'Federation' means the Federal Republic of Nigeria."

In *A.G. Kano State v. A.G. Federation (supra)*, this court *per* Mahmud Mohammed, JSC, relying on the definition of "Federation" within the meaning of Section 232 of the 1999 Constitution, which bears the same meaning in Section 212 of the 1979 Constitution, differentiated between Federation (or the Federal Republic of Nigeria) and the Federal Government thus:

*".....Section 212 of the 1979 Constitution under which the word "Federation" was defined is in pari materia with the provisions of Section 232 of the 1999 Constitution now under consideration. I therefore respectfully adopt the definition of the word "Federation" in Section 232 of the 1999 Constitution as bearing the same meaning as the 'Federal Republic of Nigeria'. By this meaning.....**all the complaints of the plaintiff in its statement of claim in the present case must be viewed as being against the Federal Republic of Nigeria in order to bring the case within the purview of Section 232 of the Constitution.** In other words, any complaint against the Government of the Federation or any person who exercises power or authority on its behalf like the Inspector General of Police as asserted by the learned senior counsel for the plaintiff in his address before this court, are completely outside the original jurisdiction of this court" (Emphasis mine)*

In paragraph 1.3.13 of the plaintiff's reply to the preliminary objection, learned senior counsel stated categorically that *"the gravamen of the claim of the plaintiff is the unconstitutionality of the Value Added Tax Act and the illegality of the collection of tax pursuant to the said Act, which tax is being collected by an agency of the Federal Government."*

With due respect to the learned senior counsel, I am of the considered view that the above submission clearly shows that the plaintiff's complaint is not against the Federal Republic of Nigeria but against the Federal Government and its agency charged with the collection of taxes. See also: *A.G. Benue State v. A.G. Federation & Ors.* (unreported) in SC.179/2006 delivered on 25/10/2007. I am further satisfied that the plaintiff's claim falls within the jurisdiction of the Federal High Court pursuant

to Section 251 (1) (a), (b) and (q) of the 1999 Constitution (as amended), which provides:

> ***"251(1) Notwithstanding anything to the contrary contained in this Constitution*** *and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes or matters -*
>
> *(a)* ***relating to the revenue of the Government of the Federation in which the said Government or any organ thereof*** *or a person suing or being sued on behalf of the said Government is a party;*
>
> *(b)* ***connected with or pertaining to the taxation of companies and other bodies*** *established or carrying on business in Nigeria and all other persons subject to Federal taxation;*
>
> *(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution* ***in so far as it affects the Federal Government or any of its agencies;***

It is instructive that Section 251 (1) above begins with the words, *"Notwithstanding anything to the contrary contained in this Constitution..."* Applying the literal interpretation to the phrase, the conclusion one must draw is that the exclusive jurisdiction conferred on the Federal High Court in respect of matters specifically provided for in the Section is to the exclusion of the original jurisdiction of the Supreme Court generally provided for in Section 232 (1) thereof.

Having regard to the claims and reliefs sought by the plaintiff in this suit, I am of the considered view that it is the Federal High Court, to the exclusion of any other court that has jurisdiction to entertain the plaintiff's claim. See: *A.G. Kano State v. A.G. Federation (supra)* at 188 G where His Lordship, Mahmud Mohammed, JSC opined that:

> *"Having regard to the plain provisions of the Constitution, I am of the strong view that to accede to the arguments of the learned senior counsel for the plaintiff to entertain the present action would result in reducing the status and function of this court to that of the Federal High Court; quite contrary to the spirit and intention of the Constitution, which assigned the limit of powers and jurisdiction to be exercised by each court created by it."*

In the circumstances, I agree entirely with my learned brother, M. D. MUHAMMAD,

JSC in the lead ruling, just delivered that this court must decline to exercise its original jurisdiction in this suit.

Although the first ground of objection has been resolved against the appellant, I deem it necessary to comment very briefly on the second issue raised in the preliminary objection, as to whether the suit is an abuse of the court's process, having regard to other proceedings, pending or concluded between the plaintiff and other parties in respect of the subject matter of this suit. Abuse of process may take many forms. One of the circumstances in which a suit is considered to be an abuse of process is where a party institutes a multiplicity of actions on the same subject matter, against the same opponent on the same issues. Another circumstance is abuse of legal procedure or improper use of legal process. See: *Okorodudu v. Okoromadu* (1977) 3 SC 21; *Amaefule v. The State* (1988) 2 NWLR (Pt.75) 156 @ 177 C - F: *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156; *Ogoejeofor v. Ogoejeofor* (2006) 3 NWLR (Pt.966) 205. One glaring fact in the instant suit, as averred in paragraph 15 of the plaintiff's supporting affidavit is that the plaintiff is experiencing "tremendous difficulty in enforcing its right to collect tax on the supply of goods and services within the territory of Lagos State as many taxable persons have resisted or are resisting such attempts in the belief that the Federal Government of Nigeria is the body authorized to collect such tax", which situation has resulted in litigation before several High Courts and the Court of Appeal. Of particular note is Appeal No.CA/L/428/2005: *A.G. Lagos State v. (1) Eko Hotels Ltd. & (2) Federal Board of Inland Revenue*, wherein the Court of Appeal, Lagos Division, on 13/7/2007, dismissed the present plaintiff's appeal against the judgment of the Federal High Court, Lagos delivered on 20/12/2004, which held that the provisions of the Value Added Tax (VAT) Decree No. 102 of 1993 now Value Added Tax (VAT) Act Cap. V1 Laws of the Federation of Nigeria, 2004 prevail over the Sales Tax Law Cap. 175, Laws of Lagos State 1995 and Sales Tax (Amendment) Order 2000- The essence of the dispute is that having regard to the provisions of the VAT Act 2004 and the Sales Tax Law of Lagos State, who as between the Lagos State Government and the Federal Board of Inland Revenue, an agency of the Federal Government, is entitled to the tax being collected by the Lagos State Government in respect of sales and services rendered within the State. The subject matter of the concluded appeal and the instant case is substantially similar and an appeal in respect of the issue contested before the Court of Appeal would have the same effect as a resolution of the issues in this case. See: *Minister for Works & Housing v. Tomas (Nig.) Ltd*. (2002) 2 NWLR (Pt.752) 740 @ 780 E - H & 785 E - H; *Ali v. Albishir* (2008) 3 NWLR (Pt.1073) 94 @ 142 - 143 E - 144B. It is therefore somewhat curious that rather than appeal against the judgment of the Court of Appeal delivered on 13/17/2007, or await the outcome of the pending suits/appeals, the plaintiff chose to file a fresh suit in an attempt to invoke the original jurisdiction of this court. If dissatisfied with any of the decisions, the proper course of action is to pursue the appeals to their logical conclusion. In the circumstances, I am of the considered view that the present suit amounts to an abuse of process.

For these and the more comprehensive reasons stated in the lead ruling of my learned brother, M. D. Muhammad, JSC, with which I concur, I also strike out the suit for want of jurisdiction. The parties shall bear their respective costs in the suit.

OKORO, JSC: By an amended Originating Summons filed on 12th August, 2009, the plaintiff made "claims that the House of Assembly of Lagos State of Nigeria is the body entitled, to the exclusion of any other legislative body, to enact laws with regard to the imposition and collection of tax on the supply of all goods and services within the Lagos State of Nigeria and that the Lagos State of Nigeria, or any other agency of the State, is the body entitled, to the exclusion of any other body, to assess and collect such tax and that the revenue of the Lagos State Government has been and continues to be affected by the enforcement of the provisions of the Value Added Tax Decree No. 102 of 1993, now Value Added Tax Act Cap. V1 Laws of the Federal Republic of Nigeria, 2004, for the determination of the following questions:-

1. Whether upon the coming into effect of the Constitution of the Federal Republic of Nigeria, 1999, the said Value Added Tax Act is an existing Law within the meaning of Section 315 of the said Constitution being a Federal Legislation which is deemed to be an Act of the National Assembly?

2. If the answer is in the affirmative, whether the combination of the provisions of Sections 2, 4, 6 and 7 of the said Value Added Tax Act which empower a federal organ to impose and collect taxes on the supply of all goods and services other than those goods and services listed in the First Schedule to the said Act amount to an imposition of tax on the supply of all goods and services within the Lagos State of Nigeria and within other states of the Federation?

3. If the answer to question 2 is in the affirmative, whether Section 2, 3, 4, 5, 6 and 7 of the said Value Added Tax Act are within the contemplation and competence of the powers conferred on the National Assembly under Section 4 of the 1999 Constitution."

The plaintiff then made the following claims against the 1st defendant only:-

"1. A declaration that the Value Added Tax Act Cap V1 Laws of the Federal Republic of Nigeria 2004 is, to the extent that it provides for the imposition and collection of taxes on goods and services in Lagos State (and other states of the Federation) outside the legislative competence of the National Assembly and is therefore unconstitutional, null and void and of no effect whatsoever.

2. *A perpetual injunction restraining the Federal Government of Nigeria by itself, its servants or any of its agencies from continuing to give effect to the provisions of the said Value Added Tax Act to impose and collect taxes on goods and services within the Lagos State of Nigeria."*

In support of the Originating Summons is a 19 paragraphs affidavit deposed to by Ade Ipaye, Legal Practitioner and Special Adviser to the Governor of Lagos State on Revenue and Tax Matters. Annexed to the affidavit are ten exhibits marked A - J. The plaintiff also filed its brief of argument in respect of the said Originating Summons. The 1st respondent and other respondents also filed their respective briefs. However, at the hearing of the Originating Summons on 4/2/14, the 1st respondent drew attention to its Notice of Preliminary Objection to the hearing of the case. The said notice was filed on 3rd February, 2010. Accompanying the Notice of Preliminary Objection is a 7 paragraph affidavit and a written brief of argument in respect thereof.

On 19th April, 2010, the plaintiff filed a response to the argument of the 1st defendant's Preliminary Objection. In keeping with the practice in this court, I intend to consider the issues raised in the preliminary objection before delving into the substantive matter placed before this court.

In the Notice of Preliminary objection which is brought pursuant to Order 2, Rule 29 of the Supreme Court Rules, 2002, the 1st defendant is praying for the following relief:

*"**AN ORDER** of this Honourable Court striking out and/or dismissing this suit on the grounds set in the Schedule hereunder."*

The Schedule alluded to above by the 1st defendant has two grounds in support of the preliminary objection.

The two grounds are as follows:-

"GROUND 1

The plaintiff's cause of action relates to acts of a Federal organ and cannot form the basis of invoking this Honourable Court's Original Jurisdiction to entertain this suit.

PARTICULARS

1. *In paragraph 8 of the Affidavit in support of the Amended Originating Summons, the plaintiff admits as follows:*

"An organ of the Federal Government of Nigeria was authorized

to assess, collect, administer and manage the tax."

In paragraph 13 as follows:

"The Federal Government continues, through its agencies, to Administer the Value Added Tax and to assess and collect tax thereunder with regard to the supply of goods and services within the Lagos State of Nigeria and within the territories of the other states and distribute such tax in accordance with the fee sharing formula."

And in paragraph 19 as follows:

"Unless restrained by this Honourable Court, I verily believe that the Federal Government will, through its agents, continue to implement the provisions of the Value Added Tax Act to the detriment of the Lagos State Government."

2. The Federal Inland Revenue Service (FIRS) is the Federal Government Organ and Agent charged and authorized to assess, administer and manage the Value Added Tax. Consequently, the Federal Inland Revenue Service is a necessary party in the matter as all complaints of the plaintiff relate to acts of the Federal Inland Revenue Service.

3. Where an agency of the Federal Republic of Nigeria is or ought to be a party in a matter, the original jurisdiction of the Supreme Court cannot be invoked.

GROUND 2

The entire suit constitutes an abuse of court process and should be struck out.

PARTICULARS

1. In paragraph 15 of the affidavit in support of the plaintiff's Amended Originating Summons, the plaintiff admits that plaintiff has been involved and is currently engaged in the following pending suits and/or appeals:

a) CA/L/23/04 M.A.N. v. Attorney General Lagos State

b) CA/L/428/05 Attorney General Lagos State v. Eko Hotels

c) CA/L/727M/06 Attorney General Lagos State v. M.A.N.

d) ID/451/2002 (now CA/L/430/06)

e) ID/454/2002

f) ID/450/2002 (now CA/L/431/06)

g) ID/453/2002.

2. The suits stated above are grounded on the same subject matter as this present suit and the plaintiff ought to pursue these suits to their logical conclusion.

3. The plaintiff in Paragraph 17 of the affidavit in support of the Amended Originating Summons admits that Suits Nos. ID/450/02 and ID/451/02 are currently on appeal.

4. The plaintiff's Appeal No. CA/L/428/05 which touches on the same subject matter in this suit was dismissed and the plaintiff has not lodged any appeal against the said judgment.

5. The Court of Appeal in its judgment in Appeal No. CA/L/428/05 declared the plaintiff's Sales Tax as null and void on all matters on which the National Assembly has legislated.

6. That the Court of Appeal judgment in Appeal No. CA/L/428/05 was delivered on 13th July, 2007 and the plaintiff admits this fact but filed this fresh matter before the Supreme Court in 2008.

7. The cause of action (if any) as disclosed in this suit can be properly determined in the above pending suits and/or appeals."

Both the defendant/Objector and the plaintiff filed and exchanged their written arguments in respect of the preliminary objection. At the hearing of this suit on 4th February, 2014, counsel for both parties adopted the said briefs alluded to above. In arguing the preliminary objection, the 1st defendant formulated two issues upon which arguments are anchored. The issues are as follows:

"1. Whether the Supreme Court's Original jurisdiction can be invoked where the acts and allegations constituting the main dispute are acts of an agency of the Federal Government.

2. Whether the present suit filed during the pendency of several suits between the main parties on record or their agents does not constitute an abuse of court process."

The plaintiff also distilled two issues for determination.

They are couched thus:

> *"1. Whether there is a dispute between the Lagos State Government and the Federation in respect of the constitutionality of the Value Added Tax Act as it applies to Lagos State (as well as other states of the Federation) over which the Supreme Court may exercise exclusive jurisdiction.*
>
> *2. Does the present action instituted by the plaintiff amount to an abuse of process of this Honourable Court?"*

A summary of the arguments in respect of the preliminary objection would suffice. In respect of the first issue, the learned senior counsel for the 1st defendant submitted that for the Supreme Court's Original Jurisdiction to be successfully invoked, there must be disclosed a dispute between the Federal Government and the state or the State interse; relying on the cases of *Attorney General Bendel State v. Attorney General of the Federation* (1982) 3 NCLR 1, *Attorney General of The Federation v. Attorney General of Abia State* (2001) 11 NWLR (Pt. 625) 689, *Attorney General of Kano State v. Attorney General of the Federation* (2007) 3 SC 59, *Attorney General of the Federation v. Attorney General of Imo State* (1993) 4 NCLR 178.

Referring to paragraphs 7, 8, 13, 15, and 19 of the plaintiff's affidavit in support of the amended originating summons, the learned senior counsel submitted that it is beyond any iota of doubt that the essence of the plaintiff's complaint is that the collection of Tax on supply of goods and services by Federal Inland Revenue Service in Lagos State, has made it difficult and almost impossible for the plaintiff to collect tax on the supply of goods and services in Lagos State. He contended that where, as in this case, the acts and allegations complained about by the plaintiff are acts of a Federal Government Agency, the original jurisdiction of this court cannot be invoked pursuant to Section 232 (1) of the 1999 Constitution (as amended). The learned senior counsel also cited the case of *Attorney General of Benue State v. Attorney General of the Federation & 35 Ors* (unreported) Suit No. SC. 179/2006 delivered on 25th October, 2007.

On the second issue, which relates to abuse of court process, he submitted that it is an abuse of court process for a party to institute multiplicity of actions in various courts over the same issue between the same parties, relying on the cases of *Attorney General of Ondo State v. Attorney General of Ekiti State* (2001) 7 NWLR (Pt.743) 706, *Central Bank of Nigeria v. Ahmed* (2001) 11 NWLR (Pt.724) 369, *Ogoejofo v. Ogoejofo* (2006) 22 WRN 183. According to learned senior counsel, the terms "issue" and "parties" include "any matter that could have been raised and canvassed in the first suit" and "agents and privies" respectively. The case of

NIMB V. UBN (2004) 52 WRN 121 at 144 was cited in support.

Referring to paragraph 15 of the plaintiff's affidavit in support of the originating summons, he submitted that the plaintiff and the 1st defendant were the principal parties in Suit No.ID/105/05 listed in sub paragraph (a) in which judgment was delivered in the plaintiff's favour and the pending appeal of the nominal parties in the matter is listed in sub paragraph (b) as CA/L/23/04. Also, that the 1st defendant's pending appeal against the judgment is listed as (c) in Appeal No. CA/L/727M/06.

Also referring to Exhibit HAGF 1, a judgment of the Court of Appeal in a related matter, learned senior counsel submitted that the plaintiff's only legal right was to appeal against the said judgment. That the plaintiff has no alternative legal right to institute a fresh suit under the original jurisdiction of this court. He urged this court to uphold the preliminary objection and strike out or dismiss this suit.

In response, it was submitted on behalf of the plaintiff that contrary to the contention of the 1st defendant that the acts complained of are acts of a Federal Government Agency, the gravamen of the claim of the plaintiff is the unconstitutionality of the Value Added Tax Act and the illegality of the collection of tax pursuant to the said Act, which tax is being collected by an agency of the Federal Government. It was further argued that the plaintiff has no dispute with the Federal Inland Revenue Service, which the 1st defendant contends under particular I of Ground I of the objection...He referred to the case of *Attorney General of Lagos State v. Attorney General of the Federation & Ors* (2003) 12 NWLR (Pt.833) 1. It was his further contention that in *Attorney General of Benue State v. Attorney General of the Federation (supra)* the court found that there was no dispute between the plaintiff and the Government of the Federation because the complaints of the plaintiff therein were against the acts of the Economic and Financial Crimes Commission and not those of the Federal Government of Nigeria.

Learned senior counsel further submitted that the Federal Inland Revenue Service is merely a collecting agent of the Government of the Federation for the purpose of giving effect to the Value Added Tax Act. He submitted that a claim has properly been brought against the Government of the Federation and that the proper person to sue is the Attorney General of the Federation, citing the case of *Attorney General of Kano State v. Attorney General of the Federation* (supra) at p.192 paragraph B. In conclusion on this issue, he submitted that the fact that a state government sues the federal government or any other state government is not conclusive of the fact that the original jurisdiction of the Supreme Court has been properly invoked. Also, that it does not matter how the claims are couched. What matters, according to him, is who the real disputants are which will be ascertained from the crux of the complaint. He cited the case of *Attorney General Ondo State v. Attorney General of the Federation & Ors (supra).* He urged this court to hold that the jurisdiction of this court has been properly invoked.

On the issue of abuse of court process, learned senior counsel for the plaintiff submitted that since the 1st defendant was not a party in the suits mentioned in the affidavits in support of the originating summons, the parties in this suit and the ones mentioned in the supporting affidavits are not the same. That the requirement of sameness of parties having not been met, it cannot be rightly contended that the present action is an abuse of court process. He referred to the case of *Saraki v. Kotoye* (1992) 9 NWLR (Pt.264) 156 at 188.

Furthermore, that it cannot be seriously contended that the plaintiff's action was taken other than to resolve an important constitutional dispute which exists between the Federation and the Lagos State of Nigeria and which cannot be resolved in all the other courts in which the actions or appeals relied upon as making this action an abuse of process were filed.

The plaintiff also made response to the 14th, 24th, 30th, and 35th defendants' arguments on the said preliminary objection which are in tune with those already made. He then urged this court to hold that the present suit does not constitute an abuse of court process.

By these arguments, a fundamental question arises and that is whether the original jurisdiction of this court has been properly activated. By Section 232 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), which provides:

> ***"232(1) The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends."***

Thus in *Attorney General of Kano State v. Attorney General of the Federation* (2007) 3 SC 59, this court held that in order to be able to invoke or activate the original jurisdiction of this court, pursuant to Section 232 (1) of the 1999 Constitution, the following conditions must be present, that is to say:-

> ***1. There must be a justifiable dispute involving any question of law or fact.***
>
> ***2. The dispute must be between the Federation and a State in its capacity as one of the constituent units of the Federation, or***
>
> ***3. Between the Federation and more states that are in their capacities as members of the constituent unit of the Federation or states inter se.***

4. The dispute must be one on which the existence or extent of a legal right in the said capacity is involved.

There is no doubt from the originating summons that there is a dispute between the Lagos State Government and the Federal Government of Nigeria in relation as to who has the power to legislate, assess, collect and manage tax with regard to the supply of goods and services within the Lagos State of Nigeria *vis-a-vis* the Value Added Tax Act enacted by the National Assembly. That is the *gravamen* of the dispute as can be garnered from the Originating Summons. It is trite that it is the claim of the plaintiff which determines the jurisdiction of the court, and where pleadings have been filed, the issue of the court's jurisdiction is determined from the averments in the plaintiff's Statement of claim. Where this is not the case, one has to look at the claim as endorsed on the Writ of Summons. See *Aladegbemi v. Fasanmade* (1988) 3 NWLR (Pt.81) 129, *Ikine & Ors v. Edjerode & Ors* (2001) 12 SC (Pt.11) 94, *Adeyemi v. Opeyori* (1976) 9 - 10 SC 31, *Nkuma v. Odili & Ors* (2006) 6 NWLR (Pt.977) 587.

The questions set out for determination in the originating summons which I had earlier set out in this Ruling and the affidavit in support thereof clearly show that the dispute arising from the facts of this case are justiciable. But in which court? Looking at the 1999 Constitution of the Federal Republic of Nigeria holistically, finding an answer to this question does not appear to be a simple task. This is so because after the framers of the Constitution had made a general provision in Section 232 (1) thereof conferring original jurisdiction on this court on any dispute between the Federation and any state of the Federation, they went further in Section 251 (1) (a) and (b) of the same Constitution to confer exclusive jurisdiction on the Federal High Court on matters relating to the claims of the plaintiff in this suit as set out above.

Now, Section 251 (1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

> *"251 (1) - Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters:-*
>
> *a) Relating to the revenue of the Government of the Federation in which the said Government or any organ thereof or a person suing or being sued on behalf of the said Government is a party.*
>
> *b) Connected with or pertaining to the taxation of companies and other bodies established or carrying on business in*

Nigeria and all other persons subject to Federal Taxation."

In view of the fact that the Constitution, after donating original jurisdiction to this court in Section 232 thereof in **"any dispute"** between the Federation and the States, and the states ***interse***, it went further to donate exclusive and specific jurisdiction to the Federal High Court in the later Section 251, (1) (a) and (b) in matters relating to the Revenue of the Government of the Federation and also in matters of taxation, it thus requires some ingenuity of interpretation in order to determine whether there is any conflict between the two sections or whether they are mutually exclusive. It was the late Sir Udo Udoma, JSC, that ingenious jurist who in *Nafiu Rabiu v. The State* (1980) 8 - 11 SC 130 at 148 said.

> *"My Lords, it is my view that the approach of this court to the construction of the Constitution should be and so it has been, one of liberalism, probably a variation of the theme of the general maxim **ut res magis valeat quam perea**. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accordance and consistent with the words and sense of such provisions will serve to enforce and protect such ends."*

In my attempt to heed the admonition of His Lordship quoted above, I wish to ask one pertinent question. The question is: Were the framers of the Constitution oblivious of the earlier provision in Section 232 (1) thereof when they proceeded to provide in Section 251 (1) (a) and (b) an exclusive jurisdiction to the Federal High Court in named and specific matters? I do not think so. The reason can be found in the opening words used in Section 251 of the said Constitution. It states:-

> *"Notwithstanding anything to the contrary contained in this Constitution....."*

By this opening statement, I hold the view that Section 232 (1) was still fresh in the mind of the framers of the Constitution when Section 251 was drafted. And in order to tinker with the original jurisdiction on **"any dispute"** conferred on this court in Section 232 (1), the framers of the Constitution said:

"Notwithstanding anything to the contrary contained in this Constitution" including Section 232 (1), the Federal High Court shall have and exercise jurisdiction, to the exclusion of any other court in matters to which sub sections (a) and (b) relate. This court in NDIC *v. Okem Enterprises Ltd* (2004) 10 NWLR (Pt.880) 107 at 182, held that when the term "notwithstanding" is used in a statute, it is meant to exclude an impinging or impeding effect of any other provision of the statute or other subordinate legislation so that the said Section may fulfill itself. I need to emphasize that in interpreting the provisions of a statute or even the Constitution, the historical antecedents of such provision could be of help in order to bring out

the real intendment of the law maker or framers of the Constitution. That is why I agree with Justice White in *Knowlton v. More 178 U.S. 41, 20 S.ct*, 747 at 768 referred to by late Nnamani, JSC in *Bronik Motors Ltd & Anor. v. Wema Bank Ltd* (1983) All NLR, 272 at 301 where the Law Lord stated as follows:

> *"The necessities which gave birth to the constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption may properly be taken into view for the purpose of tracing to this source any particular provision of the constitution in order thereby to be enabled to correctly interprete its meaning."*

Historically, the Federal High Court metamorphosed from the Federal Revenue Court which had jurisdiction to entertain matters relating to the revenue of the Government of the Federation. It seems to me and I strongly believe so, that the Constitution intended to give exclusive jurisdiction to the Federal High Court in matters relating to the Revenue of the Government of the Federation including matters of taxation in spite of its earlier provision granting original jurisdiction to the Supreme Court ***"in any dispute"*** between the Government of the Federation and any state of the Federation and the states ***inter se***. It follows that the plaintiff's claim having come squarely within the exclusive jurisdiction of the Federal High Court, this court has no original jurisdiction to entertain it.

Let me say a few words as regards issue of abuse of court process. There is no doubt that this court in a plethora of authorities frown at issue of abuse of court process whenever it occurs. Abuse of court process simply means that the process of the court has not been used *bona fide* and properly. It also connotes the employment of the judicial process by a party in improper way to the irritation and annoyance of his opponent and the efficient and effective administration of justice. See *Arubo v. Aiyelei* (1993) 3 NWLR (Pt.280) 126, *Central Bank of Nigeria v. Ahmed* (2001) 5 SC. (Pt.11) 140 *Edjerode v. Ikine* (2001) 12 SC (Pt.11) 125. Where a party re-litigates an issue afresh after the same issue has been tried and decided by a court of competent jurisdiction, it is an abuse of court process.

In the instant suit, the plaintiff has, in paragraph 15 of its affidavit in support of the amended Originating Summons listed quite a number of cases which are either pending or disposed of or on appeal which relate substantially to the subject matter now before us. I shall refer, though briefly to one of such cases. In appeal No.CA/L/428/05 (No. (e) in paragraph 15 of plaintiff's affidavit) delivered on 13th July, 2007, the Court of Appeal upheld the decision of the Federal High Court in issues substantially the same as the issues placed before this court to decide.

For the avoidance of doubt, part of the judgment of the Court of Appeal alluded to above which is Exhibit HAGF 1 at page 17 states:

> *"It is the contention of the learned counsel for the appellant that the decision*

of the learned trial judge that the VAT Tax of the Federal Government prevails over the Sales Tax of the State is erroneous and does not have any constitutional support. The learned counsel cites the provision of Section 4 (2) and (3) of the Constitution 1999 in support of his submission. Counsel maintains that the sales tax is neither on the exclusive nor concurrent legislative list. It is therefore a residual matter within the jurisdiction of the state legislative houses."

The plaintiff herein, who was the Appellant at the Court of Appeal, has not appealed against the above summary by the learned justice of the Appeal Court. So it stands.

Therefore, the issue of the VAT Act and the Sales Tax Law will certainly resonate before this court should we decide to hear the matter. But then the matter as decided by the Court of Appeal is still subsisting. I agree with the learned senior counsel for the 1st defendant that what is available to the plaintiff in that matter is a right of appeal.

The plaintiff does not have an alternative legal right to institute a fresh suit under the original jurisdiction of this court in respect of the same. It amounts to an abuse of court process for the plaintiff herein to abandon the judgment of the Court of Appeal and institute a fresh suit in this court on the same issue. Based on this also, this court lacks the jurisdiction to entertain this suit.

In view of all I have said above, I agree with my learned brother, Musa Dattijo Muhammad, JSC, in his lead judgment, that this court lacks the jurisdiction to hear the complaint of the plaintiff in its original form. Accordingly, this suit is hereby struck out for want of jurisdiction. I also make no order as to costs.

Cases cited in the judgment

A.G. Abia State v. A.G. Federation & 35 Ors (2005) 12 NWLR (Pt.940) 452
A.G. Anambra State v. A.G. Federation & 35 Others (2007) 12 NWLR (Pt.1047) 4
A.G. Bendel State v. A.G. Federation (1982) 3 NCR 1; (1981) 10 SC 2
A.G. Benue State v. A.G. Federation (unreported)
A.G. Federation v A.G. Abia State (2001) 11 (Pt.625) 689
A.G. Federation v. A.G. Imo State (1983) 4 NCLR 178
A.G. Lagos State v. A.G. Federation & 35 Ors (2003) 12 NWLR (Pt.833) 1
A.G. Lagos State v. Dosunmu (1989) 3 NWLR (Pt 111) 552
A.G. of Kano State v. A. G. of the Federation (2007) 6 N.W.L.R. (Pt.1029) 164
A.G. Ondo State v. A.G. Ekiti State (2001) 17 N.W.L.R. (Pt.743) 706
Abdulkarim v. Incar (Nig.) Ltd. (1992) 7 NWLR (Pt.251) 1
Adelusola v. Akinde (2004) 12 NWLR (Pt.887) 295
Adesanya v. President of the Federal Republic & Anor (1981) 5 SC 112
Adeyemi v. Opeyori (1976) 9 - 10 SC 31
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Akaighe v. Idama (1964) All NLR 322

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Akilu v. Fawehinmi and Togun (No.2) (1989) 2 N.W.L.R. (Pt.102) 122
Aladegbemi v. Fasanmade (1988) 3 NWLR (Pt.81) 129
Ali v. Albishir (2008) 3 NWLR (Pt.1073) 94
Amadi v. N.N.P.C. (2000) 10 N.W.L.R. (Pt.674) 76
Amaefule v. The State (1988) 2 NWLR (Pt.75) 156
Arubo v. Aiyeleru (1993) 3 NWLR (Pt.280) 126
Associated Discount House Ltd. v. Amalgamated Trustees Ltd.(No 2) (2007) 7 SC 168
Bamgboye v. Administrator-General 14 WACA 616
Bena Plastic Industries v. Vasilyev (1999) 10 N.W.L.R. (Pt.624) 620
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Buhari v. Yusuf (2003) 6 SC (Pt.11) 156
CBN v. Ahmed (2001) 11 NWLR (Pt.24) 369
Consortium M. C. v. NEPA (1992) 6 NWLR (Pt.246) 132
Daplanlong v. Dariye (2007) 8 NWLR (Pt 1036) 332
Doma v. Adamu (1999) 4 N.W.L.R. (Pt. 598) 311
Dr. Felix Amadi & Anor v. INEC & 2 Ors (2012) 2 SC (Pt.1) 1
Ebodagbe v. Okoye (2004) 18 NWLR (Pt.905) 472
Edjerode v. Ikine (2001) 12 SC (Pt.11) 125
Federal Republic of Nigeria v. M. K. O. Abiola (1997) 2 NLCR 44
Governor of Kaduna State & Others v. Lawal Kagoma (1982) 6 SC 87
Hon. Justice Raliat Elelu-Habeeb (Chief Judge of Kwara State) v. A.G. Federation & 2 Ors (2012) 2 SC (Pt.1) 145
Ibrahim v. Barde (1996) 9 NWLR (Pt.474) 513
Ikine & Ors v. Edjerode & Ors (2001) 12 SC (Pt.11) 94
Inakoju & Ors v. Senator Rashidi Ladoja & Ors (2007) All FWLR (Pt.353) 1
Izenkwe v. Nnadozie 14 W.A.C.A 361
Jeric Nig Ltd v. UBA Plc (2000) 12 SC (Pt 11) 33
Kraus Thompson Organisation Ltd v. National Institute for Policy and Strategic Studies (2004) 9 NWLR (Pt 879) 61
M.A.N. v. Attorney General Lagos State CA/L/23/04
Madukolu v. Nkemdilim (1962) 2 SCNLR 341
Minister for Works & Housing v. Tomas (Nig.) Ltd. (2002) 2 NWLR (Pt.752) 740
NDIC v. Okem Enterprises Ltd (2004) 11 CLRN 1
NIMB v. UBN (2004) 52 WRN 121
Nkuma v. Odili & Ors (2006) 6 NWLR (Pt.977) 587
Nnonye v. Anyiche (2005) 2 NWLR (Pt 910) 623
Ogbunyiya v. Okudo (1979) 6-9 SC 32
Ogoejeofor v. Ogoejeofor (2006) 3 NWLR (Pt.966) 205
Ojokolobo v. Alamu (1987) 3 NWLR (Pt.61) 377
Okafor v. A. G. Anambra State (1991) 6 N.W.L.R. (Pt.200) 659
Okorodudu v. Okoromadu (1977) 6 NWLR (Pt. 2001) 659
Okoye v. N.C.& F. Company Ltd. (1991) 6 N.W.L.R. (Pt.199) 501
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Omoregbe v. Lawani (1980) 3-4 SC 108
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Owodunni v Registered Trustees of Celestial Church of Christ & Ors (2000) 10 NWLR (Pt.675) 315
Osadebay v. A.G. Bendel State (1991) 1 SC (Pt.11) 73
P.D.P v. INEC (1999) 11 NWLR (Pt.626) 200
Rabiu v. The State (1980) 8 - 11 SC 130; (1980) 8 - 11 SC (Reprint) 85
Saraki v. Kotoye (1992) 9 N.W.L.R. (Pt.264) 156
Schroder v. Major (1989) 2 NWLR (Pt.101) 1
Tukur v. Govt. of Gongola State (1989) 4 NWLR (Pt.117) 517
Udoh v. Orthopaedic Hospital Management Board (1993) 7 NWLR (Pt.304) 139
Umeh & Anor. v. Iwu & Ors. (2008) 8 N.W.L.R. (Pt.1089) 225

Foreign cases cited in the judgment
Knowlton v. More 178 U.S. 41, 20 S.ct, 747
Thames Launettes Ltd v. Corporation of the Trinity House of Deptford Strond (1961) All ER 26

Statutes cited in the judgment
Section 20 of the Supreme Court Act, Cap S15 Laws of the Federation of Nigeria 2004
Supreme Court (Additional Original Jurisdiction Act) Cap S16 Laws of the Federation of Nigeria, 2004
Sections 4 (8), 6 (6) and 212 (1) of the 1979 Constitution of the Federal Republic of Nigeria
Sections 4 (2) (3) (8), and 6 (6) (a) & (b), 6 (1), (5) and (6), 232 (1), 251 (1) (a), (b) and (q), 318 (1of the 1999 Constitution of the Federal Republic of Nigeria
Sections 2, 3, 4, 5, 6 and 7 of the said Value Added Tax Act Cap V1 Laws of the Federation of Nigeria 2004

Rules of court referred to in the judgment
Order 2, Rule 29 of the Supreme Court Rules, 2002

Book referred to in the judgment
Halsbury's Laws of England 4th Edition

History:

SUPREME COURT OF NIGERIA
Mahmud Mohammed, JSC*(Presided)*
John Afolabi Fabiyi, JSC
Nwali Sylvester Ngwuta, JSC
Mary Ukaego Peter-Odili, JSC
Musa Dattijo Muhammad, JSC (*Read the lead ruling)*

Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC
John Inyang Okoro, JSC

Counsel:

Ade Ipaye - Hon. Attorney General of Lagos State, with E. O. Sofunde SAN, C. Umensuyi Edosomwan SAN, R. Tarfa SAN, Prof. Y. Osinbajo SAN, Prof. T. Osipitan SAN, M. Igbokwe SAN, D. Akinosan, O. T. Akinsola, L. O. Akangbe, L. Akinsola, J. Jacob, Seun Awolade, Dayo G. Ashonibare, A. M. Kayode, C. Okezie (Miss), P. Tarfa, J. Okah, Y. Killa and C. V. Ofoegbu, for the plaintiff.

J. B. Daudu SAN with A. Adedeji, I. C. Okonji and C. E. Ogbozor, for the 1st defendant.

Uke Kalu - Hon. Attorney General of Abia State with Val Offia, Omokue U. (C.S.S.) and Chukwu L. Ogechi (S.S.C.), for the 2nd defendant.

Ekenyong Ntetim with Bassey Ekanem, for the 4th defendant.

P. A. Afuba - Hon. Attorney General of Anambra State with I. C. Adingwu, for the 5th defendant.

E. Y. Kurah, for the 6th defendant.

Chief F. F. Egele - Hon. Attorney General of Bayelsa State with B. Kingdom and E. Ameh, for the 7th defendant.

A. Olaleru, for the 10th defendant.

C. A. Ajuyah SAN, Hon. Attorney General of Delta State with N. W. Ogbogu, Director Department of Revenue Matters, A. O. Orohorhoro, Esq., Assistant Director, C. O. Abagwu, Esq., Chief State Council, O. P. Ekpemina, Esq., State Senior Counsel, D. C. Atigari, Esq., Senior Counsel and N. B. Emakpor, (Mrs.) State Senior Counsel, for the 11th defendant.

Dr. Ben O. Igwenyi - Hon. Attorney General of Ebonyi State with P. M. Awada (D.C.L.), for the 12th defendant.

Nnamons Ekanem with Iniabasi Udobong, for the 13th defendant.

F. Omotosho, for the 14th defendant.

Nduka Ikeyi with Solomon Ejim and Ifeanyi Eeanyi Ezea, for the 15th defendant.

I. M. Njaka with Sunday Olabode and Michael Dunioh, for the 17th defendant.

Y. A. H. Ruba, Esq. - Hon. Attorney General of Jigawa State with M. A. Lamin (A.C.S.C.), for the 18th defendant.

D. C. Enwelum for Kaduna State, for the 19th defendant.

Mukhtar Sani Daneji - Solicitor General Kano State with Dalhatu Yusuf Dada D.D.P.P., for the 20th defendant.

Napoleon O. Idenala, for the 21st defendant.

Muhammad Ibrahim Pama - Director Civil Litigation Katsina State with Ahmadu Rufai Amin - Chief State Counsel Kebbi State, for the 22nd defendant.

Kamaldeen Ajibade - Hon. Attorney General of Kwara State with F. D. Lawal (Mrs.) S. G. Kwara, S. K. Grillo (Mrs), A. D. Civil Litigation, M. J. Orire (Mrs.) (S.S.C.) and O. S. Balogun (S.S.C.), for the 24th defendant.

Mrs. Abimbola Akeredolu - Hon. Attorney General of Ogun State with Dehinde Dipeolu - S. C. Ogun State Ministry of Justice and Olakunle Agbebi, for the 27th defendant.

O. Oshobi with K. Daudu, O. I. Arasi and O. C. Obayuwana (Miss), for the 29th defendant.
F. B. Lotben (Mrs.) Director Civil Litigation with V. Z. Dadom (Mrs) Deputy Director/ Assistant Head of Legal Drafting, Ministry of Justice, for the 31st defendant.
Worgu Boms - Hon. Attorney General of Rivers State with Dame N. C. Iwegbu D. C. L. Rivers State, for the 32nd defendant.
M. I. Hanafi with D. T. Nwachukwu and H. H. Oloriegbe (Miss), for the 35th defendant.
Abdul Ahmad with Salisu M. Akwati, for the 36th defendant/respondent

UNION BANK OF NIGERIA PLC v. MR. N.M. OKPARA CHIMAEZE

SUPREME COURT OF NIGERIA

SC. 204/2006
FRIDAY 11TH APRIL, 2014

(I. T. MUHAMMAD; ARIWOOLA; M. D. MUHAMMAD; OGUNBIYI; KEKERE-EKUN, JJ.SC)

BANKING – Cheques – Banker will be liable for wrongly dishonouring trader's cheque.

BANKING – Cheques – Banker has fiduciary duty to honour a customer's instrument properly drawn on it.

BANKING – Customer – Persons having an account with bank and for whom the bank has agreed to collect items.

DAMAGES – Award – Appellate court will not interfere with lower court's award except arrived at upon a wrong principle of law or erroneous assessment.

DAMAGES – Aggrevated Damages – are awarded for wrongful dishonour of trader's cheque.

DAMAGES – Award – Damages are awarded in an attempt to restore an injured party as far as possible to the position he was before the injury.

DAMAGES – Special Damages – must be specifically pleaded and concrete evidence led in proof.

DAMAGES – Award – Appellate court will vary if sum is too low or excessive.

DAMAGES – General Damages – are presumed to follow as a result of breach and do not need to be specifically claimed.

DAMAGES – Special Damages – arise from a particular wrong and must be specifically pleaded.

DAMAGES – Double Compensation – Claimant seeking compensation for wrongful dishonour of cheque can recover under several heads of damages.

COMMERCIAL LITIGATION – Perverse Decision – Where court neglects facts or evidence or wrongly applies principles of law and this leads to miscarriage of justice.

COMMERCIAL LITIGATION – Damages – are sums ordered to be paid as compensation to persons who have been wronged.

COMMERCIAL LITIGATION – Special Damages – Defendant that fails to successfully challenge evidence given in proof of special damages may be liable.

Facts:

The respondent is a trader and customer of the appellant. He drew a cheque in favour of Lever Brothers Nig. Plc, but the appellant dishonoured the cheque. The respondent alleged that he had sufficient credit in his account to facilitate the payment and as such, there was no basis for the appellant's actions.

Further, he alleged that being a trader and a major distributor with Lever Brothers Nig. Plc, he suffered loss of income and damage to his reputation and creditworthiness. Consequently, he commenced an action against the appellant at the Edo State High Court claiming the sum of ₦30,000,000 (Thirty Million Naira) as special and general damages. The appellant in its defence claimed that the respondent did not have sufficient funds in his account. It also alleged fraud on the respondent's part.

The trial court found that the respondent's cheque was wrongly dishonoured by the appellant and awarded ₦100,000.00 (One Hundred Thousand Naira) and ₦250,000 (Two Hundred and Fifty Thousand Naira) as general and special damages respectively in favour of the respondent. Dissatisfied, the appellant appealed to the Court of Appeal and the respondent cross appealed against the damages awarded to him. The Court of Appeal dismissed the appeal but allowed the cross appeal and increased the general damages awarded by ₦1,000,000 (One Million Naira).

Further dissatisfied, the appellant appealed to the Supreme Court, the respondent also cross appealed on the grounds that the damages awarded was low.

Held *(Unanimously dismissing the appeal and cross appeal):*

[1] ***Banking – Cheques – Banker will be liable for wrongly dishonouring trader's cheque.***

In the case at hand one of the reasons the lower court relied upon in its interference with the general damages the trial court awarded the respondent/cross appellant is the undisputed fact of his being a trader. Award of damages for the dishonour of cheques issued by the respondent who is in fund is *sui generis*. The very act of dishonouring a trader's cheque without more, on the authorities, entitles him to substantial damages.

In *Hirat Aderinsola Balogun v. The National Bank of Nigeria* (1978) 3 SC 111 a case from which the lower court rightly drew, this Court held that a banker's act of wrongly dishonouring the cheque of a trader is calculated to be particularly injurious. At page 126 of the report, the apex court for this very reason allowed the appeal before it and consequentially ordered thus:-

> ***"This appeal succeeds on the question of damages. Accordingly the judgment of the High Court of Lagos State in Suit LD/23/73 dated 26th May, 1975, in so far only as it makes an award of ₦10 to the appellant is hereby set aside and in substitution therefore it is ordered that judgment be entered in favour of the plaintiff (appellant herein) against the defendants (respondents herein) in the sum of ₦1000."*** (Underlining supplied for emphasis).
> **(P. 96 lines 35 - 45; P. 97 lines 1 - 9)**

[2] ***Banking – Cheques – Banker has fiduciary duty to honour a customer's instrument properly drawn on it.***

PER ARIWOOLA, JSC:

In the instant case, the appellant is a fiduciary to the respondent.

It owes the respondent a duty to exercise a high standard of care in managing the respondent's money. Therefore, for dishonouring his cheque when his account was in credit to accommodate the amount on the cheque, the appellant had breached the fiduciary relationship between them, to which the respondent was entitled to compensation by way of damages.

... It is the duty of a banker to its customer to honour and pay cheques drawn on it by the customer as long as it has in its possession at the material time, sufficient and available funds for the purpose.

Therefore, when there is sufficient and available fund in customer's account and a cheque is presented but payment is refused, the holder is entitled to treat the cheque as dishonoured, even if requested to represent. See; *Ide Chemists Limited v. National Bank of Nigeria Limited* (1976 - 1984) 3 NBLR 111 at 118.

In *Allied Bank (Nig.) Limited v. Akubueze* (1997) 6 NWLR (Pt 509) 374; (1997) 6 SCNJ 166 this court held, *inter-alia*, that a bank is bound to honour cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account and that refusal to honour the cheque will amount to a breach of contract which would render the banker liable in damages.

In the same vein, in *Union Bank of Nigeria Limited v. Nwoye* (1996) 3 NWLR (Pt 435) 135, this court held that the liability of a banker to its customer arises in contract when a banker refuses to pay a customer's cheque when the customer holds in his account an amount equivalent to that endorsed on the cheque.
(P. 100 lines 41 - 45; P. 101 lines 1 - 2; 43 - 45; P. 102 line 1 - 16)

[3] ***Banking – Customer – Persons having an account with bank and for whom the bank has agreed to collect items.***

PER ARIWOOLA, JSC:

Furthermore, generally, the relationship of a bank customer and a banker is contractual. In other words, a customer to a bank in relation to the business of banking is any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank. See; *Nigeria Deposit Insurance Corporation (Liquidator of Allied Bank of Nigeria Plc) v. Okem Enterprises Limited & 1 Ors*. (2004) 11 CLRN 1 (Pt 880) 107; (2004) 50 WRN 1 at 108, (2004) 4 SC (Pt 11) 77. **(P. 101 lines 35 - 41)**

[4] ***Damages – Award – Appellate court will not interfere with lower court's award except arrived at upon a wrong principle of law or erroneous assessment.***

This Court has held in a seemingly endless body of cases that it is not the business of the appellate court to interfere with general damages awarded by the trial court unless it is satisfied that the trial judge had acted upon some wrong principle in the award of such damages or that the amount awarded was so large or so small as to make it a completely erroneous assessment of the damages. See *Onaga v. Micho & Co* (1961) 1 All NLR 101 at 105 - 106, *Ifeanyi-Chukwu Co Ltd v. Akhigbe* (1999) 7 SC (Pt 1) 1, *Odogu v. AG Federation* (1996) 6 NWLR (Pt 456) 508 and *Imah v. Okogbe* (1993) 12 SCNJ 57. **(P. 95 lines 12 - 19)**

[5] ***Damages – Aggrevated Damages – are awarded for wrongful dishonour of trader's cheque.***

Damages awarded in this class of claims is aggravated not only for the inconvenience caused the claimant but injury done to his reputation, credit, loss incurred following the wrongful dishonour of his cheque and for his overall anguish as well. **(P. 97 lines 19 - 22)**

[6] ***Damages – Award – Damages are awarded in an attempt to restore an injured party as far as possible to the position he was before the injury.***

The object of the award made the respondent/cross appellant here is to put him, as far as possible, in the position he would have been but for the negligence of the appellant/cross respondent in dishonouring his cheque. See *Agbanelo v. Union Bank of Nigeria* (2000) 4 SC (Pt 1) 233 at 245. **(P. 97 lines 22 - 25)**

[7] ***Damages – Special Damages – must be specifically pleaded and concrete evidence led in proof.***

The foregoing finding of the lower court given the pleadings and the testimony of PW1, the respondent/cross appellant, as well as Exhibit MOC.7 is unassailable. The ₦250,000.00k naira claimed was not only specifically pleaded but, from the available evidence, clearly proved. In *Neka B.B.B. Manufacturing Co. Ltd v. ACB Ltd* (2004) 2 NWLR (Pt 858) at 540 this Court held on the point thus:-

> ***"It is trite law that where the claimant specifically alleges that he suffered special damages he must per force prove it. The method of such proof is to lay before the court concrete evidence demonstrating in no uncertain terms easily cognisable the loss or damages he has suffered so that the opposing party and the Court as umpire would readily see and appreciate the nature of the special damages suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such fractions."***

In the case at hand appellant's contention that the lower court's affirmation of the trial court's award of special damages is wrong is manifestly incorrect. The trial court's award that proceeded on the basis of respondent's specific pleadings and evidence in strict proof of the pleaded facts, on the authorities, cannot be faulted. See *Dumez Ltd v. Ogboli* (1972)3 SC 196 and *Marine Management Associates INC & Anor v. NMA* (2012) 12 SC (Pt 11) 141. **(P. 94 lines 27 - 45; P. 95 lines 1 - 4)**

[8] ***Damages – Award – Appellate will only vary if sum is too low or excessive.***

The principle remains that an appellate court will not entertain an appeal against the award of general damages unless it is shown that such award was so low or too excessive as to amount to an erroneous estimate having regard to the evidence. See *Nigeria Bottling Co Ltd v. Ngonadi* (1985) 1 NWLR (Pt 4) 74. **(P. 98 lines 18 - 21)**

[9] ***Commercial Litigation – Perverse Decision – Where court neglects facts or evidence or wrongly applies principles of law and this leads to miscarriage of justice.***

In a seemingly endless number of the decisions of this court, it has been held that a decision of a court is perverse when it ignores the facts or evidence before it which lapse when considered as a whole constitutes a miscarriage of justice. In such a case an appellate court is bound to interfere with such a decision and set it aside. See *N.E.P.A. v. Ososanya* (2004) 5 NWLR (Pt 867) 601 and *Marine Management v. N.M.A.* (2012) 12 SCNJ 128 at 159.

In the case at hand, therefore, the appellant succeeds only if it establishes that in its findings in respect of the special and general damages the lower court has ignored the evidence on record and/or wrongly applied a principle to the evidence. The appellant/cross respondent must establish, too, that the lapse has occasioned a miscarriage of justice. The pleadings and evidence proffered by the respondent/cross appellant in proof of same immediately call for some scrutiny. **(P. 92 lines 32 - 44)**

[10] ***Commercial Litigation – Damages – are sums ordered to be paid as compensation to persons who have been wronged.***

PER ARIWOOLA, JSC:

What then is damages generally? Damages are money claimed by or ordered to be paid to, a person as compensation for loss or injury. In other words, damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong. **(P. 99 line 45; P. 100 lines 1 - 3)**

[11] ***Damages – General Damages – are presumed to follow as a result of breach and do not need to be specifically claimed.***

PER ARIWOOLA, JSC:

General damages are damages that the law presumes follow, from the type of wrong complained of and do not need to be specifically claimed. **(P. 100 lines 1 - 6)**

[12] ***Damages – Special Damages – arise from a particular wrong and must be specifically pleaded.***

PER ARIWOOLA, JSC:

While special damages are damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. See Black's Law Dictionary, Ninth edition, pages 445, 446 and 448; *Shell Petroleum Development Co. (Nig) Ltd v. Teibo & Ors* (1996) 4 NWLR (Pt.445) 657 at 680; *Iyere v. Bendel Feed & Flour Mills Ltd* (2008) 18 NWLR (Pt.1119) 300; (2008) 12 SCM (Pt.1) 66 at 96; *Yalaju Amaye v. AREC* (1990) NWLR (Pt.145) 422. **(P. 100 lines 8 - 14)**

[13] ***Commercial Litigation – Special Damages – Defendant that fails to successfully challenge evidence given in proof of special damages may be liable.***

On special damages, it has been held that where the plaintiff plead the special damages and gives necessary particulars and adduce some evidence of it without the defendant challenging or contradicting the evidence, he has discharged the onus of proof placed on him and unless the evidence adduced is of such a quality that no reasonable tribunal can accept, it ought to be accepted. The reason is that where evidence called by the plaintiff in a civil case is neither challenged nor contradicted, his onus of proof is discharged on a minimal of proof. See; *Elijah Oladeji Kosile v. Amuba Olaniyi Folarin* (1989) NWLR (Pt 107) 1; (1989) 4 SC (Pt 1) 150; *S.O. Nwabuoku v. P.N. Ottih* (1961) 1 All NLR 487; *Boshali v. Allied Commercial Exporters* (1961) 1 All NLR 917 at 921; *Ugwe Ukuha & Ors. v. Golden Okoronkwo* (1972) 1 All NLR (Pt 11) 100 at 105. **(P. 101 lines 14 - 24)**

[14] ***Damages – Double Compensation – Claimant seeking compensation for wrongful dishonour of cheque can recover under several heads of damages.***

With regard to the first issue, it is settled law that in cases of breach of contract for wrongful dishonour of cheques (which are *sui generis*) damages are said to be at large. A successful plaintiff is entitled to recover under several heads of damages. **(P. 103 lines 35 - 37)**

M.D. MUHAMMAD, JSC (Delivering the lead Judgment): This is an appeal against the judgment of the Benin Division of the Court of Appeal dismissing the appeal of the appellant/cross respondent herein and allowing the cross appeal of the respondent/cross appellant herein. The judgment appealed against was delivered on the 22nd day of February 2006. The brief facts of the case that brought about the instant appeal and cross appeal are told hereinafter at once.

The respondent/cross appellant as plaintiff took out a writ at the Edo State High Court, hereinafter referred to as the trial court, against the appellant/cross

respondent, the defendant thereat, claiming the sum of thirty million naira general and special damages for the wrongful dishonour of the cheque he drew on the appellant/cross respondent in favour of Lever Brothers Nigeria Plc. It is averred in the writ that the respondent/cross appellant had enough credit in the account which he operated as a general trader and major distributor of the Lever Brothers Nigeria Plc.

Appellant/cross respondent's case is that the lodgment of ₦206,000.001 into respondent/cross appellant's account was fictitious and that the purported documentary evidence that one Miss. D Nwakaeze had deposited the amount is fraudulent.

It is contended that a conspiracy between one of the bank's staff and the respondent/cross appellant's staff is behind the fictitious entry in the latter's account. The respondent/cross appellant, therefore, never had the required credit in his account to warrant the payment of the cheque he issued and same was duly dishonoured.

The trial judge, Omage J (as he then was) having found that the respondent/cross appellant had sufficient money in his account and the appellant/cross respondent had wrongly dishonoured his cheque for the sum of ₦205,936.00k issued in favour of the Lever Brothers Nig Plc, awarded the respondent/cross appellant ₦100,000 and ₦250,000.0k general and special damages respectively. Dissatisfied with the trial court's judgment, the appellant/cross respondent appealed to the lower court on an amended notice containing five grounds. The respondent/cross appellant also appealed against the trial court's judgment.

The lower court in its judgment dismissed appellant's appeal in its entirety, allowed in part respondent's cross appeal and consequentially increased the general damages awarded the latter from ₦100,000.00 (One Hundred Thousand Naira) by ₦1,000,000.00 (One Million Naira). Aggrieved, both parties have appealed against the lower court's judgment with the appellant/cross respondent complaining that the increase of the general damages of ₦100,000.00k (One Hundred Thousand Naira awarded to the respondent/cross appellant by the trial court to ₦1,100,000.00k (One Million One Hundred Thousand Naira) by the lower court is excessive. Respondent/cross appellant's grudge in his appeal is that the lower court's increase is still insufficient. He urges that it be further enhanced.

Parties have filed, exchanged and adopted their respective briefs at the hearing of the appeal as their arguments in support and/or opposition of the two appeals. The two issues formulated in the appellant/cross respondent's brief for the determination of his appeal read:-

> ***"(1) Whether or not the court below was right in affirming the award of the sum of ₦250,000.00 (solicitors cost) as special damages to the respondent in the circumstances of this suit.***

(2) Whether or not there are circumstances in this case to warrant the increase by the court below of the general damages from ₦100,000.00k (One Hundred Thousand Naira) to ₦1,100,000.00k (sic) One Million Naira in favour of the respondent."

The two similar issues the respondent/cross appellant distilled at page 3 of his brief as having arisen for the determination of the appeal are:-

"(i) Whether or not the court below was right in affirming the award of the sum of ₦250,000 (solicitor's costs) as special damages to the respondent in the circumstances of this suit.

(ii) Whether or not there are circumstances in this case to warrant the increase by the court below of the general damages from ₦100,000 to ₦1,100,000.00k (sic) in favour of the respondent."

Under the 1st issue, it is submitted that the respondent/cross appellant in paragraphs 21 and 22 of his amended statement of claim averred that he had deposited one hundred and fifty thousand naira with the solicitor that charged him two hundred and fifty thousand naira to prosecute his case against the appellant/cross respondent. In joining issue with the respondent/cross appellant, it is further submitted by the learned appellant's counsel, the appellant/cross respondent not only denied in paragraphs 2 and 20 of its statement of defence but averred in the alternative that the payment of the solicitor's fees by the respondent/cross appellant was not a loss that had arisen from appellant/cross respondent's dishonour of respondent's cheque. Respondent/cross appellant's evidence at pages 26 and 36 lines at 25 and 17 respectively that he only paid ₦150,000 out of the ₦250,000 fees stand at variance with his pleadings. The lower court's affirmation of the trial court's award of the entire ₦250,000 special damages, contends learned counsel, is a grave error for at least three reasons.

Firstly, learned appellant's counsel contends, the respondent/cross appellant's failure to strictly prove the special damages disentitles him to the award of the sum he claims.

Learned counsel relies on *Neka B.B.B. Manufacturing Co. Ltd v. ACB Ltd* (2004) All FWLR (Pt 198) 117.

Learned appellant's counsel further contends that appellant/cross respondent's evidence as to the sum he paid his solicitor remains contradictory. Whereas he stated in his evidence in chief that he paid the solicitor ₦150,000.00k and tendered a receipt, under cross examination, the respondent/cross appellant told the trial court that he paid the sum of ₦250,000.00k. The affirmation of the award by the trial court on the basis of such contradictory evidence having occasioned grave

injustice should be set-aside. The damages, it is also contended, has not been established by the respondent to have flown from the alleged wrongful dishonour of respondent's cheque. Lastly, it is submitted, the award of the special damages on fees paid to solicitor is against public policy.

Under their 2nd issue, learned appellant's counsel argues that the hike of the general damages of ₦100,000.00k the trial court awarded to ₦1,100,000 by the lower court is wrong. The respondent did not satisfy the lower court that the award by the trial court had contravened any known principle. The increase by the lower court, learned counsel submits, on the authority of *UBA Ltd v. Mudasiru Oladipo Ademuyiwa* (1999) 11 NWLR (Pt 628) 570 at 591 and *Nigerian Bank for Commerce and Industry v. Integrated Gas (Nig) Ltd. & Another* (1998) 8 NWLR (Pt 613) 119 at 131 should be interfered with. The lower court cannot substitute its own view of what damages the respondent/cross appellant should be awarded with what the trial court adjudged he was entitled to.

Further relying on *Sabru Motors (Nig) Ltd v. Rajab Enterprises (Nig) Ltd* (2002) FWLR (Pt 116) 841 at 852 - 853, learned counsel insists that the award by the trial court that had complied with the applicable principles for such award should be restored. The respondent/cross appellant, it is contended, was unable to establish the damages he sustained to enable any award and even the trial court's award had proceeded without the benefit of the required evidence. The trial court's highly generous award, contends counsel, is gratuitous. The lower court's further hike being all the more gratuitous must be revisited. Citing and relying on the decision in *Basheer v. Same* (1992) 4 NWLR (Pt 236) 49 at 502, learned counsel urges that the issue be resolved in appellant's favour.

The appeal, learned counsel urges, should be allowed as well.

Learned counsel for the respondent submits that the affirmation of the trial court's finding by the lower court of the ₦250,000 solicitor's fees as special damages was made on the basis of the pleadings, evidence on record and the law relating to wrongful dishonour of cheques. The apex court, learned respondent's counsel submits, does not make a habit of overturning concurrent finding of facts which does not constitute miscarriage of justice.

It is further contended that the special damages awarded had arisen after the cause of action and the respondent had satisfied the court as to how same was quantified. The evidence led in proof of respondent's amended statement of claim, submits learned respondent's counsel, contrary to what the appellant asserts, is devoid of any contradiction. Findings on such solid evidence, it is argued, disentitles an appellate court from interfering. Finally, learned counsel submits, a court cannot refuse damages in a proper case on the basis of public policy and the lower court has rightly stated the principle in that regard. Relying *inter-alia* on *Barge v. Ganduma* (2001) 13 NWLR (Pt 731) 693, *Imhanria v. Nigerian Array* (2007) 14 NWLR (Pt

1053) 76, *Allied Bank Plc v. Akubaeze* (1997) 6 KLR 1202, *UBN v. Nwoye* (1996) 3 LRCN 232, *Odulaja v. Haddad* (1973) 11 SC 357 and *Ajomale v. Yaduat* (No 2) (1991) 5 NWLR (Pt 191) 266, learned respondent's counsel urges that the issue be resolved against the appellant.

On the 2nd issue, it is submitted that the lower court's increase of the general damages awarded by the trial court from ₦100,000.00k to ₦1,100,000.00k in favour of the respondent/cross appellant is justified. The increase that proceeded from the court's thorough and unimpeachable examination of the entire surrounding circumstances of the case, submits learned respondent's counsel, cannot be revisited by this Court. The respondent/cross appellant being a trader, even without pleading and proving actual damages or loss, is entitled to recover substantial damages for the wrongful dishonour of his cheque. Damages for wrongful dishonour of cheques, concludes learned respondent's counsel, occupies a special class. The lower court's findings at page 185 lines 15 - 18 which rightly captures and applies the principle, it is submitted, cannot be faulted. On the authority of the decisions in, among others, *U.B.N. v. Odusote Bookstores Ltd* (1995) 5 NWLR (Pt 421) 558, *ELF v. Sillo* (1994) 6 NWLR (Pt 350) 258 and *Ifeanyichukwu Osondu v. Akhigbe* (1999) 11 NWLR (Pt 652) 1 at 22 learned counsel prays, the issue be resolved in respondent/cross appellant's favour. He also urges that the appeal be dismissed.

I agree, for all the right reasons advanced by learned respondent/cross appellant's counsel, that the lower court's decision cannot be interfered with. The appellant seeks this court's interference, given the two issues it coded for the determination of the appeal, firstly because the lower court in its affirmation of the special damages awarded by the trial court and secondly the court's increase of the general damages from the ₦100,000.00k awarded by the trial court to ₦1,100,000.00k, are both wrong. Learned respondent/cross appellant's counsel is right in his submission that a finding of a lower court on appeal is only set-aside where same is perverse.

In a seemingly endless number of the decisions of this court, it has been held that a decision of a court is perverse when it ignores the facts or evidence before it which lapse when considered as a whole constitutes a miscarriage of justice. In such a case an appellate court is bound to interfere with such a decision and set it aside. See *N.E.P.A. v. Ososanya* (2004) 5 NWLR (Pt 867) 601 and *Marine Management v. N.M.A.* (2012) 12 SCNJ 128 at 159.

In the case at hand, therefore, the appellant succeeds only if it establishes that in its findings in respect of the special and general damages the lower court has ignored the evidence on record and/or wrongly applied a principle to the evidence. The appellant/cross respondent must establish, too, that the lapse has occasioned a miscarriage of justice. The pleadings and evidence proffered by the respondent/cross appellant in proof of same immediately call for some scrutiny.

At paragraphs 21 and 22 of his amended statement of claim, the respondent/ cross appellant as plaintiff avers as follows:-

> ***"21 Plaintiff avers that he ran and briefed his solicitors Messrs G. C. Igbokwe & Co who charged him ₦250,000 (Two Hundred and Fifty Thousand Naira) only to prosecute this action.***
>
> ***22 Plaintiff avers that he made a deposit of ₦150,000 to the said solicitors who issued him a receipt. The solicitor's receipt No. 045 of 2405/94 shall be funded (sic) upon at the trial of this action."***

In joining issue with the respondent/cross appellant the appellant/cross respondent avers in paragraph 20 of the statement of defence thus:-

> ***"20 In answer to paragraphs 21 and 22 of the statement of claim, the defendant says that the plaintiff did not pay his solicitor the sum of ₦150,000.00k (One Hundred and Fifty Thousand Naira) as alleged. Alternatively, the payment of the said solicitors fee is not a loss arising from the return of the plaintiff's cheque No 5053."***

In proof of his pleadings in paragraphs 21 and 22 of his statement of claim, the respondent/cross appellant as PW1 testified at page 26 lines 25 - 26 of the record inter-alia thus:-

> ***"My solicitor charged me ₦250,000 but I paid him ₦150,000. I see the receipt of deposit to my counsel"***

The receipt issued to the respondent/cross appellant copied at page 68 of the record is hereunder reproduced for ease of reference.

> ***"Exhibit MOC.7:***
>
> ***G.C. IGBOKWE & CO.***
> ***Legal Practitioners & Consultants***
> ***136, Upper mission Road, Benin City.***
>
> ***Official Receipt No.045***
> ***Date: 24/5/1994***
>
> ***Received from Chief N. M. Okpara Chimaeze the sum of One Hundred and Fifty Thousand Naira only being payment for' Deposit in Suit against Union Bank Plc. ₦150,000.00k***

Bal. ₦100,000 (sgd)

Receiver's Signature."

In affirming the trial court's award of special damages to the respondent/cross appellant the lower court at page 157 of the record firstly stated thus:-

> ***"In reply to the above paragraphs, the appellant made a general traverse to the claim in paragraph 2 of his statement of defence..... It is trite law that mere general denials in pleadings are never sufficient traverse and amounts to no denials at all with end result that the particular pleaded fact remains unchallenged and only required minimal evidence or none at all to be admitted as proved by the trial court."***

Notwithstanding the foregoing, the court proceeded at page 158 of the record as follows:-

> ***"The respondent pleaded that his solicitors charged him ₦250,000.00k to prosecute this case for him. He also went further to claim the said sum as special damages in paragraph 25 of his amended statement of claim among his other heads of claim before the trial court. It is therefore my considered view that even if paragraphs 21 and 22 of the appellant's statement of defence (sic) were denied by the appellant, the respondent has established same by preponderance of evidence before the trial court and I therefore so find."***

The foregoing finding of the lower court given the pleadings and the testimony of PW1, the respondent/cross appellant, as well as Exhibit MOC.7 is unassailable. The ₦250,000.00k naira claimed was not only specifically pleaded but, from the available evidence, clearly proved. In *Neka B.B.B. Manufacturing Co. Ltd v. ACB Ltd* (2004) 2 NWLR (Pt 858) at 540 this Court held on the point thus:-

> ***"It is trite law that where the claimant specifically alleges that he suffered special damages he must per force prove it. The method of such proof is to lay before the court concrete evidence demonstrating in no uncertain terms easily cognisable the loss or damages he has suffered so that the opposing party and the Court as umpire would readily see and appreciate the nature of the special damages suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. It should not rest on a puerile conception or notion which would give rise to speculation, approximation or estimate or such fractions."***

In the case at hand appellant's contention that the lower court's affirmation of the trial court's award of special damages is wrong is manifestly incorrect. The trial

court's award that proceeded on the basis of respondent's specific pleadings and evidence in strict proof of the pleaded facts, on the authorities, cannot be faulted. See *Dumez Ltd v. Ogboli* (1972) 3 SC 196 and *Marine Management Associates INC & Anor v. NMA* (2012) 12 SC (Pt 11) 141.

Appellant/cross respondent's 1st issue, therefore, fails. It is resolved in favour of the respondent/cross appellant.

Under appellant's 2nd issue, it has been argued that the lower court's interference with the trial court's award of general damages is erroneous.

This Court has held in a seemingly endless body of cases that it is not the business of the appellate court to interfere with general damages awarded by the trial court unless it is satisfied that the trial judge had acted upon some wrong principle in the award of such damages or that the amount awarded was so large or so small as to make it a completely erroneous assessment of the damages. See *Onaga v. Micho & Co* (1961) 1 All NLR 101 at 105 - 106, *Ifeanyi-Chukwu Co Ltd v. Akhigbe* (1999) 7 SC (Pt 1) 1, *Odogu v. AG Federation* (1996) 6 NWLR (Pt 456) 508 and *Imah v. Okogbe* (1993) 12 SCNJ 57.

The question now to answer is whether the lower court's interference with the general damages awarded by the trial court is on the basis of these principles.

The lower court's decision varying the general damages awarded the respondent/cross appellant is founded on his evidence in chief at page 26 lines 26 - 36 of the record of appeal *inter-alia* thus:-

> ***"..... By the action of the Bank, I lost an annual profit of ₦5 million naira, I also lost the goodwill of Lever brothers. I am a first class chief in my town. The people threatened to withdraw my title. My annual turnover with LBN Plc is between ₦55 - 60 million naira per annum. The Lever Brother have not written to restore my credit facility."***

The respondent/cross appellant further stated under cross examination as follows:-

> ***"I paid tax and VAT of ₦5,000 and a personal tax of ₦5,000.00 as Director of a company. I make profit of over ₦5 million naira....."***

Inspite of the foregoing evidence, the trial court at page 63 lines 29 - 32 of the record of appeal held:-

> ***"Throughout the hearing no evidence was given of the actual value of loss sustained by the plaintiff as a result of the refusal of the defendant to honour the plaintiff's cheque to it when evidence shows***

that the plaintiff had sufficient sums in his account No 55053." (Underlining supplied for emphasis).

Not surprisingly, the lower court, in relation to the foregoing findings of the trial court, authoritatively held at page 184 as follows:-

"The mere dishonour of a cheque by a banker is injurious to a person in trade. This is the rationale of the award without proof of actual loss. Where a Banker without justification dishonours a customer's cheque, he is liable to a customer in damages for injury to his credit and if the customer is also a trader then damages for such injury to the customer's credit will also be at large and the court may award substantial damages although there is no evidence from such a customer of any actual damage suffered by him..... I agree with the learned cross appellant's counsel that the circumstances of this case warrant a much more enhanced award of damages especially when the court found that the cross appellant was a major distributor to Lever Brothers Nigeria Plc who suspended its credit facilities and with whom he had an annual business turnover of over ₦50,000,000.00k as distributor in Edo, Delta and Kwara States. Based on the above facts, even without the declining value of the Naira being taken into consideration, which is quite legitimate for a court to take into consideration in appropriate cases and in a proper manner in the award of general damages, the Cross Appellant deserves, a much more enhanced damages." (Underlining supplied for emphasis).

One cannot agree more with the lower court that where the trial judge ignores facts on record in arriving at the general damages he awards a successful plaintiff, an appellate court is duty bound to interfere by making the estimation the justice of the case demands based on the facts ignored by the trial judge.

See *Ukoma v. Nicol* (1962) NSCC (vol 2) 73.

In the case at hand one of the reasons the lower court relied upon in its interference with the general damages the trial court awarded the respondent/cross appellant is the undisputed fact of his being a trader. Award of damages for the dishonour of cheques issued by the respondent who is in fund is sui genesis. The very act of dishonouring a trader's cheque without more, on the authorities, entitles him to substantial damages.

In *Hirat Aderinsola Balogun v. The National Bank of Nigeria* (1978) 3 SC 111 a case from which the lower court rightly drew, this Court held that a banker's act of wrongly dishonouring the cheque of a trader is calculated to be particularly injurious. At page 126 of the report, the apex court for this very reason allowed the appeal

before it and consequentially ordered thus:-

> ***"This appeal succeeds on the question of damages. Accordingly the judgment of the High Court of Lagos State in Suit LD/23/73 dated 26th May, 1975, in so far only as it makes an award of ₦10 to the appellant is hereby set aside and in substitution therefore it is ordered that judgment be entered in favour of the plaintiff (appellant herein) against the defendants (respondents herein) in the sum of ₦1000."*** (Underlining supplied for emphasis).

Being bound by the foregoing, one is unable to agree with learned appellant/cross respondent's counsel that the lower court's judgment that proceeded on similar vein is perverse.

Given the passages reproduced from its judgment, it is glaring that the lower court had taken into consideration all the relevant facts required for a just decision of the amount it awarded.

Damages awarded in this class of claims is aggravated not only for the inconvenience caused the claimant but injury done to his reputation, credit, loss incurred following the wrongful dishonour of his cheque and for his overall anguish as well. The object of the award made the respondent/cross appellant here is to put him, as far as possible, in the position he would have been but for the negligence of the appellant/cross respondent in dishonouring his cheque. See *Agbanelo v. Union Bank of Nigeria* (2000) 4 SC (Pt 1) 233 at 245.

Appellant/cross respondent's 2nd issue is accordingly resolved also in favour of the respondent/cross appellant.

As a whole, finding no merit in the appeal same is hereby dismissed.

THE CROSS APPEAL

The respondent/cross appellant has submitted a lone issue for the determination of his cross appeal thus:-

> ***"Having regard to his proved trader status, the value of his dishonoured cheque, the volume of his trade and losses and the entire circumstances of this matter whether the enhanced award of ₦1,100,000 (One Million One Hundred Thousand Naira) by the court below was too low to warrant further interference of the Supreme Court by an upward review."***

The appellant/cross respondent neither formulated any issue nor adopted the respondent/cross appellant's issue *(supra)*. The appellant/cross respondent has

not, also, proffered any argument in opposition to the cross appeal. The cross appeal was argued on the cross appellant's brief alone.

Learned respondent/cross appellant counsel contends that given the surrounding circumstances to this case the lower court's hike of the general damages awarded to him by the trial court is still insufficient. He urges us that the amount be further enhanced.

The respondent/cross appellant who had argued in the main appeal, and rightly too, that the lower court had acted correctly in its enhancement of the general damages awarded to him by the trial court, would seem to be gold digging at this breath to be asking for more.

It must be answered at this point whether on the facts of the case at hand if this Court can further vary the damages awarded the respondent/cross appellant against the appellant/cross respondent.

The principle remains that an appellate court will not entertain an appeal against the award of general damages unless it is shown that such award was so low or too excessive as to amount to an erroneous estimate having regard to the evidence. See *Nigeria Bottling Co Ltd v. Ngonadi* (1985) 1 NWLR (Pt 4) 74.

In the course of resolving appellant's/cross respondent's 2nd issue in the main appeal I alluded to the evidence on record varied the general damages awarded the respondent/cross appellant. The same facts and principles inform my resolution of the issue raised by the cross-appeal herein. It is my considered view that the lower court in varying the award made by the trial court acted judicially and judiciously such that this Court cannot, in the circumstance, legally interfere. In hiking the general damages to ₦1,100,000.00k the court had taken all the facts surrounding respondent/cross appellant's claim and applied the relevant legal principles. The lower court's findings in this regard which have not been shown to be perverse must invariably endure. I so hold. It is for that reason that I resolve respondent/cross appellant's lone issue against him. The cross appeal accordingly fails and it is hereby dismissed.

I. T. MUHAMMAD, JSC: I read before now the judgment just delivered by my learned brother, M. D. Muhammad, JSC. I am in agreement with him in his reasoning and conclusion which I adopt as mine. I do not intend to add anything. I abide by all orders made in the leading judgment.

ARIWOOLA, JSC: I had the privilege of reading in draft the lead judgment of my learned brother, Dattijo Muhammad, JSC just delivered. I am in total agreement with the reasoning and the conclusion arrived thereat.

The appellant was a defendant in the action initiated by the respondent at the trial

court in Edo State High Court, claiming the sum of Thirty Million Naira (₦30m) special and general damages for the wrongful dishonour of the cheque he drew on his account with the appellant in favour of Lever Brothers Nigeria Plc. It was the respondent's case that he had enough credit in his bank account to accommodate the cheque he had drawn. He was a general trader and a major distributor of the Lever Brothers Nigeria PIc.

In defence, the appellant had alleged fraud on the part of the respondent and had contended that the respondent had no credit enough in his bank account to accommodate the amount on the cheque drawn in favour of the Lever Brothers PIc, hence the cheque was dishonoured. Indeed, the appellant gave a general denial to the respondent's averments in his pleadings.

The trial court had in my view, rightly found in favour of the respondent against the appellant and held that the respondent's cheque was wrongly dishonoured by the appellant. The sum of Two Hundred and Fifty Thousand Naira (₦250,000) and One Hundred Thousand Naira (₦100,000) special and general damages respectively, were awarded in favour of the respondent.

Dissatisfaction with the decision of the trial court led to the appeal to the Benin Division of the Court of Appeal, hereinafter referred to as the lower court, by the appellant to which the respondent cross appealed on the damages awarded.

The appellant's appeal was found lacking in merit and was dismissed in its entirety while the cross appeal succeeded and was allowed in part. The sum of One Hundred Thousand Naira (₦100,000) awarded as general damages was increased to One Million Naira (₦1 million). The respondent/cross appellant has prayed for further increase of the damages awarded in his favour.

The issues distilled by the appellant for the determination of the appeal are:-

> "1. Whether or not the court below was right in affirming the award of the sum of ₦250,000 (Solicitor's costs) as special damages to the respondent in the circumstances to this suit.
>
> 2. Whether or not there are circumstances in this case to warrant the increase by the court below of the general damages from ₦100,000 (One Hundred Thousand Naira) to ₦1,100,000 (sic) One Million Naira in favour of the respondent."

It is on record that the appellant had challenged the award of special and general damages in favour of the respondent by the trial court and the affirmation of same and increasing the general damages by the lower court.

What then is damages generally? Damages are money claimed by or ordered to

be paid to, a person as compensation for loss or injury. In other words, damages are the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong.

General damages are damages that the law presumes follow, from the type of wrong complained of and do not need to be specifically claimed.

While special damages are damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved. See Black's Law Dictionary, Ninth edition, pages 445, 446 and 448; *Shell Petroleum Development Co. (Nig) Ltd v. Teibo & Ors* (1996) 4 NWLR (Pt.445) 657 at 680; *Iyere v. Bendel Feed & Flour Mills Ltd* (2008) 18 NWLR (Pt.1119) 300; (2008) 12 SCM (Pt.1) 66 at 96; *Yalaju Amaye v. AREC* (1990) NWLR (Pt.145) 422.

The respondent in paragraphs 21 and 22 of his statement of claim filed on 6/7/1994 pleaded specifically his special damages, in particular, the solicitors fees as follows:

> "21. Plaintiff avers that he ran and briefed his Solicitors Messrs G. C. Igbokwe & Co. Who charged him ₦250,000 (Two Hundred and Fifty Thousand Naira) only to prosecute this action
>
> 22. Plaintiff avers that he made a deposit of ₦150,000 to the said Solicitors who issues him a receipt. The Solicitors receipt No.045 of 24/5/94 shall be founded upon at the trial of this action."

On page 26 of the record is the testimony of the plaintiff in respect of the averment on his claim for special damages. The receipt obtained for the deposit paid to the counsel for his services was tendered, admitted and marked Exhibit MOC7 by the trial court. It is noteworthy that this evidence was neither challenged nor controverted by the appellant. There is no doubt that the respondent's Solicitor was entitled to the balance of his fee.

The object of an award of damages is to give compensation to the plaintiff for the damages, loss or injury which he has suffered. However, before damages can be recovered by a claimant, there must be a wrong committed. In other words, recoverable damages by a plaintiff must be attributable to the breach of some duty by the defendant. See; *Bourhil v. Young* (1943) AC 92; *Ademe v. Dantunbu* (1994) 2 NACR 74.

In the instant case, the appellant is a fiduciary to the respondent.

It owes the respondent a duty to exercise a high standard of care in managing the respondent's money. Therefore, for dishonouring his cheque when his account was in credit to accommodate the amount on the cheque, the appellant had

breached the fiduciary relationship between them, to which the respondent was entitled to compensation by way of damages.

However, it is settled already that the award of damages by a trial court will not ordinarily be disturbed or interfered with and can only be upset or reviewed by an appellate court if that court feels that the trial court acted on wrong principles of law or that the amount awarded by the trial court is extremely high or low. The appellate court ought not to upset the award of damages by a trial court merely because it would have awarded a lesser amount, if it had tried the matter. See; *Flint v. Lovel* (1935) 1 K.B. 354; *James v. Mid Motors (Nig.) Limited* (1978) 12 SC 31. *Williams v. Daily Times of Nigeria Limited* (1990) 1 SC 23; (1990) LPELR 3487 (SC).

On special damages, it has been held that where the plaintiff plead the special damages and gives necessary particulars and adduce some evidence of it without the defendant challenging or contradicting the evidence, he has discharged the onus of proof placed on him and unless the evidence adduced is of such a quality that no reasonable tribunal can accept, it ought to be accepted. The reason is that where evidence called by the plaintiff in a civil case is neither challenged nor contradicted, his onus of proof is discharged on a minimal of proof. See; *Elijah Oladeji Kosile v. Amuba Olaniyi Folarin* (1989) NWLR (Pt 107) 1; (1989) 4 SC (Pt 1) 150; *S.O. Nwabuoku v. P.N. Ottih* (1961) 1 All NLR 487; *Boshali v. Allied Commercial Exporters* (1961) 1 All NLR 917 at 921; *Ugwe Ukuha & Ors. v. Golden Okoronkwo* (1972) 1 All NLR (Pt 11) 100 at 105.

On the general damages claimed, it needs not be specifically pleaded. It arises from inference of law and need not be proved by evidence. It suffices once generally averred in the pleadings. As I stated earlier, they are presumed by the law to be the direct and probable consequence of the act of the defendant complained of. Unlike special damages, it is generally incapable of substantially exact calculation. See; *Yalaju Amaye v. Associated Registered Engineering Contractors Limited & Ors.* (1990) NWLR (Pt 145) 422; (1990) 6 SC 157; (1990) LPELR 3511 (SC); *Incar v. Benson* (supra).

Furthermore, generally, the relationship of a bank customer and a banker is contractual. In other words, a customer to a bank in relation to the business of banking is any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank. See; *Nigeria Deposit Insurance Corporation (Liquidator of Allied Bank of Nigeria Plc) v. Okem Enterprises Limited & 1 Ors*. (2004) 10 NWLR (Pt 880) 107; (2004) 50 WRN 1 at 108, (2004) 4 SC (Pt 11) 77.

It is the duty of a banker to its customer to honour and pay cheques drawn on it by the customer as long as it has in its possession at the material time, sufficient and available funds for the purpose.

Therefore, when there is sufficient and available fund in customer's account and a cheque is presented but payment is refused, the holder is entitled to treat the cheque as dishonoured, even if requested to represent. See; *Ide Chemists Limited v. National Bank of Nigeria Limited* (1976 - 1984) 3 NBLR 111 at 118.

In *Allied Bank (Nig.) Limited v. Akubueze* (1997) 6 NWLR (Pt 509) 374; (1997) 6 SCNJ 166 this court held, *inter-alia*, that a bank is bound to honour cheque issued by its customer if the customer has enough funds to satisfy the amount payable on the cheque in respect of the relevant account and that refusal to honour the cheque will amount to a breach of contract which would render the banker liable in damages.

In the same vein, in *Union Bank of Nigeria Limited v. Nwoye* (1996) 3 NWLR (Pt 435) 135, this court held that the liability of a banker to its customer arises in contract when a banker refuses to pay a customer's cheque when the customer holds in his account an amount equivalent to that endorsed on the cheque.

I am therefore not in the slightest doubt that the lower court was right and perfectly in order in their alteration upward, of the amount awarded as general damages by the trial court in favour of the respondent in addition to the special damages affirmed for the breach of the contractual relationship between them.

On the cross appeal by the respondent there is no basis to further review the general damages awarded. The cross appeal lacks merit and should be dismissed.

For the above reason and the fuller and detailed reasoning in the well considered lead judgment of my learned brother, Dattijo Muhammad, JSC, I too will dismiss the appeal and cross appeal for lacking in merit. Accordingly, both the appeal and the cross appeal against the judgment of the lower court delivered on 22/02/2006 are hereby dismissed. I abide by the consequential orders including the order on costs in the lead judgment.

OGUNBIYI, JSC: I read in draft the lead judgment of my learned brother M. D. Muhammad, JSC and I agree that both the main appeal and also the cross appeal are to be dismissed for want of merit.

The judgment of my brother is very well researched and comprehensive.

Consequently, I hereby adopt all the reasonings and conclusions arrived thereat as mine. I do not in the circumstance have anything useful to add.

In dismissing the appeal, and cross appeal therefore, I also abide by the order made as to costs.

KEKERE-EKUN, JSC: I have had the benefit of reading in draft the judgment of my

learned brother, MUSA DATTIJO MUHAMMAD, JSC just delivered. I agree with the reasoning and conclusion that both the main appeal and cross-appeal lack merit and should be dismissed. In support of the lead judgment, I wish to add a few words.

The respondent/cross appellant (as plaintiff) took out a writ of summons at the High Court of Edo State sitting in Benin (the trial court) for the sum of ₦30 million (under several heads) for the wrongful dishonour of his cheque. The trial court found that he had established his case. He was awarded the sum of ₦100,000.00 as general damages and ₦250,000.00 as being special damages incurred as solicitors fees. The appellant/cross-respondent appealed against the award of ₦250,000.00 as special damages while the respondent/cross-appellant appealed against the award of ₦100,000.00 as general damages. The Court of Appeal, Benin Division (the lower court) on 22/2/2006 dismissed the main appeal on special damages and allowed the cross appeal, increasing the award of general damages by ₦1 million bringing it to ₦1,100,000.00.

The appellant/cross-respondent was dissatisfied with this decision and has further appealed to this court against the dismissal of its appeal on the award of special damages and the enhancement of the general damages. The respondent/cross-appellant is also dissatisfied with the enhancement of the award of general damages on the ground that the increased award of ₦1,100,000.00 is still too low, hence the cross-appeal. Thus, both appeals are on the issue of damages only.

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

1. Whether or not the court below was right in affirming the award of the sum of ₦250,000.00 (Solicitor's cost) as special damages to the respondent in the circumstances of this case.

2. Whether or not there are circumstances in this case to warrant the increase to by the court below of the general damages from ₦100,000.00 to ₦1,000,000.00 in favour of the respondent.

With regard to the first issue, it is settled law that in cases of breach of contract for wrongful dishonour of cheques (which are *sui generis*) damages are said to be at large. A successful plaintiff is entitled to recover under several heads of damages.

See: *Balogun v. N.B.N. Ltd.* (1978) 3 SC (Reprint) 111 @ 117 lines 19 – 24, 35 – 38 & 118 lines 4 - 11 where this Court held:

> *".....it has long been established that refusal by a banker to pay a customer's cheque when he holds in hand an amount equivalent to that endorsed on the cheque, belonging to the customer amounts to a breach of contract for which the banker is liable damages. The only question*

which arose in these circumstances, has been that relating to question or amount of damages.

.....it is on this account that damages awarded for wrongful dishonour of cheques by a banker are generally nominal, save in the instances which the law has come to regard as exceptional; and these constitute exceptions with which we shall deal anon.

..... As it is always extremely difficult to have an accurate estimate of damages under this "head" it has therefore been laid down by a long line of cases beginning with that of Marzetti v. Williams (1830) 1 B & Ad 415 that damages in such cases are "at large", which is to say that in such cases a jury may within reason make an award of any such sum as they consider the circumstances of the breach of contract or dishonour of cheque warrant although there has been no proof of any actual loss (i.e. special damage) to the customer".

The respondent pleaded in paragraphs 21 and 22 of his amended statement of claim and proved through Exhibit MOC 7 that he was charged a fee of ₦250,000.00 by his solicitors, out of which he had paid ₦150,000.00, leaving a balance of ₦100,000.00. His claim was for the total solicitor's fee of ₦250,000.00. Even if he had only paid ₦150,000.00, he was still liable for the balance. The appellant/cross-respondent made a general denial of the averments in paragraphs 21 and 22 of the amended statement of claim in paragraphs 2 and 20 of its statement of defence. A general traverse is not an effective denial of essential or material averments in the opposing party's pleading. See. *Balogun v. U.B A. Ltd*. (1992) 6 NWLR (Pt 247) 336 @ 349 D; *Akintola v. Solana* (1986) 2 NWLR (Pt 24) 598; *Bamgbegbin v. Oriare* (2009) 13 NWLR (Pt.1158) 370. In the instant case the appellant/cross-respondent failed to rebut the credible evidence led by the respondent in this regard. I therefore agree with the concurrent findings of the two lower courts that the respondent/cross-appellant was entitled to his claim for special damages. No reason has been advanced to warrant interference with these findings as they are fully supported by the evidence on record.

With regard to the second issue, the circumstances that would warrant interference with an award of general damages made by a trial court are:

1. If the court is satisfied that the trial Judge acted in the award of such damages, upon some wrong principle; or

2. That the amount awarded was so large or so small as to make it a completely erroneous assessment of the damages; or

3. Where a finding of the trial court is found to be perverse.

Se e *U.B.A. Ltd. v. Mudashiru O. Ademuyiwa* (1999) 11 NWLR (Pt 628) 570 @ 591 A C; *NBCI v. Integrated Gas Ltd & Anor.* (1998) 8 NWLR (Pt.613) 119 @ 131 D - E.

In the case of: *Balogun v. N.B.N. Ltd*. (1978) 3 SC (Reprint) 111 @ 117 - 118, this court held thus:

> *"Direct and/or natural damage arising from a breach of contract by a banker to honour the cheque of his customer apart, there is, however also the serious likelihood of considerable danger to the reputation of a customer and generally to his business; (if he - the customer - is engaged in business). People generally, whether or not in business, do not deal with a person whose cheques are not paid, although it is conceded that instances of disinclination to deal with such a person more readily abound in the field of business. As it is always extremely difficult to have an accurate estimate of the extent of damages under this "head", it has therefore been laid down by a long line of cases beginning with that of Marzetti v. Williams (1830) 1 B & Ad 415 that damages in such a cases are "at large" which is to say that in such cases a jury may within reason make an award of any such sum as they consider the circumstances of the breach of contract or dishonor of cheque warrant although there has been no proof of any actual loss (i.e. special damage) to the customer. In the case of Marzetti (supra) in which a trader is bankers for wrongful dishonor of cheque although there was no evidence show that the plaintiff had sustained any injury from the bankers mistake, Lord Tenterden, CJ remarked:*
>
> *'I cannot forbear to observe that it is a discredit to a person and therefore injurious in fact, to have a draft refused payment for a small sum, for it shows that the bankers had very little confidence in the customer. It is an act particularly calculated to be injurious to a person IN trade'. (underlining and capitals supplied)*

See: 109 E.R. 842; (1830) 1 B Ald. 415 @ 424

> *..... The case of Marzetti (supra), therefore put it beyond doubt that where a banker without justification dishonours his customer's cheque, he is liable to the customer in damages for injury to his credit and the case of Rolin v. Steward makes it clear that if the customer is also "in trade" ... at the time of such dishonor then damages for such injury would be at large and a jury may within reason award substantial damages although there is no evidence from such customer of any actual damage suffered by him."*

Thus, a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage or loss. The trial court

based its award of ₦100,000.00 general damages on the fact that the respondent did not prove actual loss. On the authority of *Balogun v. N.B.N. Ltd*. supra he was not required to do so.

However, as rightly found by the lower court at pages 184 - 186 of the record, in the instant case there was in fact undisputed evidence that:

1. The respondent was a major distributor of Lever Brothers in Edo, Delta and Kwara States.

2. That he had sufficient funds in his account to cover the cheques.

3. That his distributorship was suspended on account of the unlawful dishonour our of his cheques.

4. That he had an annual turnover of over ₦50,000,000.00.

5. He is a first class chief.

The court judiciously exercised its discretion when it made an upward review of the award of general damages from ₦100, 000.00 to ₦1,100,000.00. This issue is accordingly resolved against the appellant.

The appeal therefore fails and is hereby dismissed.

Cross-Appeal

The main contention of the respondent/cross-appellant in the cross-appeal is that the declining value of the Naira was not taken into account in assessing the award. I agree with my learned brother, M.D. Muhammad, JSC, that in reviewing the award, the court below took all relevant factors into account, including the declining value of the Naira. I see no reasons to disturb the enhanced award of ₦1,100.000.00.

For these and the fuller reasons ably marshaled in the lead judgment, I also find no merit in the cross-appeal and dismiss it accordingly. I affirm the judgment of the lower court delivered on 22/2/2006. The parties shall bear their respective costs in the appeal.

Cases cited in the judgment

Ademe v. Dantunbu (1994) 2 NACR 74
Agbanelo v. Union Bank of Nigeria (2004) 4 SC (Pt. 1) 233
Ajomale v. Yaduat (No 2) (1991) 5 NWLR (Pt 191) 266
Akintola v. Solana (1986) 2 NWLR (Pt. 24) 598
Allied Bank (Nig.) Limited v. Akubueze (1997) 6 NWLR (Pt. 509) 374; (1997) 6 SCNJ 166

Balogun v. N.B.N. Ltd. (1978) 3 SC (Reprint) 111
Balogun v. U.B.A. Ltd. (1992) 6 NWLR (Pt. 247) 336
Bamgbegbin v. Oriare (2009) 13 NWLR (Pt.1158) 370
Barge v. Ganduma (2001) 13 NWLR (Pt 731) 693
Basheer v. Same (1992) 4 NWLR (Pt 236) 491
Boshali v. Allied Commercial Exporters Ltd (1961) 1 All NLR 917
Dumez Ltd v. Ogboli (1972) 3 SC 196
ELF (Nig) Ltd v. Sillo (1994) 6 NWLR (Pt 350) 258
Elijah Oladeji Kosile v. Amuba Olaniyi Folarin (1989) NWLR (Pt 107) 1; (1989) 4 SC (Pt 1) 150
Hirat Aderinsola Balogun v. National Bank of Nigeria (1978) 3 SC 111
Ide Chemists Limited v. National Bank of Nigeria Limited (1976 - 1984) 3 NBLR 111
Ifeanyichukwu Osondu & Co Ltd v. Akhigbe (1999) 11 NWLR (Pt. 652) 1
Imah v. Okogbe (1993) 12 SCNJ 57
Imhanria v. Nigerian Array (2007) 14 NWLR (Pt. 1053) 76
Iyere v. Bendel Feed & Flour Mills Ltd (2008) 18 NWLR (Pt.1119) 300; (2008) 12 SCM (Pt.1) 66
James v. Mid Motors (Nig.) Limited (1978) 12 SC 31
Marine Management Associates Inc & Anor v. N.M.A. (2013) 2 CLRN 1
N.E.P.A. v. Ososanya (2004) 5 NWLR (Pt. 867) 601
NBCI v. Integrated Gas Ltd & Anor. (1999) 8 NWLR (Pt.613) 119
NDIC (Liquidator of Allied Bank of Nigeria Plc) v. Okem Enterprises Limited & 1 Ors. (2004) 11 CLRN 1
Neka B.B.B. Manufacturing Co. Ltd v. ACB Ltd (2004) 2 NWLR (Pt. 858) 540
Nigerian Bottling Co Ltd v. Ngonadi (1985) 1 NWLR (Pt 4) 739
Nwabuoku v. P.N. Ottih (1961) 1 All NLR 487
Odogwu v. A.G. Federation (1996) 6 NWLR (Pt. 456) 508
Odulaja v. Haddad (1973) 11 SC 357
Onaga v. Micho & Co (1961) 1 All NLR 101
Sabru Motors (Nig) Ltd v. Rajab Enterprises (Nig) Ltd (2002) FWLR (Pt 116) 841
Shell Petroleum Development Co. (Nig) Ltd v. Teibo & Ors (1996) 4 NWLR (Pt.445) 657
U.B.N. v. Nwoye (1996) 3 LRCN 232
U.B.N. v. Odusote Bookstores Ltd (1995) 9 NWLR (Pt. 421) 558
UBA Ltd v. Mudasiru Oladipo Ademuyiwa (1999) 11 NWLR (Pt. 628) 570
Ugwe Ukoha & Ors. v. Golden Okoronkwo (1972) 1 All NLR (Pt. 11) 100
Ukoma v. Nicol (1962) 1 All NLR 107
Union Bank of Nigeria Limited v. Nwoye (1996) 3 NWLR (Pt. 435) 135
Williams v. Daily Times of Nigeria Limited (1990) 1 NWLR (124) 255
Yalaju-Amaye v. AREC & Ors. (1990) NWLR (Pt 145) 422; (1990) 6 SC 157

Foreign cases cited in the judgment
Bourhil v. Young (1943) AC 92
Flint v. Lovel (1935) 1 K.B. 354

Marzetti v. Williams (1830) 1 B & Ad 415; 109 E.R. 842; (1830)

Book referred to in the judgment
Black's Law Dictionary, Ninth Edition

History:

HIGH COURT
High Court of Edo State (Benin Division)
Omage, J

COURT OF APPEAL (BENIN DIVISION)

SUPREME COURT OF NIGERIA
Ibrahim Tanko Muhammad, JSC*(Presided)*
Olukayode Ariwoola, JSC
Musa Dattijo Muhammad, JSC (*Read the lead judgment)*
Clara Bata Ogunbiyi, JSC
Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC

Counsel:
Dr. V.J.O. Azinge with Mrs. S. Offiah and Victor Azubikwe Esq. for the appellant
G. C. Igbokwe Esq. with Chief A. T. Udechukwu for the respondent

DENNIS AKOMA; ADAMA MAXWELL (For themselves and on behalf of the People of Usebe Village Ebu) v. OBI OSENWOKWU; IDEBUBA OGBOI (For themselves and on behalf of the people of Ogodor); COPANE FARMS (NIG) LTD

SUPREME COURT OF NIGERIA

SC.102/2005
FRIDAY 9TH MAY, 2014

(ONNOGHEN; GALADIMA; RHODES-VIVOUR; PETER-ODILI; OKORO, JJ.SC)

COMMERCIAL LITIGATION – Delayed Judgment – Emphasis is not on length of delay but effect.

COMMERCIAL LITIGATION – Judgment – Delay in delivery of judgment alone is insufficient to invalidate judgment.

COMMERCIAL LITIGATION – Judgment – Delay in delivery does not invalidate judgment except miscarriage of justice is occasioned.

COMMERCIAL LITIGATION – Judgment - Appellate court has no statutory time limit to deliver judgment as it does not evaluate the evidence of parties.

COMMERCIAL LITIGATION – Judgment – Requirement of judge to submit report on late judgment is an administrative requirement which does not affect the validity of the judgment.

COMMERCIAL LITIGATION – Estoppel – does not require special pleading.

COMMERCIAL LITIGATION – Res Judicata – Plea of res judicata is not available to claimant except by way of reply to the defendant's statement of defence.

Facts:

The respondents are indigenes of Ogodor town, Asaba and commenced this suit as representatives of the people of the town. The appellants are indigenes of Usebe Village, Ebu and were sued for themselves and as representatives of the people of Ebu. The appellants and respondents had filed two different suits at separate courts. Both suits were consolidated. The respondents claimed that they inherited a vast parcel of land known as Ofia Ogodo in Asaba from their ancestors, Okogboi. They claimed that the land was sold to Okogboi by the Ebu family upon furnishing the required consideration for the sale and that since then they have been in possession and exercised various possessory rights.

Further, the respondents claimed that sometime in August 1972, some members of the appellants' village including the appellants, forcefully entered into the respondents' land, cleared and traversed part of it. Consequently, the respondents commenced an action against the appellants and sought: a declaration that Ofia Ogodo is their property according to native law and custom, an injunction restraining the appellants and their servants from continuing or repeating acts of trespass and the sum of ₦600.00 (Six Hundred Naira) as damages for trespass.

The appellant denied that their ancestors ever sold the land to the said Okogboi but claimed that it belonged to them being part of their land known as Iyi-Mkpume land.

The trial court found that some of the facts of the case had been settled before a native court and refused to take evidence on the facts. It also gave judgment in favour of the respondents. However, the court failed to give judgment within the timeline provided in the 1999 Constitution of the Federal Republic of Nigeria.

Dissatisfied with the judgment of the trial court, the appellant appealed to the Court of Appeal which dismissed the appeal. Further dissatisfied, the appellants appealed to the Supreme Court.

Held (*Unanimously dismissing the appeal):*

[1] ***Commercial Litigation – Delayed Judgment – Emphasis is not on length of delay but effect.***

Firstly, the fact that Section 294 (1) of the 1999 Constitution makes it mandatory for a Court to deliver its judgment within 90 days after final address, and that by Section 294 (5) of the same Constitution, a judgment will not be invalidated or nullified for non-compliance unless and until the appellate Court considering such a complaint on appeal is fully satisfied that the appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. Further the fact that in determining whether a miscarriage of justice has occasioned due to inordinate delay, the emphasis is not the length of time simplicities, but on the effect it produced in the mind of the court, such as if the delay is found to have obviously alleged the court's perception, appreciation and evaluation of the cases and that it is court would readily interfere.
(P. 119 lines 43 - 45; P. 120 lines 1 - 8)

[2] ***Commercial Litigation – Judgment – Delay in delivery of judgment alone is insufficient to invalidate judgment.***

The true position of the law, in the light of the foregoing provision, is that a party should not just go on appeal merely on the ground that the judgment

he wants to set aside was delivered outside the three months (90 days) period. He will have to fight the appeal on all known grounds of appeal which can render the judgment unsustainable; not merely on the assessment of facts. Indeed, an appellant with good grounds of appeal may have no need at all to canvass a ground of non-compliance with the 90 days, except for the purpose of having the judge (or justice) disciplined by drawing attending (sic) of the breach to the Court hearing the appeal in view of subsection (6) of the Section 294 of the 1999 Constitution (formerly subsection (5) of Section 258 of the 1979 Constitution. See *Owoyemi v. Adekoya* (2003) 12 SC. (Pt. 1) 1. **(P. 120 lines 33 - 43)**

[3] ***Commercial Litigation – Judgment – Delay in delivery does not invalidate judgment except miscarriage of justice is occasioned.***

The delay *perse* does not lead to a judgment being vitiated or nullified. The delay must occasion a miscarriage of justice to in (sic) such a conclusion. In other words it has to be established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses to, testify for that he had lost his impressions of the trial due to such inordinate delay. See *Akpan v. Umoh* (1999) 7 SC. (Pt. II) 13. **(P. 120 line 45;P. 121 lines 1 - 5)**

[4] ***Commercial Litigation – Judgment - Appellate court has no statutory time limit to deliver judgment as it does not evaluate the evidence of parties.***

I do not agree with the submission of the learned counsel for the appellants that the delay of the lower court in delivery of its judgment affected the Courts' "perception, appreciation and evaluation of the case" or that the delay has eroded the conference in the entire judicial system. The reasons for my so held (sic) are not farfetched. Careful study of the provisions of S. 294 of the Constitution will show that they apply more particularly to judgments of the trial courts. In those courts the trial judge who, after seeing and hearing the testimonies of witnesses, inordinately delays the delivery of his judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led; and could also have forgotten the demeanour of the witnesses who testified before him thus leading to a miscarriage of justice. In the circumstance as opposed to the appellate Court which duties are limited to reviewing the case of trial court and the judgment which followed, based on printed records only and written briefs of Argument of the parties and in some cases oral amplifications of such briefs which are recorded in writing. The appellate Courts in these circumstances can rarely be said to have lost touch of the contents of the printed records placed before them, which could be said to have affected their perception and evaluation of the facts

based on the printed records of the facts based on the printed records of appeal only. **(P. 121 lines 7 - 25)**

[5] ***Commercial Litigation – Judgment – Requirement of judge to submit report on late judgment is an administrative requirement which does not affect the validity of the judgment.***

On this issue, the appellants have also argued that failure on the part of the presiding Justice at the Court of Appeal to send a report on the delay in delivery of his final judgment to the Chairman of the National Judicial Council as provided in subsection (6) of S. 294 (supra) even if the said delay did not occasion any miscarriage of justice to the appellant, renders the judgment of the Court of Appeal null and void. This argument is with due respect, preposterous and just a cent-worth as it is technical and misconceived. The requirement that "a person presiding at the sitting of the court to send a report on the case to the Chairman of the National judicial Council" in which judgment was delivered outside 90 days, so that he could inform the council to take such action as it may deem fit, is a purely administrative provision meant to notify the council, which in the circumstance of a particular (sic), may deem it necessary to take any disciplinary action against Judges who flagrantly "or inordinately" refuse to comply with the provision of this section of the Constitution. The council does not have the power to declare a judgment of the appellate Courts established under the Constitution, indeed the Court of Appeal null and void for failure of the presiding judge who delivered the judgment to send a report thereafter to NJC. Failure to inform the NJC cannot form a ground of appeal against the judgment since the report is not meant to form part of the judgment. Indeed of the appellants' 4 Grounds of appeal none deals directly with or complains about the failure to send an Administrative Report to NJC. **(P. 121 lines 38 - 45; P. 122 lines 1 - 12)**

[6] ***Commercial Litigation – Estoppel – does not require special pleading.***

It is trite law that estoppels need not be pleaded in any special form, provided that the facts which can be interpreted as constituting estoppels are stated in such a way that estoppels is raised, and this has been clearly done by the respondents herein. See *Mbonu v. Nwoti* (1991) 7 NWLR (Pt. 206) page 737; *Ikeni v. Efamo* (2001) 5 SC. (Pt.1) 160; *Ibero v. Ume-Ohana* (1993) 2 NWLR (Pt 227) 510. **(P. 124 lines 5 - 9)**

[7] ***Commercial Litigation – Res Judicata – Plea of res judicata is not available to claimant except by way of reply to the defendant's statement of defence.***

We know what is *"res judicata"* Simply put it arises where a court of competent

> jurisdiction had earlier adjudicated upon an issue the same comes up again between the same parties or their privies. See *Fadiora v. Gbadebo* (1978) 3 SC. 29, *Ladega v. Durosimi* (1978) 3 SC. 64. In a long line of cases it has been decided *judicata* is not available to a plaintiff as basis of his claim except by way of a reply to a defence raised by the Defendant in a statement of defence. A plaintiff cannot be seen raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that court. As it is often said. It is a *shield* rather than a *sword*. See *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 321) 539. **(P. 122 lines 26 - 34)**

GALADIMA, JSC (Delivering the lead Judgment): At the trial Ugwashi-Uku High Court of the then Bendel State of Nigeria, two suits between two communities were consolidated. In Suit No. 01/11/75, the appellants herein were the defendants and in Suit No. 01/11/76, they were the plaintiffs. On consolidation of the two land suits, the appellants were made the defendants while the respondents remained as plaintiffs. Suit No. 01/11/75 was first commenced at the Asaba High Court as Suit No. A/30/72, but was later transferred to Ugwuashi-Uku High Court as Suit re-numbered as 01/11/75. On 21/5/76, the defendants/appellants herein also instituted an action at Ugwuashi-Uku High Court and it was numbered 01/11/76. The 1st and 2nd respondents admitted in their pleadings that they granted a portion of the disputed land to the 3rd respondents; hence it was not difficult for the trial Court to consolidate the two actions when an application to that effect was granted on 27/10/78.

I shall summarise the facts of the case leading to this appeal. In their Amended Writ of Summons, the respondents as plaintiffs, claimed as follows:

> "The plaintiffs claim jointly and severally for themselves and on behalf of Ogodo against the defendants jointly and severally for themselves and on behalf of Usebe Village, Ebu as follows:-
>
> (a) A declaration that the piece and parcel of land described, known and called OFIA OGODO (Ogodo Bush) lying and situated in Ogodo, Asaba Division and verged pink in Survey plan No. Lus 3081 filed with Statement of Defence in Suit No. 01/11/76 and now used for this Suit is the property of the plaintiffs according to Native Law and Custom.
>
> (b) ₦600.00 (Six Hundred Naira) being general damages for trespass.
>
> (c) An injunction restraining the defendants, their servants and/or agents and each of them from continuing or repeating similar or other acts of trespass on the said land."

On the other hand the appellants herein, as plaintiffs in Suit No. 01/11/76 also sought

for a declaration thus:

> *"(1) A declaration of title to all that piece or parcel of land known and called Iyi-Nkpume land in Ebu within Ugwashi-Uku Judicial Division whose annual rental value does not exceed ₦10.00.*
>
> *(2) ₦600.00 damage for trespass into the plaintiffs' land which the said land will be particularly described in the plan to be filed in court by the plaintiffs.*
>
> *(3) Perpetual injunction restraining the defendants, their agents and/or privies from further acts of trespass into the said land."*

The parties filed their respective pleading which were severally amended. A total of 6 witnesses testified for the plaintiffs and defendants respectively. A number of Exhibits were tendered and admitted in evidence and some were rejected by the trial High Court. The witnesses for the parties were Cross-Examined after which the respective counsel addressed the Court. The case was reserved to 6/12/96 for judgment when the learned trial Judge ODITA (J) (as he then was) after reviewing the evidence called by either side, entered judgment in favour of the plaintiffs on pp.228-229 of the records, in the following terms:

> (1). I Declare that the plaintiffs are entitled to Customary Right of Occupancy of the entire land called OFIA OGODOR OR "OGODO BUSH" lying and situate in Ogodor, Aniocha North Local Government Area of Delta State verged PINK in plan No. LSU 3081 of 10th September 1977 Exhibit B in this proceedings or Plan No. LSU 5044 of 10th November, 1973 Exhibit A in this proceedings also verged PINK therein.
>
> (2). The defendants are to pay the plaintiffs the sum of ₦600.00 (Six Hundred Naira) damages for trespass.
>
> (3). I hereby order injunction restraining the defendants their servants and/or agents privies, and each of them from continuing or repeating similar or other acts of trespass on the land verged PINK in Plan No. LSU 3081 of 10th September, 1977 - Exhibit B in these proceedings or in Plan No. LSU 5044 of 10th November, 1973 Exhibit A in this proceedings and thereon verged PINK.

The Suit No. 0/11/76 of the defendants and their claims thereof are hereby dismissed in its entirety. Costs of ₦1000.00 to the plaintiffs against the defendants.

Dissatisfied with the judgment of the learned trial judge, the appellants herein appealed to the Court of Appeal Benin Division vide their Notice of Appeal filed on

24/12/96 on 3 Grounds of Appeal and with leave of Court added 2 additional grounds from which 5 issues were identified for determination. The Court below however, dismissed the appeal and affirmed the findings and judgment of the trial Court (see pp.300 - 323 of the records).

It is against that judgment that the appellant have further appealed to this Court upon 3 Grounds of Appeal as follows:

GROUND (1)

The learned justices of the Court of Appeal erred in law for failure to comply with S. 294 (1) and (6) of the 1999 Constitution which non-compliance has caused serious miscarriage of Justice.

GROUND (2)

The learned Justice of the Court of Appeal erred in law in relying on exhibit C as *res judicata* when they held "the judgment in Exhibit 'C' was not appealed against up to the time the consolidated suit 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of facts forming the ground for judgment"

GROUND (3)

The learned justices of the Court of Appeal erred in law in pronouncing on an issue of estoppels not canvassed before them which had denied appellant fair hearing."

In the light of the judgment of the Court below, being appealed against and the grounds of appeal filed, the appellant identified the following 3 issues for determination:

"(a) whether in the face of the provision of Section 294(1) and (6) of the 1999 Constitution, the judgment of the lower court is not a nullity.

(b) whether the learned justices of the Court of Appeal were right in dismissing the appellant's Appeal on the ground that Exhibit 'C' constituted res judicata.

(c) whether the Court of Appeal were (sic) right in pronouncing on an issue not canvassed before the Court without inviting parties to address on it."

On the other hand, the respondent have equally raised 3 issues similar to those

identified by the appellants for determination thus:

> *"(i) Whether by virtue of the provision of Section 294 (1) (5) and (6) of the 1999 Constitution the judgment of the Court of Appeal amounts to a nullity.*
>
> *(ii) Whether the learned justices of the Court of Appeal dismissed the appellants appeal on the ground that Exhibit 'C' constitutes res judicata; and if so, whether same has led to a miscarriage of justice.*
>
> *(iii) Whether the Court of Appeal pronounced on an issue not canvassed before the Court without inviting parties to address on it and if so whether same has led to a miscarriage of justice.*

In the light of the foregoing, it is obvious that the 3 issues raised by the respective parties in this appeal are similar. I cannot fathom out why the respondents did not simply adopt the appellants issues and simply canvass arguments in support of them.

In Issue No. 1 which I have observed is identical to the respondent's Issue No. 1 on the main plank of the appeal, the appellants have drawn our attention to the lapse of time between final addresses by counsel on behalf of the parties at the lower court and when the learned Justices of that Court eventually delivered judgment on the appeal. Learned counsel for the appellants FOLABI KUTI Esq., has submitted that it is evident on pages 299 - 324 of the records that final addresses were made on 18/2/2002, whilst judgment was delivered on 30/7/2003, a period of over 450 days after the conclusion of final addresses. It is submitted that the time within which the court below must deliver its judgment in writing as constitutionally provided by S. 294 (1) of the 1999 Constitution is not later than 90 days after the conclusion of the final addresses. That as a mandatory provision, its breach is unconstitutional and therefore renders the judgment given outside this mandatory period a nullity. Reliance was placed on the cases if *Ifezuo v. Mbadugha* (1984) 1 SCNLR 427; *Odi v. Osafile* (1985) 1 NWLR (Pt. 1) 1.

It is conceded that a cumulative reading of subsections 1 and 5 of Section 294 clearly show that a decision would not be nullified for non-compliance unless and until the Appeal Court considering a complaint on appeal is fully satisfied that the party complaining of such late delivery shows that it had suffered a miscarriage of justice as a result of such late delivery of the judgment: See *Owoyemi v. Adekoya* (2003) 18 NWLR (Pt. 852) 307.

Relying on the decision of this Court in *Dimbia Maka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101 at 114, learned counsel for the appellants has submitted thus:

That in deciding whether a party has suffered a miscarriage of justice as a result of inordinate delay between the conclusion of a trial and the delivery of judgment, the emphasis is not on the length of the time *simpliciter* but on the effect it produced in the mind of the Court. That is if the inordinate delay apparently and obviously affected the case, then the appellate Court would intervene and hold that there has been a miscarriage of justice. It is submitted that the instant case, the inordinate delay in delivering judgment, has deeply impacted in the Court's perception, appreciation and evaluation of the appeal, thus severely occasioning a miscarriage of justice as apparently shown in their Lordship's difficulty at having a proper appreciation and evaluation of the case evident in several passages of their judgment. Particularly those on pages 307 of the records.

To embellish the foregoing arguments, learned counsel concluded his submission on this note: That non-compliance *simpliciter* without more with the provisions of Section 294(1) by the lower court will not render its judgment a nullity, unless by virtue of Section 294(5) the party complaining has shown that he has suffered a miscarriage of justice by reason of non-compliance. It is urged on this court to give a literal interpretation to the clear and unambiguous words of Section 294, which intend merit is not difficult to see: as it reveals that the requirement of miscarriage of justice becomes evident only when subsections (1) and (5) are read together. Indeed whilst the community reading of subsection and (6) of S. 294 (supra) shows that the subsection was enacted to act as a check on both the trial and the Appellate Courts the failure of the Court (as in the case at hand) in not reporting the non-compliance to the National judicial Council would render any such decision null and void.

On issue No. 2, it is the contention of the appellants' counsel herein that the learned justice of the Court of Appeal fell into a grave error in relying on Exhibit 'C' as *res judicata*, when they held that the judgment in Exhibit 'C' is conclusive of the facts forming the grounds for the judgment. Learned Counsel for the appellants has further contended that the respondents never raised the issue of *res judicata* as it does not avail them, as plaintiffs, to make any such claim in the statement of claim. He submitted that learned trial judge erred when he came to the conclusion that 'Exhibit 'C' in Suit No. 74/50, constitutes *res judicata*, a position which the court below also had to support. It is submitted that the court below having held that the approach of the learned trial judge on the issue of plea of *res judicata* was wrong, the said lower court ought to have followed the ratio of this court in *Odofin & Ors v. Mogaji & Ors* (1978) 2 NSCC 275 and accordingly order a retrial in the circumstance of this case.

It is further submitted that the court below failed to review the erroneous evaluation of the evidence by the trial court in Suit Nos. 0/11/75 and 0/11/76 and this led to their conclusion that Exhibit 'C' created *res judicata*. He refers to the passage in the lead judgment on page 320 of the records paragraph 17.

Arguing issue No.1, learned counsel for the respondent submitted that assuming but without conceding that this issue has merit and is consequently resolved in favour of the appellants, this would have the legal consequences, *inter alia*, of not entering judgment for a declaration of title to the land in dispute in favour of the appellants by this court as prayed for by the appellant in his brief; but most importantly, that would nullify the judgment of the court below while leaving intact, the 1966 judgment of the trial High Court, which granted the respondents a declaration of title to the said disputed land and restrained the appellants perpetually from trespassing thereon.

However, arguing on the core issue, learned counsel, agreed with the submission of the appellants' learned counsel on the legal effect of non-compliance with Section 294 (1) and 294 (5) of the 1999 Constitution. He equally agrees with their further submission that in determining whether a miscarriage of Justice has occasioned due to the inordinate delay, the emphasis is not on the length of time *simpliciter*, but on the effect it produced in the mind of the court such as, if the inordinate delay is found to have obviously affected the court's perception, "appreciation and evaluation of the case," and it is in such cases that the appellate court would interfere. However, the learned counsel does not agree that the delay in delivery of the judgment by the court below has affected the perception, appreciation and evaluation of the case, neither has the delay "eroded the confidence in the entire judicial system". He advances the following reasons. The fact that Section 294 of the Constitution applies mostly to judgments of trial courts where the judge after seeing and hearing the testimony of witnesses, has delayed delivery of judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led, and perhaps forgotten the demeanour of the witnesses who had testified before him, thus in this circumstances, a miscarriage of justice has occasioned, in the other hand, as opposed to the appellate Court which has the duty of only reviewing the case at the trial court and arrived at its judgment based on printed records only. In the foregoing circumstances the Appellate Court can rarely be said to have lost touch of the contents of the printed records placed before it. Learned counsel submitted therefore that the learned justices of the court below did not after finding that the learned trial Judge was in error to have held that the native court proceedings and judgment in Exhibit "C" was res judicata, then "somersaulted" to conclude that the said Exhibit "c" constituted *res judicata*, due to the inordinate delay in delivering their final judgment.

Learned counsel has flawed appellants' argument that failure of the presiding Justice of the court below to send a report on the delay in delivery of his final judgment to the Chairman of the National Judicial Council as provided in Section 294 (6) of the Constitution (even if the said delay did not occasion any miscarriage of justice to the appellants) renders the judgment of that court null and void. He has contended that the foregoing subsection of the Constitution, is purely administrative provision, meant to enable the National Judicial Council, the body vested with the power to discipline erring judicial officers) to take any disciplinary measures, it may seem

fit to take against those judges who frequently disobey the said provision of Section 294 (1) supra

Submitting on issues 2 and 3 together learned counsel for the respondents has submitted that the court below never found that the judgment in exhibit 'C' was *res judicata*, but that certain facts which were accepted by the National Court therein constituted issue *estoppel* which were clearly pleaded in paragraphs 15 - 17 of the respondent's pleadings pp 53 - 54. It is submitted that the phrase *"issue estoppel"* and *"res judicata"* need not be expressly stated in a party's pleadings, provided facts Constituting such a plea are stated; as was clearly done by the respondents herein, consequently, it is not correct for the appellants to argue that the court below made out a case of issue of *estoppel* for the respondents and proceeded to pronounce on same unilaterally as the parties fully joined issues on the plea in their Amended statement of claim and Amended statement of defence.

On the concept of what constitutes *res judicata* or issue *estoppel*, the learned counsel though agrees with the general principle that it is used as a shield and not as a sword, it can not apply to the instant case. His reason is that there are two actions for declaration of title: one by the respondents as plaintiff suing the appellants as defendants, and were perfectly entitled to rely on the plea in their defence in the suit against them by the appellants claiming declaration of the title over the same parcel of land adjudged to belong to the respondents by the Native Court in Exhibit "C". He did not, however, concede that the Court below found that the proceedings and judgment in Exhibit "C" constituted *res judicata* or issue *estoppel*.

It is submitted however, that the judgment of the learned trial judge which was affirmed by the Court of Appeal was founded in traditional evidence of the parties and not necessarily on *res judicata*. Finally he urged the Court to dismiss the appeal and affirm the decision of the Court below.

As noted from onset this appeal emanated from a consolidated land suits between two communities in which the lower court affirmed the findings and judgment of the trial court. The appeal, however, falls within a narrow compass. The issues set out by the parties herein are simple and straight forward, appellant's issue No.1 is identical to the respondent's issue No. 1, which is the main plank of the appellant's appeal. This issue shall be taken and considered separately. Issues 2 and 3 of the respective party shall be considered together.

On issue No. 1, certain facts are not at all in dispute, having been legally provided/ established and/or conceded. The facts are as follows:

Firstly, the fact that Section 294 (1) of the 1999 Constitution makes it mandatory for a Court to deliver its judgment within 90 days after final address, and that by Section 294 (5) of the same Constitution, a judgment will not be invalidated or

nullified for non-compliance unless and until the appellate Court considering such a complaint on appeal is fully satisfied that the appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. Further the fact that in determining whether a miscarriage of justice has occasioned due to inordinate delay, the emphasis is not the length of time simplicities, but on the effect it produced in the mind of the court, such as if the delay is found to have obviously alleged the court's perception, appreciation and evaluation of the cases and that it is court would readily interfere.

In view of the foregoing I find it appropriate to resort to the provisions of the relevant subsections of S. 294 of the 1999 Constitution of the Federal Republic of Nigeria.

> *"S. 294 (1). Every Court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.*
>
> *(5) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.*
>
> *(6) As soon as possible after hearing and deciding a case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial who shall keep the council informed of such action as the Council may deem fit."*

The true position of the law, in the light of the foregoing provision, is that a party should not just go on appeal merely on the ground that the judgment he wants to set aside was delivered outside the three months (90 days) period. He will have to fight the appeal on all known grounds of appeal which can render the judgment unsustainable; not merely on the assessment of facts. Indeed, an appellant with good grounds of appeal may have no need at all to canvass a ground of non-compliance with the 90 days, except for the purpose of having the judge (or justice) disciplined by drawing attending (sic) of the breach to the Court hearing the appeal in view of subsection (6) of the Section 294 of the 1999 Constitution (formerly subsection (5) of Section 258 of the 1979 Constitution. See *Owoyemi v. Adekoya* (2003) 12 SC. (Pt. 1) 1.

The delay *perse* does not lead to a judgment being vitiated or nullified. The delay

must occasion a miscarriage of justice to in (sic) such a conclusion. In other words it has to be established that the delay occasioned a miscarriage of justice in that the trial judge did not take a proper advantage of having seen or heard the witnesses to, testify for that he had lost his impressions of the trial due to such inordinate delay. See *Akpan v. Umoh* (1999) 7 SC. (Pt. II) 13.

I do not agree with the submission of the learned counsel for the appellants that the delay of the lower court in delivery of its judgment affected the Courts' "perception, appreciation and evaluation of the case" or that the delay has eroded the conference in the entire judicial system. The reasons for my so held (sic) are not farfetched. Careful study of the provisions of S. 294 of the Constitution will show that they apply more particularly to judgments of the trial courts. In those courts the trial judge who, after seeing and hearing the testimonies of witnesses, inordinately delays the delivery of his judgment for such a long time that from the judgment it becomes apparent that he has lost touch or grasp of the evidence led; and could also have forgotten the demeanour of the witnesses who testified before him thus leading to a miscarriage of justice. In the circumstance as opposed to the appellate Court which duties are limited to reviewing the case of trial court and the judgment which followed, based on printed records only and written briefs of Argument of the parties and in some cases oral amplifications of such briefs which are recorded in writing. The appellate Courts in these circumstances can rarely be said to have lost touch of the contents of the printed records placed before them, which could be said to have affected their perception and evaluation of the facts based on the printed records of the facts based on the printed records of appeal only.

My third reason is thus. The learned justices of the court below did not, after finding that the learned trial judge was in error to have held that the native court proceedings and judgment in Exhibit "C" was *res judicata*, turn around to hold that same constituted *res judicata*, due to the inordinate delay in delivering their final judgment. Rather, I must observe, what the Justices did was to hold that the proceedings and judgment in Exhibit "C" was conclusive of facts (as stated in the testimonies of witnesses) forming the ground for the judgment. Put simply, that the facts which led to the judgment which was appealed against constitutes issue estoppels as distinct from *res judicata* which robs the Court of jurisdiction to entertain the case at all.

On this issue, the appellants have also argued that failure on the part of the presiding Justice at the Court of Appeal to send a report on the delay in delivery of his final judgment to the Chairman of the National Judicial Council as provided in subsection (6) of S. 294 (supra) even if the said delay did not occasion any miscarriage of justice to the appellant, renders the judgment of the Court of Appeal null and void. This argument is with due respect, preposterous and just a cent-worth as it is technical and misconceived. The requirement that "a person presiding at the sitting of the court to send a report on the case to the Chairman of the

National judicial Council" in which judgment was delivered outside 90 days, so that he could inform the council to take such action as it may deem fit, is a purely administrative provision meant to notify the council, which in the circumstance of a particular (sic), may deem it necessary to take any disciplinary action against Judges who flagrantly "or inordinately" refuse to comply with the provision of this section of the Constitution. The council does not have the power to declare a judgment of the appellate Courts established under the Constitution, indeed the Court of Appeal null and void for failure of the presiding judge who delivered the judgment to send a report thereafter to NJC. Failure to inform the NJC cannot form a ground of appeal against the judgment since the report is not meant to form part of the judgment. Indeed of the appellants' 4 Grounds of appeal none deals directly with or complains about the failure to send an Administrative Report to NJC. It is an issue I need not seriously consider as the learned counsel for the appellants only merely relied on the submissions of their counsel in his brief of Argument to urge this Court to declare the judgment of the Court of Appeal null and void.

In the light of the foregoing I shall resolve this issue in favour of the respondent as no form of miscarriage of justice has been shown from the records to have been suffered by the appellants.

On issue No.2, is the contention of the appellants that the learned Justices of the Court of Appeal fell into grave error in relying on Exhibit 'C' as *res judicata* when they held that the judgment in exhibit 'C' is conclusive of the facts forming the grounds for the judgment.

We know what is *"res judicata"* Simply put it arises where a court of competent jurisdiction had earlier adjudicated upon an issue the same comes up again between the same parties or their privies. See *Fadiora v. Gbadebo* (1978) 3 SC. 29, *Ladega v. Durosimi* (1978) 3 SC. 64. In a long line of cases it has been decided *judicata* is not available to a plaintiff as basis of his claim except by way of a reply to a defence raised by the Defendant in a statement of defence. A plaintiff cannot be seen raising a plea that will oust the jurisdiction of the court to entertain the action he has brought before that court. As it is often said. It is a *shield* rather than a *sword*. See *Ike v. Ugboaja* (1993) 6 NWLR (Pt. 321) 539.

However, in the case at hand contrary to the foregoing contention of the appellants, I agree with the learned counsel for the respondents that the court below never, at any time found that the judgment in Exhibit "C" was *res judicata*. It found on page 320 of the record of appeal thus:

> "The judgment in Exhibit "C" was not appealed against up to the time of the consolidated suits 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of the facts forming the ground for judgment."

In other words that certain facts which were accepted by the Native Court (Clan

Court) therein, constituted issue estoppels and which facts constitute issue estoppels were clearly pleaded by the respondent on pages 53 - 54 (lines 15 - 17) of the record of appeal, as follows:

"15. In Odian Clan Court Civil case No. 57/50 Obi Osenwokwu Versus Okonkwo Mgbokole, the first plaintiff's father sued the plaintiffs, Eastern Ibo tenants for arrears of rent as tenants in the farm land.

(a). One Chief Okada from defendants village, who is now dead testified on behalf of Mgbokojele, and as representing one Asieme, the then Obi of Ebu. He testified to the effect that the land belonged to Ebu and all rents were due to Asieme.

(b). The clan Court on noticing that ownership of the land was being contested by Ogodor and Ebu people, suspended judgment until one of the parties took action for a declaration of title to the area in dispute.

(c). Ebu people did not sue, but the plaintiffs in Odiani clan Court Suit No. 74/50 by the 1st plaintiff's father, Obi Osenwokwu, sued Obi Asieme of Ebu for a "Declaration of title to the land and bush of Ogodor known as Ogodor Town Land-Bush" and obtained judgment.

16. (a) In that case one Ekpei a native of Ebu, but now dead testified on the 27th day of September, 1950 as follows:

"The whole of Ebu town of nine quarters gave this land in dispute to plaintiffs' fore-grand fathers before the advent of British in Nigeria. We Okei and Usebe are one...."

(b). On the same day Chief Okoda aforementioned also testified and said *inter alia*, "It now comes to the British advent that plaintiff keeps one man called Isaac Anene in the land. We called the plaintiff (sic) keeps one man called Isaac Anene in the land. We called the plaintiffs attention and asked him why he allows an Eastern Ibomen to come and carried (sic) all monies in the land and goes away without paying a farthing to you and also planting rubber depriving all the benefits that you will enrich yourself with." Okoda belonged to defendants village of Usebe. Anene's settlement is shown as old camp on plaintiffs' plan.

17. The plaintiff will at the trial found on the said Odiani Clan Court suits and particularly rely on the testimonies of the deceased witnesses."

It is trite law that estoppels need not be pleaded in any special form, provided that the facts which can be interpreted as constituting estoppels are stated in such a way that estoppels is raised, and this has been clearly done by the respondents herein. See *Mbonu v. Nwoti* (1991) 7 NWLR (Pt. 206) page 737; *Ikeni v. Efamo* (2001) 5 SC. (Pt.1) 160; *Ibero v. Ume-Ohana* (1993) 2 NWLR (Pt 227) 510.

With profound respect to the learned counsel for the appellants, it is not correct to argue that the court below made a case of issue *estoppel* for the respondents and proceeded to pronounce on same unilaterally. Issues on that fact had been joined in the pleading of parties. See *Spaco Vehicle and Plant Hire Co. v. Alraime (Nig.) Ltd* (1995) 8 NWLR (Pt. 416) 655 at 670 - 671, *Alao v. Acb Ltd* (1998) 3 NWLR (Pt. 542) 339 at 369 - 370, *Oshodi v. Eyifunmi* (2000) 13 NWLR (Pt. 684) 298; (2000) 7 SC (Pt. 2) 145 *D.T.I. Ent. (Nig.) Ltd v. Busari* (2011) All FWLR (Pt. 563) 1818 at 1846 - 1847.

I am overwhelmed by the glib or facile further submissions of the learned counsel for the respondents on the issue in paragraph 4.02 of the respondent's brief of argument. This is a direct response to the submission made by the learned counsel for the appellants in paragraph 5.2 of their brief, on the reliance of the principle of law that *res judicata* is used as a shield, (a defence) and not as a sword, and that it is anomalous for the plaintiff who has invoked the jurisdiction of the court by raising it as it is done by the respondents in this case. Learned counsel for the respondents rightly conceded to the principle as stated. It does not apply to the case in hand. The reasons are simple. In the instant case there are two actions in which declaration of the title was sought: one by the appellants herein, as plaintiffs suing the respondent as defendants. On the other hand the action for the same claim by the respondents as defendants. Therefore, the respondents were perfectly right and entitled to rely on the plea of *res judicata* in their defence in the suit against them by the appellants. The appellants are not disputing these facts.

What is irksome in this case is the way the appellants have strenuously argued that the issue of *res judicata* does not avail the respondents as plaintiffs. That Exhibit "C" in suit No 74/50 does not constitute a plea of issue of *estoppel* was clearly pleaded. Therefore, even if this plea did not meet all the conditions to constitute *res judicata*, I agree with the respondents that, it would at least constitute a plea of issue *estoppel* in respect of the issue that the entire Ebu Community, including their Star Witness, Chief Okoda from the present appellants' Usebe Quarters or village of Ebu Community, claimed and led evidence that the land originally belonged to the said entire Ebu Community. It was after that (sic) the community sold the land outrightly to the respondents' ancestor. This fact was accepted by the court below in its judgment in Exhibit 'C', thus barring the appellants

herein, who are only one set out of the nine villages that make up Ebu Community to raise the same issue, claiming now that their Usebe Village were the original owners of the said land.

The appellants have extensively addressed the Court on this issue, drawing a distinction between *res judicata* and issue *estoppel* on pages 184 to 185 and also canvassed in the respective briefs of argument of the parties on appeal on pages 266 to 269 to 285 of the record. This was a live issue presented before the trial court and the Court of Appeal for determination. With due respect, the contention of the appellants' counsel that this was a new issue introduced at the trial court and raised by the Court of Appeal *suo motu*, is based on mere technicality , barren and lacks sustainability. Again, issue 2 and 3 are resolved in favour of the respondents.

In the final result all the issues having been resolved in favour of the respondents, the appeal is dismissed. However, in the circumstance of this case, I shall not award costs in favour of the respondents in the spirit and promotion of brotherhood and good neighbourliness amongst the parties.

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 lacks merits and should be dismissed.

The main issue in the appeal is whether in the face of the provisions of Section 294(1) and (6) of the 1999 Constitution, as amended, the judgment of the lower court is not a nullity.

It is admitted by both parties and the record of appeal also confirms, that the judgment of the lower court was not delivered within ninety (90) days of the final addresses by counsel for the parties as required by the provisions of Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999, hereinafter referred to as the 1999 Constitution as amended. Also not in contention is the fact that the lower court was not a court of first instance in the case giving rise to this appeal but sat and heard the matter in its appellate jurisdiction. The question is what is the consequence(s) of the failure of the lower court, in the circumstances of the case, to deliver its decision within ninety days of the final addresses of counsel?

The answer is that the judgment/decision/order so delivered is valid except an appellant can satisfy the court that the non delivery of the judgment within the stipulated time has occasioned a miscarriage of justice to him - see Section 294(5) of the 1999 Constitution; *Owoyemi v. Adekoya* (2003) 18 NWLR (Pt. 852) 307.

In dealing with the provisions of Section 294 of the 1999 Constitution, as amended, it is necessary to draw a distinction between the proceedings in the trial Court and that before the appellate Court. The distinction is necessary because you need to determine whether a miscarriage of justice has occurred following the inordinate delay in delivering the judgment.

However in determining whether a miscarriage of justice has occurred as a result of the said delay, one has to take into consideration not simply the length of time between when the final addresses were presented and the date the judgment was delivered, but the effect the delay has produced in the mind of the court: such as if the delay has affected the court's perception of case/evidence, appreciation and evaluation of the case of the parties particularly where the evaluation is based on the credibility of the witnesses as attested to by their demeanour while testifying.

It is for the above reasons that it is very clear that the provisions of the said Section 294 of the 1999 Constitution, as amended, apply more to the Court of trial than an appellate Court as it is a trial court that has the primary responsibility to evaluate the evidence and proscribe probative value thereto particularly where the evaluation is not solely of documentary evidence but based on credibility of the witnesses concerned. It is the trial court that sees and hears the testimony of witnesses. Where it is apparent, on record, that the trial court has lost touch or grasp of the evidence led or has forgotten the demeanour of the witnesses, it will be demonstrably clear that the delay complained of has led to a miscarriage of justice and such a decision is liable to be set aside by an appellate Court under Section 294 of the 1999 Constitution, as amended.

The above position, however, does not apply to an appellate court exercising its appellate jurisdiction where the duty of the court is limited to reviewing the case at the trial court and the judgment of same based on the printed record and the issues raised for determination and arguments proferred either in support or opposition thereto. In such a situation, it cannot be said that the appellate court has lost touch with the case as contained in the record of appeal capable of affecting its perception and evaluation of the issues for determination in the appeal.

There is also the argument of learned counsel for appellant to the effect that the failure of the Presiding Justice of the Court of Appeal concerned to send a report on the delay in the delivery of the judgment to the Chairman of the National Judicial Council as provided in sub-section (6) of Section 294 of the 1999 Constitution, as amended, is fatal to the judgment so delivered contrary to Section 294(1) of the said 1999 Constitution as amended.

I hold the considered view that the above submission is misconceived as the provision of sub-section (6) of Section 294 of the 1999 Constitution is directive in nature - not mandatory - and it is crafted for administrative convenience for the purpose of discipline of the judicial officer(s) concerned, where appropriate. It has

nothing to do with the validity of the judgment concerned which validity depends on appellant satisfying the appellate Court that the inordinate delay has resulted in a miscarriage of justice as earlier discussed in this judgment and provided for under subsection (5) of Section 294 of the 1999 Constitution, as amended.

It is for the above reasons and the more detailed reasons assigned in the lead judgment of my learned brother that I too find the appeal devoid of any merit and dismiss same accordingly.

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

Appeal dismissed

RHODES-VIVOUR, JSC: I have had the benefit of reading in draft the leading judgment of my learned brother Galadima, JSC. I agree with his lordship on his reasoning and conclusions. I intend to add a few words of my own on the importance of Section 294 of the Constitution. Section 294(1) and (5) of the Constitution states that:

> **"294(1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined duly authenticated copies of the decision within seven days of the delivery thereof.**
>
> **(5) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section, unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.**

The Court of Appeal heard closing speeches on the 18th of February 2002 and delivered judgment on the 30th of July 2003. That is to say judgment was delivered 450 days after address instead of within 90 days as stated in subsection (1) of Section 294 of the Constitution.

All courts in Nigeria are to ensure that they comply with the provisions of Section 294(1) of the Constitution. Judgments from all our courts must be delivered within 90 days after closing speeches.

Would subsection (5) of Section 294(1) of the Constitution apply to the decision of the Court of Appeal that delivered judgment 450 days after closing speeches?

A trial judge watches the demeanour of witnesses to see how readily they answer questions, were they evasive, contradictory of vague. What was the reaction of the witnesses when confronted with evidence, be it documentary which suggests that their testimony is untrue. It is after the above that the judge can attach weight to the evidence of witnesses and that can only be done when the judge sits in his study to prepare the judgment. A trial judge preparing a judgment after 90 days would have forgotten all the above or his memory would have faded on those issues.

Now, miscarriage of justice usually depends on the circumstances of the case. There would be miscarriage of justice when an error can be seen in the proceedings/ judgment, and had it not been for the error a decision more favourable to the party that lost would have been given. There is a miscarriage of justice when the decision given is inconsistent with established rights of the party complaining.

Would all that I have been saying apply to the judgment of the Court of Appeal?

It cannot be said that there is miscarriage of justice when an Appeal Court delivers judgment after 90 days. This is so since delay cannot affect the court perception, and evaluation of the case, since appeals are heard and determined on briefs. The appellant has in the circumstances failed to show how a delay of 450 days after address before judgment was delivered affected the judgment or how the delay has resulted in a miscarriage of justice. Non- compliance with Section 294(1) of the Constitution applies more to judgment of the High Courts.

For, this and the fuller reasons in the leading judgment the appeal is dismissed.

PETER-ODILI, JSC: I am in complete agreement with the judgment just delivered by my Lord, Suleiman Galadima JSC, and I shall make some remarks in support of the reasoning.

This is a consolidated land suit between two communities. The appellants, as plaintiffs in suit No. 0/11/76 representing themselves and the people of Usebe Village Ebu, sued the respondents representing themselves and the people of Ogodor.

In suit No/11/75, the respondents as plaintiff therein sued the appellants. On consolidation of the two suits, the plaintiffs in 0/11/75 remained plaintiffs, in the consolidated suits while the defendants in the said suit 0/11/75 remained defendants in the consolidated suits. In both suits, the claims of the parties, each on declaration of title to the land.

BACKGROUND FACTS

The facts are best presented by the pleadings which shall be quoted extensively

and they are thus:

FURTHER AMENDED STATEMENT OF CLAIM

1. **The plaintiffs are natives of Ogodor town and bring this suit for themselves and as representatives of the people of the said town, in Odiani Clan, of Asaba Division. The defendants are members of Usebe Village, Ebu, and are sued for themselves and representing the people of the said Usebe Village.**

2. **The land in dispute which is known as Ofia Ogodor (Ogodo Bush) is situate in Ogodo within Ogwashi-Uku Judicial Division and is more particularly described and verged PINK in survey plan No. LSU 3081 made for the plaintiffs by Chief I. U. Ufoegbune, Licensed Surveyor. The Plan No. LSU 3081 was made for the plaintiffs in answer to the defendants, cross action - Suit No. 0/11/76 Adano Maxwell and Another etc (as plaintiffs) v. Obi Osenwokwu and others etc (as defendants). The plaintiffs will also rely on the plan No.LSU 3081 in the above suit at the trial with necessary changes as to title, suit Number and parties where applicable.**

3. **The land in dispute verged PINK, which is part of larger expanse of land owned by the plaintiffs shown verged YELLOW in the plaintiffs, Plan NO. LSU 3081 is bounded on the south by Ogodo town itself and other portion of plaintiffs, land not in dispute, on the North by the Utor River and land of Ishan people, on the West by Iyi Anene and on the East by the Iyi Nkpume and the land of the Ebu people.**

4. **The plaintiffs inherited the entire land shown verged YELLOW in the plaintiffs, plan of which the land is dispute shown verged PIN in the lesser portion from one OKOGBOI the earliest ancestor of the plaintiffs' people. Okogboi begat Akote, the father of Izoya who begat Bidokwu the father of Obi Osenwokwu and the second defendant. The Obi Osenwokwu begat Obi Akabude Osenwokwu. The 2nd plaintiff also has children.**

5. **The said Okogboi came from Bini. He first settled at Idumuje Unor and later moved to Ugbodu from where he moved to Obomkpo. He was a notable hunter and travelled for and wide in the forests around.**

6. During his hunting expeditions Okogboi met and made friend with one Igbo-Nwoodogwu, an Ezi man.

7. It was during Okogboi's association with his Ezi friend that he went on the hunting expedition that took him up to a stream now known as Iyi-Anene, and which is shown on plaintiff's plan.

8. Okogboi was fascinated by the area around this stream because of the numerous bush pigs which evidently resided therein.

9. Okogboi communicated his find to his friend Igbo - Nwoodogwu, and further expressed a desire to establish a permanent settlement in the area. He was told that the area belonged to the people of Ebu.

10. Okogboi and his Ezi friend arranged to meet the people of (sic) whereupon they went to one Agbeona who was then a leading figure in Ebu, to whom they explained their mission.

11. Agebona advised a repeat visit so that he would have time to consult with his people of Ebu.

12. During a later visit as arranged, he bargained for an absolute grant of a piece of land to Okogboi, was concluded in the following terms -

(a) That Okogboi was to take oaths before three juju shrines that he would not allow unfriendly people to pass through his territory into Ebu. The juju shrines which belonged to Ebu were Ani-Ebu, Ubueyi and Iyiaja.

(b) That three goats were needed for the swearing ceremony which Okogboi had to produce.

(c) That in addition to this, Okogboi had to produce two women to be betrothed to Ebu people without payment of bride price.

(d) Okogboi performed all these conditions. The two women produced and (sic) given to the two divisions of Ebu were named Mgbodudu and Amuasua, the

two divisions of Ebu being Okomaje and Iyiakpati.

13. **On the conclusion of the ceremonies the people of Ebu led by one Odokpe of Iyiago-Shimili conveyed to Okogboi absolutely according to Native Law and Custom a portion of their land shown verged YELLOW in the plaintiffs' Plan. The Eastern boundary was fixed between the cotton tree and the Iroko referred to as "OATH" Tree. (for oaths were taken thereat). These trees have now fallen leaving the stumps there. The oath tree stump and the cotton tree stump are shown in the plaintiffs, Plan. The Ebu *people escorted Okogboi to the length and breadth of his land as shown verged YELLOW in the plaintiffs' plan. This happened before the advent of the Europeans.***

14. ***The plaintiffs as their ancestors before them formed their land including the portion now in dispute, and exercised other acts of ownership and possession over the said land. They built houses thereon, set up and worshipped juju thereon, tapped the raffia palm trees and have continued to let out the land to various tenants including Copane mechanized farmers. The plaintiffs have also defended their rights of ownership and possession over the land and to the knowledge of the defendant's people.***

15. ***In Odiani Clan Court Civil Case No. 57/50 Obi Osenwokwu v. Okonkwo Mgbokojele, the first plaintiffs father sued the plaintiffs' Eastern Ibo tenants for arrears of rent as tenants in the farm land.***

(a) ***One Chief Okoda from defendants village, who is now dead testified on behalf of Mgbokojele, and as representing one Asieme, the then Obi of Ebu. He testified to the effect that the land belonged to Ebu and all rents were due to Aseime.***

(b). ***The Clan Court on noticing that ownership of the land was being contested by Ogodor and Ebu people, suspended judgment until one of the parties took action for a declaration of title to the area in dispute.***

(c). ***Ebu people did not sue, but the plaintiffs in Odiani clan court suit No.74/50 by the 1st plaintiffs father, Obi Osenwokwu, sued Obi Asieme of Ebu for a "Declaration of title to the land and bush of Ogodor***

known as "Ogodor Town Land-Bush" and obtained judgment.

16. (a) In that case one Ekpei a native of Ebu, but now dead testified on the 27th day of September, 1950 as follows:

"The whole of Ebu town of nine quarters gave this land in dispute to plaintiffs' fore-grand fathers before the advent of British in Nigeria. We Okei and Usebe are one...."

16(b). On the same day Chief Okoda aforementioned also testified and said inter alia, "It now comes to the British advent that plaintiff keeps one man called Isaac Anene in the land. We called the plaintiff keeps one man called Isaac Anene in the land. We called the plaintiffs attention and asked him why he allows an Eastern Ibomen (sic) to come and carried (sic) all monies in the land and goes away without paying a farthing to you and also planting rubber depriving all the benefits that you will enrich yourself with." Okoda belonged to defendants village of Usebe. Anene's settlement is shown as old camp on plaintiffs' plan.

17. *The plaintiff will at the trial found on the said Odiani Clan Court suits and particularly rely on the testimonies of the deceased witnesses."*

18. In the month of August 1972 several members of defendant's village including the defendants, their servant and or agents broke and entered the plaintiffs' said land, *cleared a portion of it and made a traverse thereon which is the cause of the present suit.*

19. The plaintiffs therefore claim jointly and severally for themselves and on behalf of the people of Ogodor, against the defendants jointly and severally for themselves and on behalf of Usebe village Ebu as follows:

(a). A declaration that the piece and parcel of land described, known and called OFIA OGODO (Ogodo Bush) lying and situated in Ogodo, Asaba Division and verged pink in Survey plan No. LUS 3081 filed with Statement of Defence in Suit No. 01/11/76 and now used for this Suit is the property of the plaintiffs according to Native Law and Custom.

(b). ₦600.00 (Six Hundred Naira) being general damages for trespass.

(c). An injunction restraining the defendants, their servants and/or agents and each of them from continuing or repeating similar or other acts of trespass on the said land.

The facts as put forward by the defendants are stated hereunder as per their pleadings, viz:

FURTHER AMENDED STATEMENT OF DEFENCE

1. Save as is hereinafter expressly admitted the defendants deny each and every allegation of fact contained in the statement of claim as if each were specifically set out and traversed seriatim.

2. Save that it is admitted that the defendants are members of Usebe village, Ebu and sued in a representative capacity, the defendant deny all the other allegations contained in paragraphs 1 and 2 of the Statement of Claim and put the plaintiffs to strict proof thereof.

3. In further answer to the said paragraphs 1 and 2 of the Statement of Claim the defendants say that the plaintiffs are natives of Ugboba, Obomkpa in Ezechimo Clan of Aniocha Local Government Area.

4. The defendants vigorously deny paragraphs 3 and 4 of the Statement of Claim and aver that the land in dispute forms part of the defendants' land known as and called IYI-MKPUME Land.

5. The said land in dispute is situate at Ebu within the Ogwoshi-Uku Judicial Division of Bendel State of Nigeria and is more particularly described and delineated with its dimensions and abuttal on the Survey Plan No. MWC/1181/80 annexed hereto and therein verged PINK.

6. The defendants deny paragraphs 5, 6, 7,(a) 8, 9, and 11 of the Statement of Claim and put the plaintiff to strict proof of the allegations.

7. In further answer to the said paragraphs 5, 6, 7, 7(a) 8, 9, 10,

and 11 of the Statement of Claim the defendant's state:

(i) That when Odokpe was the Diokpa and head Chief of Iyagoshimi, Usebe and Aganike, that is to say, about 90 years ago, one Okolo Nwagba, a farmer and hunter from Ugboba, Obomkpa approached one Agbona, the then Chief and head of Usebe family in Ebu and asked for the grant to him of a portion of the defendants' Iyi-Nkpume land to live on and farm subject to Ebu native law and custom.

(ii) That when Okoto Nwagba went to Usebe, Ebu to ask for a portion of the said Iyi-Mkpume land he was accompanied by one Morah, an Ezi man who led him on the said mission for grant of the said land under Ebu customary law.

(iii) That following the said request by Okolo Nwagbo to Agbona for the grant to him of a portion of the defendants' Iyi-Nkpume land Agbona promised to take and did take him to the then Diokpa and head Chief of called Odokpe before whom Okolo Nwogba renewed his request for the grant of a portion of the said Iyi-Mkpume land after presenting to him three calabashes of palm wine, 20 kola nuts and one head of tobacco.

(iv) The said Diakpa and head Chief of Usebe and the elders of the defendants' village including Agbona after full and detailed discussions and consideration of Okolo Nwagba's request agreed to grant him a portion of Iyi-Mkpume land to live on and farm as a customary tenant. The portion of Iyi-Mkpume land granted to him is that shown and delineated in Survey plan No. MWC/1181/80 and therein verged GREEN.

Paragraph 12 of the Statement of Claim is emphatically denied and in further answer thereto the defendants say that their people did not grant any land absolutely or at all to Okogboi.

In still further answer to the said paragraph 12 of the Statement of Claim, the defendants say that about 90 years ago their people made a grant of their Iyi-Mkpume land to Okolo Nwagba in accordance of the Ebu customary law and subject to the following terms and conditions:

(a) That Okolo Nwagba will present goat and swear by the Ani-Ebu shrine not to allow unfriendly people and or enemies of Ebu to enter the said portion of land granted to him, pass through the same to invade the defendants and their other people of Ebu;

(b) To live on and farm the land;

(c) Not to seal, lease or in any other way to dispose of or alienate the same without the consent or the people of Usebe;

(d) To pay customary tributes of 60 yams, 50 kolanuts and one calabash of palm wine every year to the defendants;

(e) That in the event of the said Okolo Nwagba or his descendants not having an issue to succeed him or them that the said portion of Iyi-Mkpume land granted to him shall revert to the Usebe people. The defendants say that the land was not sold and no women were exchanged as is therein alleged or at all.

The defendants deny paragraph 13 of the statement of claim and put the plaintiffs to strict proof thereof. The defendants say that the portion of Iyi-Mkpume land granted to Okolo Nwagba under Ebu native law and custom is shown and delineated in the defendants, plan No. MWC/1181/80 and therein verged green and it was not the head Chief Odokpe who showed Okolo Nwagba the said land granted to him nor did he lead Ebu people to show the land as is alleged or at all.

The defendants further deny that the Eastern boundary of the land granted was fixed between a cotton tree and an "Oath" iroko tree, there being no "Oath" iroko tree as alleged or at all. The boundary of the land granted is shown verged green in the defendants Plan No. MEC/1181/80. The defendants put the plaintiffs to strict proof of all the other allegations contained in the said paragraph 13 of the Statement of Claim.

1. Paragraph 14 of the Amended Statement of claim is denied and in further answer thereto the defendants say that neither the plaintiffs nor their ancestors were ever in possession of the land in dispute nor did they exercise acts of ownership and possession as are alleged in the said paragraph or at all.

2. In answer to paragraphs 15, 16 and 17 of the Amended Statement of Claim, the defendants say that the said suits 57/50 (Obi Osenwokwu v. Okonkwo Mgbokojele) and 74/50 (Obi Osenwokwu v. Obi Asieme) were instituted by

Osenwokwu and the said two suits were not instituted in respect of and did not concern the land now in dispute but concerned portions of the land granted by the defendants, ancestor and shown, delineated and verged green in Survey plan No. MWC/1181/80. The defendants will at the hearing contend that the said suits are irrelevant and inadmissible.

3. **When Odokpe and his people granted the land to Okolo Nwagba, he Okolo Nwagba thankfully accepted the customary grant subject to the said terms and conditions and presented one goat with which he swore the Ani-Ebu shrine.**

4. **After the said customary grant, Okolo Nwagba and his descendants faithfully kept the terms and conditions of the grant and paid the customary tributes until during the time of Obi Osenwokwu. At first Obi Osenwokwu carried out the terms and conditions of the grant and paid tributes to the defendants until about 1949 when he began to put the tenants on the said land without the consent of (sic) to pay the said tributes, all contrary to the terms and conditions of the said grant.**

5. **Following the putting of tenants, including one Isaac Anene of Obosi, on the said land by Obi Osenwokwu without the approval of the defendants in or about 1949. One Obi Asieme of Ebu Objected that the tenants should pay rents to Obi Osenwokwu and he claimed that the same shall be paid to him. This claim by the said Obi Asieme led to the institution of Suits 57/50 and 74/50 by Obi Osenwokwu against him. The said Suits were in respect of portions of the said land granted to the plaintiffs' ancestor, Okolo Nwagba by the defendants, people.**

6. **The said portion of land granted to the said Okolo Nwagba to live on and farm is described, shown and delineated on the defendants, plan No MWC/1181/80 filed in this suit and therein verged GREEN and it does not extend to or include the defendants, land now in dispute, shown verged PINK in the said plan.**

7. **The defendants, land now in dispute is bounded on or towards the North by the Utor River, and the land of Inyelen people in Ishan Area of Bendel State of Nigeria, to the south partly by the land granted by the defendants to the plaintiffs,**

ancestor and partly by the other land of the defendants, not in dispute, on the East by Iyi-Mkpume and the other lands of the defendants also not in dispute and on the West by the Iyi-Anene and the land of Ogbeofu, Ezi called Ugboko Ogbeofu.

8. **The said land in dispute has been the property of the defendants who have also been in possession of the same from time out of human memory. As owners in possession of the said land in dispute, the defendants have exercised maximum acts of ownership over the same by farming thereon, cutting palm fruits from palm trees growing on the land and giving portions thereof to tenants who farmed the same, built their farm houses thereon and paid tributes to the defendants.**

9. **In or about the year 1951, one Okodu Anene, a member of the defendants, people planted rubber seedlings on the Western portion of the said land in dispute and these plants later grew into a big rubber plantation, which were tapped by him for many year. The defendants have two of their family shrines, the Iyi-Akpaka shrine and the Aji-Mkpume shrine, which they worship on their said land now in dispute.**

10. **The defendants also put tenants who tap raffia palm wine from raffia palms growing on the northern portion of the land in dispute.**

11. **At the hearing, the defendants will contend that the plaintiffs whose action is speculative and vexatious are on a land grabbing adventure and that the same ought to be dismissed.**

12. **The defendants will further contend that the plaintiffs are not entitled to the relief sought or to any part thereof and will pray the court to dismiss the same.**

At the trial of the consolidated suit, the plaintiffs called six witnesses. The defendants in turn called six witnesses. At the close of trial and after addresses by learned counsel for the parties, the learned trial judge reviewed the evidence before him and dismissed the case of the plaintiffs, who being dissatisfied appealed to the Court of Appeal or the court below. The court below also dismissed the appeal and again aggrieved the appellants has appealed to this court upon three grounds of appeal.

In keeping with the Rules of his court, briefs of argument were settled and filed by each side and on the 10th day of February, 2014 date of hearing, learned counsel for the appellant, Mr. Folabi Kuti adopted their Brief of Argument settled by Osaro Eghobamien and filed on 9th day of February 2006. In the Brief were couched three issues for determination stated hereunder as follows:

(a) Whether in the face of the provision of Section 294 (1) & (16) of the 1999 Constitution, the judgment of the lower court is not a nullity.

(b) Whether the learned Justices of the Court of Appeal were right in dismissing the appellants' appeal on the ground that Exhibit C constitutes *res judicata*.

(c) Whether the Court of Appeal were right in pronouncing on an issue not canvassed before the court, without inviting parties to address on it.

For the respondents, learned counsel, Chike Onyemenam Esq. adopted their Brief of Argument filed on 31/10/12 and deemed filed on 7th day of October 2013. Learned counsel for the respondents crafted three issues for determination which are thus:

1. Whether by virtue of the provisions of Section 294(1), (5) and (6) of the 1999 Constitution, the judgment of the Court of Appeal amounts to a nullity.

2. Whether the learned justices of the Court of Appeal dismissed the appellants' appeal on the ground that Exhibit "C" constitutes *res judicata* and if so, whether same has led to a miscarriage of justice.

3. Whether the Court of Appeal pronounced on an issue not canvassed before the court without inviting parties to address on it, and if so, whether same has led to a miscarriage of justice.

The issues as differently couched by either side are really in substance asking the same questions and so it is easy to utilise the issues as distilled and framed by the appellants.

ISSUE ONE

Whether in the face of the provision of Section 294 (1) & (16) of the 1999 Constitution, the judgment of the lower court is not a nullity.

Learned counsel for the appellant submitted that with the inordinate delay from the final address made on the 18th day of February 2002 whilst the judgment was delivered on the 30th day of July 2003, a period of well over 450 days after the conclusion of final addresses had a negative impact on the minds of the judges and leaves one of the parties with an impression that justice has been denied. That the constitutional provision of Section 294(1) of the 1999 Constitution provides that every court established under the Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses which provision had been infringed upon by the Court of Appeal. He said the provision for 90 days for delivery of judgment is mandatory. He cited *Ifezue v. Mbadugha* (1984) 1 SCNLR 427; *Odi v. Osafile* (1985) NWLR (Pt 1); *Owoyemi v. Adekoya* (2003) 18 NWLR (Pt 852) 307; *Dibiamaka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101 at 114.

For the appellant was submitted that the clear, literal and unambiguous words and interpretation of Section 294 of the Constitution reveal that the requirement of miscarriage of justice becomes evident only when subsections (1) and (5) are read together, while the community reading of subsection (1) and (6) clearly shows that the subsection was enacted to act as a check on both the trial courts and the appellate courts. He said the failure of the court as in the instant appeal in not reporting the non-compliance to the National Judicial Council would render any such decision null and void. That the employment of the word "shall" in subsection (6) when used put the position precisely and beyond speculation or conjecture. The learned counsel for the appellant further contended that well established rules of interpretation require that the meaning and intention of the framers of a constitution must be ascertained from the language of that constitution itself. He referred to *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356 (SC); *A.G. Lagos State v. A.G. Federation* (2004) 18 NWLR (Pt. 904) SC 1.

For the respondents were contended that the interpretation of Section 294 (6) of the 1999 Constitution is that it is a purely administrative provision meant to enable the NJC, the body vested with the power to discipline erring Judicial Officers, to take any disciplinary measures it may deem fit to take against judges who flagrantly disobey the provisions of Section 294(1) of the 1999 Constitution. That the consequences of failure to comply with the above mandatory but administrative provisions is totally left with the NJC as provided therein, to take any action it may deem fit. That the failure of the presiding Judge to send the report of the NJC cannot form a ground of appeal against the judgment since the Report is not meant to be embodied or form part of the judgment, but is supposed to be written and sent as soon as possible after delivery of judgment.

It was further submitted that the appellants did not provide any evidence or any explanation as to how they came to the conclusion that the Presiding Justice of the Court of Appeal did not send the said Administrative Report or even show that the presiding Judge whose failure is the subject of this complaint was served with

a notice of same. That the burden was on the appellants to adduce evidence of non-compliance but they failed to do so and merely relied on the submissions of their counsel in his Brief of Argument to urge this court to declare the judgment of the Court of Appeal null and void.

The posture of the appellants is that the inordinate delay in delivering judgment has deeply impacted on the court's perception, appreciation and evaluation of the appeal, thus occasioning a severe miscarriage of justice. The respondent disagreeing stated that the failure of the presiding justice to send a report to the National Judicial Council is an administrative lapse which would not fatally affect the validity of the judgment so long as no miscarriage of justice had been occasioned.

The issue is based on Section 294 (1), (5) and (6) which provisions I shall recast hereunder *viz*:

> **"294. (1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof."**
>
> **"(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section, unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.**
>
> **(6) As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the council informed of such action as the Council may deem fit".**

Indeed, it is not in dispute that the final addresses in the Court of Appeal were made on the 18th day of February, 2002 and the judgment was delivered on the 30th day of July, 2003, a period of 450 days after those addresses were rendered. However by the provisions of Section 294 (1) of the 1999 Constitution of Federal Republic of Nigeria, the period for the delivery of judgment is 90 days of the final addresses. These 90 days prescribed even though mandatory cannot be taken that the judgment is rendered a nullity after 90 days would have elapsed on account

of the provisions of subsection (5) of the same Section 294 since there has to be established that a miscarriage of justice had been occasioned on account of the time lag. In this regard in deciding whether a party has suffered a miscarriage of justice as a result of the delay between the conclusion of the trial and addresses as against the delivery of the judgment, the main issue is not on the length of time but on the effect the delay has produced in the mind of the court in terms of whether the delay had apparently and obviously affected the court's perception, appreciation and evaluation of the case and if the mind of the court was impaired thereof then the intervention of the appellate Court is called for. See *Dibiamaka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101 at 114. In this instance, the appellant have not shown how the mind of the court below was negatively affected in the way they evaluated the documents before them on appeal and how that court showed its perception, appreciation and evaluation of the case. It has to be said that it is not enough to tout the number of days, weeks, months or years between the end of trial and the delivery of judgment as it has to be proved by the party who is aggrieved to show the impact of that delay, inordinate or not in the review of the case by the court. That appellants have failed to do except to make much of the period of the delay.

Furthermore the provision under Section 294(6) of the Constitution which provided for a report by the presiding justice on the matter of the delay to the National Judicial Council which report has not been shown to have been made has no effect on whether or not the judgment would be declared null and void for the passage of time but for administrative purposes at which the NJC would see if there was negligence of duty on the part of the court or its justices and what sanction to be visited on the infringing justices. This is to show that there is a distinction between the non-compliance with the 90 days period for delivery of judgment and the vitiation of the judgment as against what the NJC would do with the erring judge involved. Therefore the stance of the appellants that the non-report to the NJC would have the effect of rendering the decision made outside the 90 days period null and void not the correct interpretation as envisaged by the lawmaker upon the community reading of Section 294(1), 5 on the one hand and (1) and (6) on the other. The conclusion is that the cases of *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356; *A.G. Lagos State v. A. G. Federation* (2004) 18 NWLR (Pt. 904), cited and on which appellants are hanging their position are not available for our purpose here.

I have no difficulty in the circumstances in resolving the issue against the appellant and in favour of the respondents.

ISSUES TWO AND THREE

4. Whether the learned Justices of the Court of Appeal were right in dismissing the appellant's appeal on the ground that Exhibit C constitutes *res judicata*.

5. Whether the Court of Appeal were right (sic) in pronouncing on an issue not canvassed before the court, without inviting parties to address on it.

For the appellants was submitted that there is a long line of cases which establish that the plea of *res judicata* is always used as a defence and that it is anomalous for a plaintiff who has invoked the jurisdiction of the court to also be the one to attack the jurisdiction of the court by raising the plea of *res judicata*. That the respondents never raised the issue of *res judicata* as it did not avail the respondents as plaintiffs to make any such claim in their statement of claim. He cited *Fadiora v. Gbadebo* (1978) 3 SC 291; *Iyayi v. Eyigebe* (1987) 3 NWLR (Pt. 61) 523; *Ijade v. Ogunyemi* (1996) 9 NWLR (Pt. 470) 17 at 33 - 34.

Learned counsel for the appellant went on to state that the approach of the trial court was wrong as he ought to have sent the matter for retrial. He cited *Odofin & Ors v. Mogaji & Ors* (1978) 2 NSCC 275.

That the Court of Appeal having failed to properly evaluate the true worth of Exhibit "C" the court below erred in dismissing the appeal on the ground that Exhibit "C" constitutes *res judicata*.

For the appellants, it was submitted that the court below raised the issue of *estoppel suo motu* since it was not pleaded by the parties and utilizing that issue fell into grave error which occasioned a grave miscarriage of justice.

Responding, learned counsel for the respondents said the Court of Appeal did not find the judgment in Exhibit "C" was *res judicata*, but that certain facts which were accepted by the Native Court therein, constituted Issue *Estoppel* and which facts consisting issue *Estoppel* were pleaded in paragraphs 15 - 17 of the respondents' pleadings. That the phrase "Issue *Estoppel*" and "*Res Judicata"* need not be expressly stated in a party's pleadings provided the facts constituting such a plea are stated as was done by the respondents. That the parties properly joined issue on the said plea in the Amended Statement of Claim and the Amended Statement of Defence. He referred to *D.T.T. Enterprise (Nig.) Ltd v. Busari* (2011) All FWLR (Pt. 563) 1818 at 1846 - 1847.

Going on, learned counsel for the respondents said assuming but not conceding that the court below found that the proceedings and judgment in Exhibit C constituted *Res Judicata* or Issue E*stoppel*, the argument that *res judicata* is used as a shield and not a sword cannot apply to the case in hand as there were two actions of declaration of title, one of the appellants as plaintiffs suing respondents as defendants and the other way round in the other suit and so the respondents were entitled to rely on the issue *estoppel* in their defence in the suit against them.

That the issue *estoppel* was a live issue placed before Court of trial and the Court

of Appeal and not a new use introduced by the trial Court and Court of Appeal *suo motu* requiring the said courts to specifically invite the parties for a fresh address on same.

The grouse of the appellants is that the Court of Appeal fell into error in relying on Exhibit C as *res judicata* when they held that the judgment in Exhibit C is conclusive of the facts forming the grounds for the judgment. That the respondents as plaintiff's *res judicata* would not avail them and it was wrong for them to make an issue relating thereto in their statement of claim.

The respondents disagreed with the view as postulated by the appellants stating that the argument that *res judicata* is used as a shield and not as a sword cannot apply to the present case because there were two actions for declaration of title, one of the appellants as plaintiff suing the respondents as defendants, and the other by the respondents as plaintiff suing the appellants as defendants and so the respondents were perfectly entitled to rely on the plea in their defence in the suit against them by the appellants claiming declaration of title over the same parcel of land adjudged to belong to the respondents by the Native Court in Exhibit "C".

In order to refresh the mind I shall quote excepts from the trial court as follows:

> **"There is no doubt at all that the land in dispute including all the land of the plaintiff belong to Ebu people. But the issue here is whether the said land belonged to the whole Ebu as contended by the plaintiffs or the Usebe people (sic) by the defendants. From the totality of evidence of the parties which I have seriously considered, I am firm that the lands in dispute originally belong (sic) to Ebu people not to the Usebe people alone of the defendants. I am fortified in this regard by the proceedings in Odiani Native Court in Suit 74/50 which was received in evidence as Exhibit "C"**
>
> **Therein it was held that "Ogodo Bush" or Ofia Ogodo was granted the plaintiffs by the whole Ebu not by Usebe people of the defendants alone. The evidence of PW6 Bidokwu Augustine in this regard was corroborated by the said Exhibit "C". Consequently I find as a fact and so hold that the land in dispute including all the other lands of the plaintiffs were granted to Ogodo people by Ebu People."**

The learned trial judge went on as stated hereunder, *viz*:

> **"Judgment for plaintiff for the declaration of title to land in view of Chief Okoda's statements that he Chief Okoda was born at Ogodo and that this land in dispute of Ogodo was alienated by the Ebu people on the whole to the plaintiff's fore fathers before the advent of British Government in Nigeria. And since twenty two years now**

of paying tax. All remunerations due to the landlord were paid to the plaintiff up to date as landlord. Which Ebu people never interfered? The plaintiff is still collecting tax in Ogodo town. It was Onicha - Olona Court that the plaintiffs father used to attend before then afterward to Odiani one. They never attended Ebu Court which shows that they are not subjected to Ebu. Therefore the land and its bush is for plaintiff" (See page 6 lines 28 - 34 and page 7 lines 1 - 5 of Exhibit "C"

The Court of Appeal on its part stated as follows:

"The judgment in Exhibit "C" was not appealed against up to the time the consolidated Suits 0/11/75 and 0/11/76 were instituted. The judgment is therefore conclusive of the facts forming the ground for judgment for Section 54 of the Evidence Act provides as follows:

"S. 54 Every judgment is conclusive proof, as against parties and privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which the judgment is intended to be proved."

By virtue of Section 54 Evidence Act, the judgment contained in Exhibit "C" is conclusive proof of the facts it decided. The plaintiffs now respondents could have pleaded *estoppel* of the said judgment since they remained plaintiffs in the consolidated actions in suit No. 0/11/75 and 0/11/76."

Clearly evident from the judgments of the Court of trial and the appellate one and considering them in line with the record, it is clear that the concurrent findings of the two Courts below were supported by the pleadings in which the issues of *Estoppel* were well captured and it is not correct to say the trial or the appellate one raised the issue *suo motu*. Therefore there was no basis for an invitation of the parties to address court on a new issue of *estoppel* or *res judicata* well situated in the pleadings and evidence linking the plea proffered in evidence.

Also available from the judgment of the trial court as affirmed by the Court of Appeal is that the decision was founded on traditional history placed side by side and the stronger evidence of the plaintiffs now respondents prevailed. The point must not be shied away from, that while the plea of *res judicata* may not be sufficient to find in totality for the respondents, it is established that *estoppel* would apply in respect of the issue that the entire Ebu community including the star witness, Chief Okoda from the present appellants, Usebe Quarters or village of Ebu Community, claimed and led evidence that the land originally belonged to the entire Ebu community as one land unit, before the community sold same out

rightly to the respondent' ancestor and which fact was accepted by the Native Court in its judgment in Exhibit C. This in effect would certainly stop the appellants who are one out or the nine villages that make up Ebu Community to raise the same issue by claiming that their Usebe villages were the original owners of the said land.

What I am trying to say, is that it is not for the appellants at subsequent periods after the judgment in Exhibit "C" to go against any of the issues therein dealt with and not appealed against. They are not allowed to dance to a tune only to come later to say that dance was not theirs as they intend to dance differently at a new occasion. They must be consistent apart from being bound for all time on an issue deliberated and concluded by a tribunal or Court and the matter not appealed against successfully. It is therefore to be said that the concurrent findings of fact by the two courts below in the absence of any exceptional circumstances or a miscarriage of justice cannot be disturbed by this court. See *Abimbola v. Abatan* (2001) FWLR (Pt. 46) 989 at 1002.

From the above and the better reasoning in the lead judgment, I too dismiss this appeal which lacks merit.

I affirm the judgment of the Court of Appeal which upheld the judgment of the trial High Court.

OKORO, JSC: I read in draft the judgment of my learned brother, Suleiman Galadima, JSC, just delivered. I completely agree that this appeal is devoid of merit and ought to be dismissed. My learned brother has ably resolved all the salient issues submitted for the determination of this appeal. I however propose to make a few comments in support of the judgment.

The facts of this case have been adequately stated in the lead judgment and I do not intend to repeat the exercise. The issues formulated for the determination of this appeal by the appellants are as follows:-

> *"a) Whether in the face of the provision of Section 294(1) & (6) of the 1999 Constitution, the judgment of the lower court is not a nullity.*
>
> *b) Whether the learned justices of the Court of Appeal were right in dismissing the appellants' appeal on the ground that Exhibit C constitutes res judicata.*
>
> *c) Whether the Court of Appeal were right in pronouncing on an issue not canvassed before the court without inviting parties to address on it."*

The learned counsel for the respondents also distilled three issues which are the

same as those of the appellants though couched different as follows:-

> *"(i) Whether by virtue of the provisions of Section 294 (1), (5) and (6) of the 1999 Constitution, the judgment of the Court of Appeal amounts to a nullity.*
>
> *(ii) Whether the learned justices of the Court of Appeal dismissed the appellants' appeal on the ground that Exhibit C constitutes res judicata and if so, whether same has led to a miscarriage of justice.*
>
> *(iii) Whether the Court of Appeal pronounced on an issue not canvassed before the court without inviting parties to address on it; and if so, whether same has led to a miscarriage of justice."*

The kernel of this appeal appears to me to be issue number one. I shall therefore limit my comments to the said issue one.

Learned counsel for the appellants in their brief drew the attention of this court to the inordinate delay between final addresses made on 18th February, 2002 and the judgment delivered on 30th July, 2003, a period of well over 450 days and submitted that such inordinate delay not only has a negative impact on the mind of the judges but also leaves one of the parties with an impression that justice has been denied. He submitted further that failure to deliver judgment within the time prescribed by Section 294 (1) of the 1999 Constitution makes the judgment unconstitutional. That the delivery of judgment within 90 days is mandatory and a failure renders the judgment a nullity, relying on the case of *Ifezue v. Mbadugha* (1984) 1 SCNLR 427.

According to learned counsel such inordinate delay, breeds miscarriage of justice, citing the cases of *Owoyemi v. Adekoya* (2003) 18 NWLR (Pt. 852) 307, *Dibiamaka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101.

In response, the learned counsel for the respondents, while agreeing with the submissions of learned counsel for the appellants on the import of Section 294 (1) of the 1999 Constitution, he however opined that by Section 294 (5) of the same Constitution a judgment will not be invalidated for non-compliance unless and until the appellate Court considering such a complaint on appeal is fully satisfied that the appellant has shown that it had suffered a miscarriage of justice by such late delivery of judgment. He further submitted that miscarriage of justice is not really based on length of time *simpliciter* but the effect it produced in the mind of the court.

Learned counsel argued that the Section applies more to judgments of trial courts where the court sees and hears the testimony of witnesses while appellate Courts

merely review documents. On the purport of Section 294 (6), learned counsel submitted that the National Judicial Council cannot nullify a judgment but can only take administrative decision against a judge for failure to make the report.

Now, Section 294 (1), (5) and (6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides:

> *"(1) Every court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery.*
>
> *(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.*
>
> *(6) As soon as possible after hearing and deciding any case in which it has been determined or observed that there was non-compliance with the provisions of subsection (1) of this section, the person presiding at the sitting of the Court shall send a report on the case to the Chairman of the National Judicial Council who shall keep the Council informed of such action as the Council may deem fit.*

From the above constitutional provision, a court is mandated to deliver its judgment within 90 days after final addresses. This applies to both trial and Appellate Courts. There is no doubt that the delay in the delivery of the judgment by the court below was inordinate and offends against Section 294 (1) of the 1999 Constitution of the Federal Republic of Nigeria. Ordinarily, that will render such a judgment a nullity. See *Ifezue v. Mbadugha* (1984) 1 SCNLR 427. However, by Section 294 (5) of the said Constitution, delay alone will not lead to setting aside the judgment unless there is evidence of miscarriage of justice.

In *Dibiamaka v. Osakwe* (1989) 3 NWLR (Pt. 107) 101, this court held that in deciding whether a party has suffered a miscarriage of justice as a result of inordinate delay between the conclusion of a trial and the delivery of judgment, the emphasis is not on the length of time *simpliciter* but on the effect it produced in the mind of the court. That is, if this inordinate delay apparently and obviously affected the court's perception, appreciation and evaluation of the case, then the appellate Court would intervene.

It is my view that in circumstance such as this, it is the duty of the appellants to show how the delay has affected the perception, appreciation and evaluation of the evidence by the judge or justices as the case may be or how the delay eroded the confidence in the entire judicial process which produced the judgment. In cases where the delay involves the judgment of a trial court which is to hear and see witnesses, I will readily agree that a delay of about 17 months after final addresses was so inordinate to affect the outcome of the proceedings. However, when it concerns an appellate Court as in this case, I will be very slow to so declare because appellate Courts' functions are based on printed records only which involved the reading and appreciation of written briefs of argument and oral amplifications of such Briefs which are recorded by the justices. They cannot be said to have lost touch with the contents of the printed reviews placed before them such that it would affect their perception and evaluation of the Appeal which is based on printed records only. I think that this section applies more to trial Courts than appellate Courts.

Let me make a few comments on Section 294 (6) of the Constitution of the Federal Republic of Nigeria. It was argued by the appellants' Counsel that failure of the court below to report the delay to the National Judicial Council should ordinarily cause such judgment to be set aside regardless of whether there has been a miscarriage of justice. This position, to say the least, is erroneous. It is my view that Section 294 (6) of the Constitution of the Federal Republic of Nigeria is merely an administrative provision which is meant to enable the National Judicial Council to take disciplinary measures against erring judges and not a provision to enable the body to set aside any judgment. Any failure to make any report cannot by any stretch of imagination lead to the annulment of the judgment.

On the whole, it is my view that the appellants failed to show that they suffered any miscarriage of justice based on the said delay. It is on this note that I agree with the judgment of my learned brother, Galadima, JSC that this appeal lacks merit. I also dismiss the appeal. I abide by the order as to costs.

Cases cited in the judgment

A.G. Lagos State v. A.G. Federation (2004) 18 NWLR (Pt. 904) SC 1
Abimbola v. Abatan (2001) FWLR (Pt. 46) 989
Akpan v. Umoh (1999) 7 SC. (Pt. II) 13
Alao v. ACB Ltd (1998) 3 NWLR (Pt. 542) 339
D.T.T. Enterprise (Nig.) Ltd v. Busari (2011) All FWLR (Pt. 563) 1818
Dibiamaka v. Osakwe (1989) 3 NWLR (Pt. 107) 101
Fadiora v. Gbadebo (1978) 3 SC 219
Ibero v. Ume-Ohana (1993) 2 NWLR (Pt. 227) 510
Ifezue v. Mbadugha (1984) 1 SCNLR 427
Ijade v. Ogunyemi (1996) 9 NWLR (Pt. 470) 17
Ike v. Ugboaja (1993) 6 NWLR (Pt. 301) 539
Ikeni v. Efamo (2001) 5 SC. (Pt.1) 160

Iyaji v. Eyigebe (1987) 3 NWLR (Pt. 61) 523
Ladega v. Durosimi (1978) 3 SC 91
Mbonu v. Nwoti (1991) 7 NWLR (Pt. 206) 737
Odi v. Osafile (1985) 1 NWLR (Pt. 1) 1
Odofin & Ors v. Mogaji & Ors (1978) 2 NSCC 275
Oshodi v. Eyifunmi (2000) 13 NWLR (Pt. 684) 298; (2000) 7 SC (Pt. 2) 145
Owoyemi v. Adekoya (2003) 12 SC (Pt. 1) 1
Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt. 50) 356 (SC)
Spaco Vehicle and Plant Hire Co. v. Alrane (Nig.) Ltd (1995) 8 NWLR (Pt. 416) 655

Statutes cited in the judgment
Section 258 of the 1979 Constitution of the Federal Republic of Nigeria
Sections 294 (1) (5) and (6) of the 1999 Constitution of Federal Republic of Nigeria

History:

HIGH COURT
Asaba High Court
Ugwuashi-Uku High Court
Odita, J

SUPREME COURT OF NIGERIA
Walter Samuel Nkanu Onnoghen, JSC *(Presided)*
Suleiman Galadima, JSC (*Read the lead judgment)*
Bode Rhodes-Vivour, JSC
Mary Ukaego Peter-Odili, JSC
John Inyang Okoro, JSC

Counsel:
Folabi Kuti Esq., with Gospel Adamu Esq. for appellants
Chike Onyemenam Esq., with Philips Adu-Odogwu Esq. for respondents

NIGERIAN AGIP EXPLORATION LIMITED v. NIGERIAN NATIONAL PETROLEUM CORPORATION; OANDO OIL 125 & 134 LTD

COURT OF APPEAL
(ABUJA DIVISION)

CA/A/628/2011
TUESDAY 25TH FEBRUARY, 2014

(SANUSI; TINE TUR; AKOMOLAFE-WILSON, JJ.CA)

ARBITRATION – Agreement – Parties are bound by arbitration agreement and ensuing award.

ARBITRATION – Award – Enforcement can only be by judicial proceedings.

ARBITRATION – Interference by Court – in arbitration is limited by law.

ARBITRATION – Injunction – Courts are reluctant to curtail arbitration proceedings as aggrieved party has alternate remedies.

ARBITRATION – Injunction – Inherent power of court is limited in relation to arbitration proceedings.

ARBITRATION – Dispute Resolution – Aim of arbitration is to ensure speedy resolution of dispute; therefore interference by courts is restricted.

COMMERCIAL LITIGATION - Injunction – Appellate court will interfere where exercise of discretion is not judicial or judicious.

COMMERCIAL LITIGATION – Injunction – Grant of interlocutory injunction must be on merit and cannot be predicated on refusal of application to discharge the interim order.

COMMERCIAL LITIGATION - Injunction – Court must not delve into the substantive suit.

COMMERCIAL LITIGATION - Injunction – Court will not grant injunction where plaintiff will not suffer irreparable damage.

COMMERCIAL LITIGATION - Interlocutory Application – Court must refrain from determining issues or rights in the substantive claim.

COMMERCIAL LITIGATION – Injunction – Applicant must show that it has an individual legal right to protect.

INJUNCTION – Interim and Interlocutory Injunction – The first is granted to preserve the res pending determination of the motion or notice while the latter is granted to preserve the res pending determination of the substantive suit.

INJUNCTION – Grant – Court must consider and show that guiding principles were followed.

INJUNCTION – Guiding Principles – Applicant must show that there are serious issues, balance of convenience is in its favour, award of damages cannot adequately compensate, its conduct is beyond reproach; and undertake to pay damages.

INJUNCTION – Balance of Convenience – Court must weigh the need to protect the claimant against injury that may arise from preventing the defendant from exercising a legal right.

FOREIGN LAW – Proof – Burden rests on party who asserts that a foreign law is different from Nigerian law.

Facts:

The appellant and respondents are parties to a Production Sharing Contract (PSC) in respect of an Oil Prospecting License which was subsequently converted to an Oil Mining Lease. The PSC contained a crude oil sharing formula.

Also, the PSC stated that disputes as to the interpretation or performance of the contract are to be referred to arbitration in accordance with the Arbitration and Conciliation Act Cap. A18 LFN 2004. Accordingly, dispute arose among the parties on the performance of the PSC, the appellant and 2nd respondent therefore sought the interpretation of the PSC by referring the matter to arbitration and issuing a Notice of arbitration to the 1st respondent.

All the parties participated in the arbitral proceedings and a partial award was issued substantially in favour of the appellant and 2nd respondent.

Dissatisfied with the award, the 1st respondent filed an originating motion at the Federal High Court Abuja seeking orders setting aside the award; refusing its recognition and enforcement; and staying further proceedings in the arbitration.

The court granted the interim orders and fixed the motion on notice for hearing. The appellant and the 2nd respondent jointly applied for the discharge of the interim orders.

The Federal High Court dismissed the appellant and 2nd respondent's application and granted the interlocutory orders sought by the 1st respondent.

Dissatisfied, the appellant appealed against this Ruling.

Held ***(Unanimously allowing the appeal):***

[1] ***Arbitration – Agreement – Parties are bound by arbitration agreement and ensuing award.***

Arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction; whose decision is in general, final and legally binding on both parties appointed by a court, to hear the parties claims and render a decision. The process of arbitration derives its force principally from an agreement of the parties and the law requires the parties to obey the rules, proceedings and awards of the arbitration panel. – *Commerce Assurance Ltd v. Alli* (1992) 3 NWLR (Pt 232) 710 SC; *Kano State Urban Dev. Board v. Fanz Construction Co Ltd* (1990) 4 NWLR (Pt 142) 1; *African Re Corp v. Aim Consultancy Ltd* (2004) 11 NWLR (Pt 884) 223. **(P. 173 lines 41 - 45; P. 174 lines 1 - 5)**

[2] ***Arbitration – Award – Enforcement can only be by judicial proceedings.***

Otherwise, the law, as correctly stated by the appellant is that an arbitral award can only be enforced through judicial proceedings. In *Okechukwu v. Etukokwu* (1998) 8 NWLR (Pt 562) 513 at 529, Tobi JSC expatiated thus -

> **"In law an arbitral award *per se* lacks enforcement and enforceability. It does not carry any element of sanction until a court of law, by its judicial powers breathe enforcement or sanction on it."**

See *Shell Trustees (Nig) Ltd v. Imani & Sons Ltd* (2000) 6 NWLR (Pt 662) 639 at 657. **(P. 172 lines 5 - 15)**

[3] ***Arbitration – Interference by Court – in arbitration is limited by law.***

Where parties choose to have their dispute settled by arbitration, then subject to certain limited exceptions the attitude of the court has been that parties should take the arbitration for better or worse. Thus the jurisdiction of the High Court to set aside an Arbitral Award is within very narrow confines. - See *Aye-Fenus Ltd v. Saipen Nig. Ltd* (2009) 2 NWLR (Pt 1126) 486 at 513 - 514; *Bake Marine (Nig) Ltd v. Danos 7 Curole Marina Contractor Inc.* (2001) 7 NWLR (Pt 712) 335.

Section 34 of the Arbitration and Conciliation Act (ACA) Cap A.18, Laws of the Federation of Nigeria, 2004 states specifically that –

> **"A court shall not intervene in any matter governed by this Act except where so provided in this Act."**

The exceptional circumstances under which an award can be set aside are restricted. They are stated in sections 29, 30 at 48 of the Act. The underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts. The essence of an award in arbitration is that it is binding on the parties. It is also implied that the parties will readily accept the decision of the arbitrators in normal circumstances.

However in Nigeria in the interest of justice and fair play, the Act provides certain exceptions for the court to intervene. On the import of Section 34 of A.C.A., J.O. Orojo and M.A. Ajomo the learned authors of LAWS AND PRACTICE OF ARBITRATION and CONCILIATION IN NIGERIA at p. 269 on the input of S.34 of A.C.A., stated thus -

> **"The Decree provides for the intervention of the court in certain aspects of the arbitral process such as stay of proceedings, issue of subpoena, appointing arbitrator where there is default, removal of an arbitrator for misconduct, setting aside of the award and enforcement of award. Where, however, the Decree does not provide for the intervention of the court, this should not be done. Thus, where, e.g. it is intended to remove an arbitrator for partiality, the challenge procedure should be adopted. It will be wrong to apply to court for an injunction to restrain him, except perhaps in the case of a recalcitrate (sic) sole arbitrator, or where he is charged with misconduct."**

It is clear from judicial decisions in this country and from other jurisdiction that the scheme of the statutes regulating arbitration generally limit the scope of courts intervention in arbitral proceedings. The learned senior counsel for the appellant also cited some foreign decisions to support his contention that the courts do not have power to intervene in private arbitral... **(P. 174 lines 7 - 44; P. 175 lines 1 - 5)**

[4] ***Arbitration – Injunction – Courts are reluctant to curtail arbitration proceedings as aggrieved party has alternate remedies.***

This court, (Lagos Division) very recently in the case of *Statoil Nig Ltd &*

Anor v. NNPC & 2 Ors (2014) 14 NWLR (Pt 1373) 1 at pages 25 paras C - F, 28 para. H, 29 paras. F - H made a pronouncement on the limit of court's intervention in arbitral proceedings; specifically on the principles of propriety of the court to grant injunction in Arbitration proceedings. The court stated that the intention of the legislature in making the provision in section 34 of the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria, 2004 is to protect the mechanism of arbitration and to prevent the courts from having direct control over arbitral proceedings or to prevent the courts from intervening in arbitral proceedings outside the circumstances specified in the Act. In other words, the intention of the legislature is to make arbitral proceedings an alternative to adjudication before the courts, and not an extension of court proceedings. In this case, the issuance of an *ex parte* order of interim injunction was not permitted under the Arbitration and Conciliation Act. In the circumstance, the trial court erred when it made the order sought by the 1st respondent.

In my humble view, since it is crystal clear that the courts are generally reluctant to intervene in the award of arbitral proceedings except in special circumstances as prescribed by the law, it appears to me that the courts will not encourage the grant of injunction to prevent the conclusion of the proceedings of an arbitral panel especially when an aggrieved party has the right to seek redress in court to set aside the Arbitral Award as provided by Sections 29, 30 and 48 of the Act. **(P. 177 lines 19 - 40)**

[5] ***Arbitration – Injunction – Inherent power of court is limited in relation to arbitration proceedings.***

PER TINE-TUR, JCA:

I have scanned the entire pages of the Arbitration and Conciliation Act, Cap.A18, Laws of the Federation of Nigeria, 2004 but I am unable to find the Section that provides for the Federal High Court to exercise the powers of entertaining and granting *exparte* interim or interlocutory injunctions as the case may be to restrain arbitral proceedings taking place or continuing to finality. The Federal High Court or any High Court for that matter is not to exercise jurisdiction in arbitral causes and matters ***"...except, where so provided for in this Act"*** according to the provisions of Section 34 of the Act (supra).

It is the contracting parties that usually opt to settle their commercial differences or disputes by submitting to arbitration proceedings. Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the Court or a Judge. The legislative intention by virtue of Section 34 of the Act (supra) is that except where so provided under the Arbitration Act, no Court of law

should intervene in arbitration proceedings. The power of the Court to interfere in arbitral proceedings is limited to well defined situations or circumstances. The Court may at times do so by invoking her inherent jurisdiction as provided under Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 and as pointed out in Halsbury's Laws of England, Vol.2, 4th edition, page 266 paragraph 518 to wit:

"Injunction restraining arbitration proceedings:

> ***The Court, in the case of a Judge-arbitrator (see paragraph 506, ante), the power to grant an injunction can only be exercised by the Court of Appeal: Administration of Justice Act, 1970, Section 4 (5) has an inherent power jurisdiction to restrain arbitration proceedings by injunction directed to the arbitrator or the other party. Kitts v. Moore (1895) 1 QB 253, CA. This jurisdiction, however, will be exercised with considerable caution. See e.g. Jackson v. Bar y Rly Co. (1893) 1 Ch.238, where the arbitrator was charged with bias and prejudice. It has been exercised to restrain the reference when an action was pending impeaching the agreement containing the reference to arbitration. Kitts v. Moore (1895) 1 QB 253, C.A.; Mylne v. Dickinson (1815) Coop G. 195, DC; Sissons v. Oates (1894) 10 TLR 392; Maunsell v. Midland Great Western (Ireland) Rly Co. (1863) 1 Hem & M 130; Edward Grey & Co. v. Tolme and Runge (1914) 31 TLR 137; C.A, where the question was whether on the outbreak of war the contract providing for arbitration was suspended or dissolved; and cf. McHarg v. Universal Stock Exchange (1895) 2 QB 81, CA; Smith, Coney and Barrett v. Becker, Gray & Co. (1916) 2 Ch. 86, CA; Scott & Sons v. Del Sel (1923) SC (HL) 37. But see now Heyman v. Darwins Ltd. (1942) AC 356, (1942) 1 All E.R. 337, HL, which, although not affecting the principle of these decisions, might clearly affect the application of the principle. But it seems that even so the Court will make some inquiry into the merits of the proceedings, The Ithaka (1939) 3 All E.R. 630, CA, where the Court refused to restrain arbitration proceedings in this country, despite the pendency of an action in the Turkish Courts impugning the agreement containing the arbitration clause as having been obtained by duress; and the Court will not as a rule restrain an arbitrator from proceeding with a reference solely on the ground that the award will be inoperative. North London Rly Co. v. Greath Northern Rly (1883) II QBD 30, CA; London and Blackwall Rly Co. Ltd. v. Cross (1886) 31 Ch.D. 354 at 368, CA; Den of Airlie SS Co. Ltd. v. Mitsui & Co. Ltd. and British Oil and***

Cake Mills Ltd. (1912) 106 LT 451, CA. And see Farrar v. Cooper (1890) 44 Ch.D. 323; Great Western Rly Co. v. Waterford and Limerick Rly Co. (1881) 17 Ch.D. 493, CA."

Again in paragraph 519 at page 266 of Halsbury's Law (supra) appears the following statement of the law:

"Declaration: The Court, in the case of a Judge-arbitrator (see paragraph 506, ante), the power to make a declaration can be exercised only by the Court of Appeal: Administration of Justice Act, 1970, Section 4 (5), has also an inherent power to make a declaration that the arbitrator has no jurisdiction to hear or determine any claim in question, whether or not an injunction would be granted. Government of Gibraltar v. Kenney (1956) 2 QB 410, (1956) 3 All E.R. 22; The Phonizien (1966)1 Lloyd's Rep.150. The exercise of this power is, however, discretionary. Government of Gibraltar v. Kenney (1956) 2 QB 410 at 424, (1956) 3 All E.R. 22 at 27, per Sellers, J."

In my humble view none of the situations or circumstances for invoking the inherent powers arose for the lower Court to have descended into the arena to grant an exparte interim or interlocutory injunction in favour of the 1st respondent. **(P. 183 lines 9 - 15; P.185 lines 36 - 38)**

[6] ***Arbitration – Dispute Resolution – Aim of arbitration is to ensure speedy resolution of dispute; therefore interference by courts is restricted.***

The nature of modern commercial activities demand quick resolutions of disputed issues and so parties avoid the usual long and tenuous procedure in the courts. The Arbitration and Conciliation Act itself was made to provide for easy settlement of commercial disputes. As a general rule, therefore the law does not encourage the intervention of the court proceedings so as not to disturb the agreement by the parties to the jurisdiction of arbitral proceedings for quick resolutions of disputes. **(P. 177 lines 33 - 38)**

[7] ***Commercial Litigation - Injunction – Appellate court will interfere where exercise of discretion is not judicial or judicious.***

In an application for injunction, though the powers of the court hearing it, is discretionary; the law enjoins the court to exercise the discretion judicially and judiciously. Where it is not so exercised, as in this case, the appellate court will interfere - *Ayoola v. Baruwa* (1996) 11 NWLR (Pt 628) 595. The lower court ought not to have granted the interlocutory injunction sought by the 1st respondent.

Issue 2 is hereby resolved in favour of the appellant. The interlocutory injunction granted in favour of the 1st respondent by Hon. Justice Abdul Kafari of the Federal High Court, Abuja Division on the 24th of October 2011 is hereby discharged. **(P. 165 lines 36 - 39)**

[8] ***Injunction – Interim and Interlocutory Injunction – The first is granted to preserve the res pending determination of the motion or notice while the latter is granted to preserve the res pending determination of the substantive suit.***

It is settled law the purpose of the grant of an injunction either interim or interlocutory is to enable matters to be kept in *status quo* that is, the preservation of the *'res'* pending when the court will determine the issues at stake in the substantive matter. The interim *ex parte* order of injunction is granted in cases of extreme urgency so as to preserve the res pending the determination of the motion on notice, whereas the latter is for the preservation of the *res* pending the determination of a substantive pending suit. However, there are differences between an interim and interlocutory injunction even though they have similar features. **(P. 178 lines 36 - 44)**

[9] ***Commercial Litigation – Injunction – Grant of interlocutory injunction must be on merit and cannot be predicated on refusal of application to discharge the interim order.***

Therefore, refusal to discharge an interim injunction is not equivalent to the grant of an interlocutory injunction. The application for the interlocutory injunction must therefore necessarily be determined on its own merits. The Supreme Court in *Group Danone v. Voltic (Nig) Ltd* (2008) 7 NWLR (Pt 1087) 637 at 678 held that "the refusal of the application to discharge an interim injunction does not metamorphose into an interlocutory injunction." In the cited case of *Ezebilo v. Chinwuba* (1997) 7 NWLR (Pt 511) 108 this court per Tobi JCA (as he then was) put it succinctly thus –

> **"...the decision of the trial Judge to grant an application for interlocutory injunction is not a matter of course or routine slavishly following the grant of an interim injunction. The injunction is not granted to compensate a plaintiff in the interim for merely initiating an action."**
> **(P. 167 lines 13 - 20)**

[10] ***Injunction – Grant – Court must consider and show that guiding principles were followed.***

The law is clear that an application for interlocutory injunction is not granted as a matter of course. A trial judge therefore must take his decision on

the examination of the facts before him. The guiding principles in the determination of an application for interlocutory injunction ought to be considered by the trial Judge before arriving at his decision. It must not be assumed that the merits of the application for interlocutory injunction were specifically determined. The mere assertion by the Judge that "I am satisfied that the plaintiff has satisfied the conditions laid down in *Kotoye v. CBN* for the grant of the application for interlocutory injunction" is not sufficient to discharge the Judge's duty to determine the case on the merits. It must be apparent from the proceedings that he indeed considered the merits of the application. **(P. 167 lines 21 - 34)**

[11] ***Commercial Litigation - Injunction – Court must not delve into the substantive suit.***

In my view this conclusion has put the appellant in a position of prejudice. In the circumstances, it is just and fair to remit the case for trial by another Judge. - See *Ojukwu v. Governor of Lagos State* (1986) 3 NWLR (Pt 26) 39 at 45. It is indisputable that it is in the interest of justice that a neutral Judge should in the circumstances of this case hear the substantive suit. None of the parties can claim prejudice by such an order.
(P. 179 lines 44 - 45; P. 180 lines 1 - 4)

[12] ***Injunction – Guiding Principles – Applicant must show that there are serious issues, balance of convenience is in its favour, award of damages cannot adequately compensate, its conduct is beyond reproach; and undertake to pay damages.***

The guiding principles for the grant of interlocutory injunction have been re-stated over the years. See the *locus classicus* case of *Kotoye v. CBN* (1989) 1 NWLR (Pt 98) 419 at 422 - 423. See also *Obeya Memorial Specialist Hospital v. A.G Federation* (1987) 3 NWLR (Pt 60) 325; *Akapo v. Hakeem* (1992) 6 NWLR (Pt 247) 266 at 302. The important factors that must be considered in an application for interlocutory injunction, as enunciated by the Supreme Court in the case of *Kotoye v. CBN* (Supra) include:

(a) **The applicant must show that there is a serious question to be tried i.e. that the applicant has a real possibility, not a probability of success at real possibility (sic), not a probability of success at the trial. See the case *Obeya Memorial Specialist Hospital v. A.G Federation* (1987) 3 NWLR (Pt. 60) pg 325.**

(b) **The applicant must show that the balance of convenience is on his side, that is that more justice will result in granting**

the application than in refusing it. See the case of *Missini v. Balogun* (1968) 1 All N.L.R. 318

(c) The applicant must show that damages cannot be an adequate compensation for his damage or injury if he succeeds at the end of the day.

(d) The applicant must show that his conduct is not reprehensible that is he is not guilty of any delay.

(e) A satisfactory undertaking as to damages except in recognized exceptions. (P. 168 lines 23 - 45;P. 169 lines 1-5)

[13] ***Injunction – Balance of Convenience – Court must weigh the need to protect the claimant against injury that may arise from preventing the defendant from exercising a legal right.***

In consideration of the balance of convenience, the court will weigh whether –

a) To protect the claimant against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial

b) The defendant's need to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour. (P. 172 lines 38 - 45; P. 173 lines 1 - 4)

[14] ***Commercial Litigation - Injunction – Court will not grant injunction where plaintiff will not suffer irreparable damage.***

In this appeal as shown above, the respondent still anchored his argument on balance of convenience on the fact that the Federal Government will be jeopardized if the computation of Petroleum Tax Oil by the Partial Award of the Arbitral Tribunal is left with the appellant in which I have held that alleged damages to the Federal Government, notably, none to the 1st respondent can be adequately compensated by award of damages. I am therefore in agreement with the learned senior counsel for the appellant that the 1st respondent has woefully failed to show that he will suffer any irreparable damage if the injunction was refused. The learned trial Judge on this score was therefore wrong to have granted the interlocutory injunction. The balance of convenience is not in favour of the 1st respondent. **(P. 173 lines 8 - 18)**

[15] ***Commercial Litigation - Interlocutory Application – Court must refrain from determining issues or rights in the substantive claim.***

It is trite law that in an application for the grant of an interlocutory injunction, pending the determination of the substantive claim, the Judge has a duty to ensure that he does not in the determination of the application determine the same issues or rights that arise for determination in the substantive suit. It is not proper for the court at that stage to express any opinion as to such rights as such an opinion might give the impression that the court has made up its mind on the substantive issues on trial before it - *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt 247) 266; *Orji v. Zaria Ind. Ltd* (1992) 1 NWLR (Pt 216) 124 at 141; *Ogunro v. Duke* (2006) 7 NWLR (Pt 978) 133; *Ogbonnaya v. Adapalm* (1993) 5 NWLR (Pt 292) 142 at 157. **(P. 179 lines 8 - 16)**

[16] ***Commercial Litigation – Injunction – Applicant must show that it has an individual legal right to protect.***

It is trite law, that it is the duty of the 1st respondent to show that it is its legal rights that are being affected; and not the rights of another or the public at large. The 1st respondent was completely silent about this issue in its Brief of Argument before us. It can only therefore be taken that he has conceded the point - see the cited case of *Ejiofor v. Uzodike* (2008) 17 NWLR (Pt 117) 470 at 481 - 482. **(P. 170 lines 4 - 8)**

[17] ***Foreign Law – Proof – Burden rests on party who asserts that a foreign law is different from Nigerian law.***

I am of the same ground with the learned senior counsel to the appellant that the argument of the learned senior counsel for the 1st respondent on this aspect of foreign law is erroneous.

The general principle of law as enunciated by the Supreme Court in case of *Ogunro & Ors v. Ogedengbe & Anor* (1960) NSCC p 98 at 99 paras 40 – 50 is that the onus of proving a foreign law is on the party who asserts that it is different from Nigeria law –

> **"Prior to making this order Mr. Solanke, for the respondents to the motion, who had contended that the court had no jurisdiction to deal with the property in Ghana, had been given over four weeks to being (sic) evidence as to Ghana law of succession. He failed to do so, and the learned judge in his order said: *"I cannot but proceed to deal with the properties as if there is no difference between the law of succession in Ghana and in Nigeria."* The view taken by the**

learned Judge is supported by the authority of Dicey on Conflict of Laws (6th ed. P 86), where it is stated: *"it is of importance to note that, if no evidence is offered of the difference between English and foreign law, the judge is bound to apply English law, however clear it may be that such law is not really the same as the foreign law on the subject."*The onus of proving foreign law lies on the party who asserts that it is different from Nigerian law, in this case the 2nd - 6th respondents to the motion, who were represented by Mr. Solanke. It may happen that when an attempt is made to enforce a judgment which treats foreign law as being the same as Nigeria law, the courts of the foreign country will refuse to enforce it, but that is the fault of the party who neglects to prove the foreign law."

In this appeal, since it is the 1st respondent that is asserting that the arbitral award when issued may be immediately enforced in any of the contracting states outside Nigeria, it is its duty to bring facts before the court the law of such foreign contracting states that permits *ex parte* enforcement of an arbitral award without recourse to the parties. **(P. 171 lines 18 - 45; P. 172 lines 1 - 5)**

Obiter:

[18] ***Taxation – Petroleum Profit Tax – Federal Inland Revenue Service is the body responsible for the assessment of Petroleum Profit Tax.***

Furthermore by the combined effect Sections 33 of the Petroleum Profits Tax Act, No 15 of 1959 and S. 34 of the Federal Inland Revenue Service (Establishment) Act No 13 of 2007, the Federal Inland Revenue Service (FIRS) has the power to make assessment on a company engaged in petroleum operations and power to sue for tax. Specifically if by the Partial Award of the Arbitral Panel the actual quantum of Petroleum Tax Oil to be paid under the Petroleum Sharing Contract (PSC) is wrong, by S. 15 of Petroleum Profits Tax Act, the FIRS has the power to refuse the tax returns submitted to it on the PSC by the Partial Arbitral Award. In that circumstance, if there is any injury, it will be to the Federal Government and since FIRS can sue on it, the alleged injury can be compensated in damages. **(P. 170 lines 23 - 32)**

AKOMOLAFE-WILSON, JCA (Delivering the lead Judgment): This appeal stems from the ruling of the Federal High Court, Abuja Judicial Division presided by The Honourable (Mr.) Justice Abdul Kafarati In Suit No. FHC/AB/CS/875/2011 delivered on 18 November, 2011, wherein the Federal High Court (i) refused to discharge the *ex-parte* interim orders of injunction granted by the lower court in

favour of the Nigerian National Petroleum Corporation (the '1st respondent') on 24 October, 2011, and (ii) granted interlocutory orders of injunction in favour of the said 1st respondent.

Briefly, the undisputed facts of the case are as follows:

The appellant and the respondents are parties to a Production Sharing Contract dated 5 July, 1993 ("PSC") in respect of Oil Prospecting License 316 which was later converted to Oil Mining Lease 125. The area covered by OML 125 includes the "Abo Field". The PSC sets out a contractually agreed mechanism by which crude oil mined from the Abo Field (referred to in the PSC as "Available Crude Oil") is allocated as between the appellant and Oando OML 125 & 135 Limited (the '2nd respondent') (on the one hand) and the 1st respondent (on the other hand).

By Clause 21 of the PSC, disputes between the parties in relation to the interpretation or performance of the PSC are to be referred to arbitration in accordance with the Arbitration and Conciliation Act, LFN 1990. In pursuance thereof, by a Notice of Arbitration dated 5 May, 2008, the Appellant and the 2nd respondent demanded reference of certain disputes concerning the interpretation and performance of the PSC to arbitration.

The arbitral tribunal convened by the Parties consisted of three (3) arbitrators namely: Sir Anthony Colman (nominated by the appellant and the 2nd respondent), Dorothy Ufot, SAN (nominated by the 1st respondent) and Gerald Aksen (chairman, nominated by agreement of the party-appointed arbitrators). In addition to appointing its own arbitrator, the 1st respondent fully participated in the arbitral proceedings from its commencement to the conclusion of the hearings.

On 3 October, 2011, the arbitral tribunal, acting by a majority, issued a Partial Award (the "Partial Award"), which resolved questions of liability substantially in favour of the appellant and the 2nd respondent. The arbitral tribunal awarded certain declaratory and injunctive Reliefs in favour of the appellant and the 2nd respondent, while in relation to monetary reliefs, the arbitral tribunal requested the appellant and the 2nd respondent to furnish their updated and revised damages in accordance with the terms of the Partial Award, in order to enable the arbitral tribunal to issue a Final Award on the quantum of damages payable to the appellant and the 2nd respondent by the 1st respondent.

On 20 October, 2011, the 1st respondent filed an Originating Motion dated 19 October, 2011 (the "Originating Motion"), seeking the following reliefs:

> **'(i) AN ORDER setting aside the Arbitral Award dated 3 October, 2011 and delivered by the Arbitral Tribunal (Sir Anthony Colman, Gerald Aksen, Chairman and Dorothy Udeme Ufot, SAN dissenting).**

(ii) AN ORDER of this Honourable Court refusing the recognition and enforcement of the Arbitral Award dated 3 October, 2011.

(iii) AN ORDER staying further and/or any other proceedings/ actions in respect of the Arbitration proceeding, including but not limited to the taking of any steps or doing anything whatsoever towards reconvening, reconstituting and or concluding the Partial Award dated 3 October, 2011 delivered by the majority of the Arbitral Panel (Sir Anthony Colman & Gerald Aksen, Chairman) and/or by any means including email communication, video conferencing, tele-conferencing and or any electronic means towards delivering the Final Award pursuant to the Partial Award dated 3 October, 2011.'

Along with the Originating Motion, the 1st respondent filed a Motion Ex parte for Interim Injunction dated 19 October, 2011. Therein the 1st respondent sought *inter alia*, the following reliefs:

'3. AN ORDER of interim injunction restraining the Claimants in the Arbitral Proceedings (the subject matter of the substantive application to set aside the award) from taking and or continuing to take any further step in the arbitral proceedings and particularly from submitting any updated and revised damages in accordance with the terms of the Partial Award or any other monetary claims pursuant to the Award dated 3 October, 2011 pending the hearing and determination of the Motion on Notice for Interlocutory Injunction filed before this Honourable Court.

4. AN ORDER directing that the parties to the Arbitral Proceedings maintain the *status quo ante* the delivery of the Partial Award pending the hearing and determination of Motion on Notice filed before this Honourable Court.'

By an Order dated 24 October, 2011, the lower court granted *inter alia* the aforesaid reliefs, and fixed the 1st respondent's Motion on Notice for Interlocutory Injunctions dated 19 October, 2011 for hearing on 31 October, 2011.

In reaction, the appellant (jointly with the 2nd respondent) filed a Motion on Notice dated 31 October, 2011 by which it prayed the lower court to discharge the interim orders granted *ex parte* on 24 October, 2011. They also filed a counter-affidavit and written address in opposition to the motion for interlocutory injunction.

In its ruling of 18 November, 2011, the lower court dismissed the appellant's Motion to discharge the interim injunction and granted the 1st respondent's Motion for Interlocutory Injunction.

Being dissatisfied, the appellant filed this appeal against the Ruling of the Federal High Court, Abuja by Hon. Justice Abdul Kafarati wherein the lower court (i) refused to discharge the *ex-parte* interim order of injunction, and (ii) granted interlocutory orders of injunction in favour of the 1st respondent.

In accordance with the Rules of this court, Briefs of Argument were filed. In the Brief of Argument filed by Babatunde Fagbohunlu (SAN) on 20th January, 2012, three issues were distilled for determination from the nine grounds of appeal filed namely:-

a. Whether the lower court ought to have discharged its interim injunctions granted ex parte on 24 October, 2011 (the 'Ex Parte Orders'). (Grounds 1, 2, 3 and 4 of the Notice of Appeal).

b. Whether the 1st respondent's Motion on Notice for Interlocutory Injunctions ought to have been granted by the lower court. (Grounds 5, 6, 7 and 9 of the Notice of Appeal).

c. Whether the lower court's ruling of 18 November, 2011 has not prejudiced the hearing of the 1st respondent's Originating Motion such that this matter ought to be remitted to another judge of the Federal High Court for hearing of the substantive suit. (Ground 9 of the Notice of Appeal).

On 25th April, 2012, the 1st respondent filed a Notice of Preliminary Objection challenging the competence of Grounds 1, 2, 3, 4 and 8 of the Grounds of Appeal and Issues A and C in the appellant's briefs. The 1st respondent's Preliminary Objection was argued in its Brief of Argument filed by P.I.N. Ikwueto (SAN) FCIArb.

The appellant in response on 8th February, 2013 filed the appellant's Brief of Argument to 1st respondent's Brief. The 2nd respondent did not file any brief of Argument.

Before I embark on this appeal, it is necessary to make some salient threshold remarks.

At the hearing of this appeal, both counsel adopted their respective Briefs of Argument which included the submissions on the Preliminary Objection. However, at the conclusion of his oral argument on point of law, Ikwazom Esq. informed the court that the appellant was no more contesting the appeal on the refusal of the lower court to discharge the interim *ex parte* injunction but was insisting on the

appeal on interlocutory injunction. It is noted that the totality of the Preliminary Objection is predicated on the challenge of the competence of grounds 1, 2, 3, 4 and 8 which deals with the refusal of the learned trial judge to discharge the interim injunction. According to counsel, the refusal to discharge an interim order of injunction is a judicial discretionary exercise based on mixed law and fact, therefore leave of the court must be obtained otherwise the grounds and issue formulated therein are incompetent. It is pertinent however to immediately point out that a scrutiny of the Grounds of Appeal shows that Ground 8 does not deal with the ex parte injunction. Rather, it deals with the question of whether the lower court determined the substantive matter while considering the interlocutory matters of injunction. This is Issue C of the appellant's Brief of Argument which he erroneously identified as dealing with Ground 9; instead of Ground 8.

Since the appellant is no more contesting the refusal to set aside the interim orders, the determination of the Preliminary Objection will only be tantamount to an academic exercise. So also will be the abandoned issue which deals with the appeal on the refusal to discharge the interim injunction. In the circumstance, grounds 1, 2, 3 and 4 of the Notice of Appeal are hereby struck out. Also struck out is Issue "a" distilled from the grounds and Notice of Preliminary Objection and the submission of both counsel on the matters.

The 1st respondent on its part drafted two issues for determination namely:-

a. Whether the learned trial court rightly and properly exercised its discretion in refusing to discharge the order ex parte for interim injunction and in granting the order of Interlocutory Injunction in the circumstances of this suit.

b. The 1st respondent adopts issue No (c) in the appellants issues for determination as arising from Ground 9 of the Notice of Appeal

A cursory look at these issues in comparison with the appellant's issues shows that the 1st respondent combined appellant's issues "a" and "b" as its issue "a".

Since issue "a" of the appellant dealing with the *ex parte* order for interim injunction has been struck out any argument predicated on this issue of refusal to discharge the *ex parte* order by the 1st respondent in his Brief of Argument; paragraphs 5.6 - 5.46 at pages 14 - 29 are also hereby discountenanced.

The contest of this appeal is hereby narrowed down to issues "b" and "c" or Issues 2 and 3 of the appellant's Brief of Argument which I hereby adopt for the determination.

ISSUE 2

Whether the 1st respondent's Motion on Notice for Interlocutory Injunctions ought to have been granted by the lower court. (Grounds 5, 6, 7 and 9)

The learned counsel for the appellant submitted that the lower court erred in law when he granted the 1st respondent's application for interlocutory injunction simply on the ground that the motion to discharge the interim injunction *ex parte* had failed. It is his contention that the conditions for the grant of an interim injunction *ex parte* are not the same as the conditions for the grant of interlocutory injunction. - *Group Danone v. Voltic (Nig) Ltd* (2008) 7 NWLR (Pt 1087) 637 at 678; *7Up Bottling Company Ltd & Ors v. Abiola & Sons Ltd* (1995) 3 NWLR (Pt 383) 257 at 276; *Kotoye v. CBN* (1989) 1 NSCC 238 at 250 - 251. Learned counsel argued that the consideration for constituents of a good judgment as enunciated in the case of *Usiobaifo v. Usiobaifo* (2005) 3 NWLR (Pt 913) 665 at 692 ought to have been followed by the learned trial Judge who should have considered the affidavits and written addresses of counsel regarding the conditions for the grant of an interlocutory injunction. Learned counsel further argued, specifically that if the lower court had directed its attention to the crucial issues as to 1st respondent's failure to demonstrate that (i) it would suffer irreparable harm if the interlocutory injunction was refused and (ii) the balance of convenience for the grant of injunction was in its favour, the lower court could have come to the conclusion that the 1st respondent was not entitled to the grant of the injunction.

As for the 1st respondent, a lot of energy was dissipated on the submission to justify the refusal of the lower court to discharge the interim order of injunction. Virtually all its Brief of Argument was concentrated on that issue. As rightly pointed out by the appellant, in its Reply Brief to 1st respondent's Brief of Argument, the only response to the issue on interlocutory injunction can be gleaned from paragraphs 5.2 to 5.3 of the 1st respondent's Brief particularly paragraph 5.2.4 at page 11 where in a simplistic manner its counsel submitted thus -

> **".....that the 1st respondent's entrenched right to the determination of the substantive application to set aside the Partial Award dated 3.10.2011, is the undisputed *RES* which the learned trial Judge has an inherent jurisdiction to preserve during the pendency of the suit before it."**

Learned counsel for the appellant remarked that no justification, legal or otherwise has been articulated by the 1st respondent before this Honourable Court affirming the reasoning adopted by the lower court in granting the motion for interlocutory injunction without considering the merits by the 1st respondent *except* attributing same to the preservation of the *res*, a reasoning which he submitted is not evident from the decision of the lower court. According to appellant this meant that the 1st respondent conceded to the issues raised in the appellant's brief. It is now necessary to examine the decision of the lower court pertaining to the application

for interlocutory injunction.

The lower court at pages 620 – 621 of the Record of Appeal held thus -

> **"On the motion on notice for interlocutory injunction, the motion for the discharge of Ex-parte (sic) having failed the interlocutory order of the injunction(sic) ought to be made. Having gone through the processes, I am satisfied that the plaintiff has satisfied the conditions laid down in *Kotoye v. CBN* for the grant of the application for interlocutory injunction."**

This is all that was considered by the lower court concerning the interlocutory injunction. It is settled law the purpose of the grant of an injunction either interim or interlocutory is to enable matters to be kept in *status quo* that is, the preservation of the *'res'* pending when the court will determine the issues at stake in the substantive matter. The interim *ex parte* order of injunction is granted in cases of extreme urgency so as to preserve the *res* pending the determination of the motion on notice, whereas the latter is for the preservation of the *res* pending the determination of a substantive pending suit. However, there are differences between an interim and interlocutory injunction even though they have similar features. Therefore, refusal to discharge an interim injunction is not equivalent to the grant of an interlocutory injunction. The application for the interlocutory injunction must therefore necessarily be determined on its own merits. The Supreme Court in *Group Danone v. Voltic (Nig) Ltd* (2008) 7 NWLR (Pt 1087) 637 at 678 held that "the refusal of the application to discharge an interim injunction does not metamorphose into an interlocutory injunction." In the cited case of *Ezebilo v. Chinwuba* (1997) 7 NWLR (Pt 511) 108 this court per Tobi JCA (as he then was) put it succinctly thus –

> **"...the decision of the trial Judge to grant an application for interlocutory injunction is not a matter of course or routine slavishly following the grant of an interim injunction. The injunction is not granted to compensate a plaintiff in the interim for merely initiating an action."**

The law is clear that an application for interlocutory injunction is not granted as a matter of course. A trial judge therefore must take his decision on the examination of the facts before him. The guiding principles in the determination of an application for interlocutory injunction ought to be considered by the trial Judge before arriving at his decision. It must not be assumed that the merits of the application for interlocutory injunction were specifically determined. The mere assertion by the Judge that "I am satisfied that the plaintiff has satisfied the conditions laid down in *Kotoye v. CBN* for the grant of the application for interlocutory injunction" is not sufficient to discharge the Judge's duty to determine the case on the merits. It must be apparent from the proceedings that he indeed considered the merits of

the application. The cited case of *Usiobaifo v. Usiobaifo (supra)* where the Supreme Court identified the attributes of a good judgment at page 692, para G, is apt. - The constituents of a good judgment include the consideration of the following:-

(i) Claims or relief of the plaintiff

(ii) Relevant facts and counter-facts leading to the claim or relief

(iii) Argument of counsel,

(iv) Reactions of the judge to the arguments of counsel;

(v) Verdict or final order.

These attributes also apply *mutantis mutandis* to motions before the court. It was wrong for the learned trial to have granted the interlocutory injunction merely on the ground that the motion to discharge the interim *ex parte* orders granted failed without specifically considering the principles for the grant of interlocutory injunction *vis a vis* the facts presented in the affidavit and counter-affidavit and the submissions of both learned counsel in their written addresses submitted before the court.

The guiding principles for the grant of interlocutory injunction have been re-stated over the years. See the *locus classicus* case of *Kotoye v. CBN* (1989) 1 NWLR (Pt 98) 419 at 422 - 423. See also *Obeya Memorial Specialist Hospital v. A-G Federation* (1987) 3 NWLR (Pt 60) 325; *Akapo v. Hakeem* (1992) 6 NWLR (Pt 247) 266 at 302. The important factors that must be considered in an application for interlocutory injunction, as enunciated by the Supreme Court in the case of *Kotoye v. CBN* (Supra) include:

(a) The applicant must show that there is a serious question to be tried i.e. that the applicant has a real possibility, not a probability of success at real possibility (sic), not a probability of success at the trial. See the case *Obeya Memorial Specialist Hospital v. A-G Federation* (1987) 3 NWLR (Pt. 60) pg 325.

(b) The applicant must show that the balance of convenience is on his side, that is that more justice will result in granting the application than in refusing it. See the case of *Missini v. Balogun* (1968) 1 All N.L.R. 318

(c) The applicant must show that damages cannot be an adequate compensation for his damage or injury if he succeeds at the end of the day.

(d) The applicant must show that his conduct is not reprehensible that is he is not guilty of any delay.

(e) A satisfactory undertaking as to damages except in recognized exceptions.

The grouse of the appellant in this appeal is that the 1st respondent failed to satisfy the requirement at the lower court that he will suffer irreparable damage if the interlocutory injunction was not granted and that the balance of convenience for the grant weighed in its favour.

One of the important factors to be considered in an application for interlocutory injunction is the requirement for the applicant to show that damages cannot be adequate compensation for the injury he will suffer before the determination of the suit if he succeeds at the end of the trial. If recoverable damages will be adequate remedy, interlocutory injunction would normally not be granted, however strong the Applicant's claim appears to be at that stage. *Nwanganga v. Military Government of Imo State* (1987) 3 NWLR (Pt 59) 185.

It is reiterated that the 1st respondent did not in its Brief of Argument before this court articulate reasons to justify the decision of the lower court to grant the interlocutory injunction. Even though in its issue one, the 1st respondent argued both the refusal to discharge the interim injunction along with the grant of interlocutory injunction, the argument of counsel was practically devoted to the justification of the refusal of the trial court to discharge the interim injunction; despite submission of appellant's counsel on the interlocutory injunction. However, in the lower court, the 1st respondent deposed to the fact that if an injunction was not granted -

"12(c) .....public effect of the Partial Award (affecting the Revenue of the Federal Government), damages will be grossly inadequate to compensate the applicant.

(d) In this vein, the balance of convenience is on the side of the applicant herein."

(See paragraphs 12 (c) and (d) of the 1st respondent's Affidavit in Support of the application for Interlocutory Injunction at pages 475 - 476 of the Record of Appeal).

The contention of the 1st respondent before the lower court in this regard is that by the Partial Award the Arbitral Tribunal has given the respondents the unfettered freedom to allocate the quantum of Tax Oil to be appropriated for payment of Petroleum Profits Tax (PPT) payable under the PSC to Federal Government and this will affect the revenue of Federal Government and tilts the balance of convenience in favour of granting the application. The appellant has before us, as

he did in the lower court, however submitted that an injury affecting the Federal Government cannot be said to be an injury to the 1st respondent.

It is trite law, that it is the duty of the 1st respondent to show that it is its legal rights that are being affected; and not the rights of another or the public at large. The 1st respondent was completely silent about this issue in its Brief of Argument before us. It can only therefore be taken that he has conceded the point - see the cited case of *Ejiofor v. Uzodike* (2008) 17 NWLR (Pt 117) 470 at 481 - 482.

Contrary to the contention of the 1st respondent that a shortfall in the computation of PPT payable by the appellant will cause irreparable damages to the 1st respondent, by its own averment per paragraph 8(a) of the 1st respondent's affidavit in support of its application for interlocutory injunction, in fact stated that –

> **"By the relevant statutory provisions in the Petroleum Profits Tax Act (PPTA) and FIRS, the only statutory authority capable of computing actual tax liability in Nigeria for Petroleum Operations in the FIRS" (Page 474 of the Record of Appeal)**

It is thus clear that the 1st respondent will not suffer irreparable damages on this ground if the injunction was refused.

Furthermore by the combined effect Sections 33 of the Petroleum Profits Tax Act, No 15 of 1959 and S. 34 of the Federal Inland Revenue Service (Establishment) Act No 13 of 2007, the Federal Inland Revenue Service (FIRS) has the power to make assessment on a company engaged in petroleum operations and power to sue for tax. Specifically if by the Partial Award of the Arbitral Panel the actual quantum of Petroleum Tax Oil to be paid under the Petroleum Sharing Contract (PSC) is wrong, by S. 15 of Petroleum Profits Tax Act, the FIRS has the power to refuse the tax returns submitted to it on the PSC by the Partial Arbitral Award. In that circumstance, if there is any injury, it will be to the Federal Government and since FIRS can sue on it, the alleged injury can be compensated in damages.

In justifying the refusal of the learned trial judge to discharge the interim injunction, the 1st respondent relied on *West Tankers Inc. v. Allianz Spa & Anor* (2012) EWCA at 27 and *African Fertilizers & Chemical Ltd (Nig) v. B.D. Shipsonavo Gmbh & Co. Reederi KG* (2011) EWHC 2452 or (2011) 2 LLOYDS REPORT 53; *Ras Pal Gazi Construction Ltd v. S.C.B.A.* (2001) 10 NWLR (Pt 722) 559. In his Brief of Argument he contended that a partial award is an enforceable award when issued. His learned Senior Counsel argued that by virtue of the New York Convention which Nigeria is a signatory, the Partial Arbitral Award of the Tribunal is regarded as an award which is capable of being recognized and enforced in any of the contracting States without recourse to Nigeria and the rules of procedure for recognition and enforcement applicable in Nigeria courts, therefore irreparable damages will be done to the 1st respondent as it will render the suit before the

lower court totally useless.

In response, the appellant in its Reply Brief submitted that the 1st respondent did not present any evidence to show that in any of the jurisdictions subject to the New York Convention, the law applicable to the enforcement of arbitral award allows for the enforcement without recourse to the other party. Therefore, it must be assumed that the appellant would be required to put the 1st respondent on notice before any enforcement. It was submitted for by the learned senior counsel succinctly that –

> **"...in the absence of an automatic enforcement of the final award in another jurisdiction it is clear that the mere availability of this option to the appellant poses no risk of irretrievable harm to the 1st respondent."**

He argued therefore that the exercise of discretion in refusing to vacate the interim injunction and granting the application for interlocutory injunction in the circumstances is wrong in law. I am of the same ground with the learned senior counsel to the appellant that the argument of the learned senior counsel for the 1st respondent on this aspect of foreign law is erroneous.

The general principle of law as enunciated by the Supreme Court in case of *Ogunro & Ors v. Ogedengbe & Anor* (1960) NSCC p 98 at 99 paras 40 – 50 is that the onus of proving a foreign law is on the party who asserts that it is different from Nigeria law –

> **"Prior to making this order Mr. Solanke, for the respondents to the motion, who had contended that the court had no jurisdiction to deal with the property in Ghana, had been given over four weeks to being (sic) evidence as to Ghana law of succession. He failed to do so, and the learned judge in his order said: *"I cannot but proceed to deal with the properties as if there is no difference between the law of succession in Ghana and in Nigeria."* The view taken by the learned Judge is supported by the authority of Dicey on Conflict of Laws (6th ed. P 86), where it is stated: *"it is of importance to note that, if no evidence is offered of the difference between English and foreign law, the judge is bound to apply English law, however clear it may be that such law is not really the same as the foreign law on the subject."* The onus of proving foreign law lies on the party who asserts that it is different from Nigerian law, in this case the 2nd - 6th respondents to the motion, who were represented by Mr. Solanke. It may happen that when an attempt is made to enforce a judgment which treats foreign law as being the same as Nigeria law, the courts of the foreign country will refuse to enforce it, but that is the fault of the party who neglects to prove the foreign law."**

In this appeal, since it is the 1st respondent that is asserting that the arbitral award when issued may be immediately enforced in any of the contracting states outside Nigeria, it is its duty to bring facts before the court the law of such foreign contracting states that permits *ex parte* enforcement of an arbitral award without recourse to the parties. Otherwise, the law, as correctly stated by the appellant is that an arbitral award can only be enforced through judicial proceedings. In *Okechukwu v. Etukokwu* (1998) 8 NWLR (Pt 562) 513 at 529, Tobi JSC expatiated thus -

> **"In law an arbitral award per se lacks enforcement and enforceability. It does not carry any element of sanction until a court of law, by its judicial powers breathe enforcement or sanction on it."**

See *Shell Trustees (Nig) Ltd v. Imani & Sons Ltd* (2000) 6 NWLR (Pt 662) 639 at 657.

In the circumstance therefore the 1st respondent cannot validly claim that it will suffer irreparable damage if an injunction is not granted pending the conclusion of the Final Award. This is because by law, before the final award on damages is made, the respondent will be put on notice in accordance with S. 31 of the Arbitration and Conciliation Act for enforcement and will be entitled to object to such recognition and enforcement under S.32 of the Act and will be afforded the opportunity to ventilate any grievance it had before its enforceability. The 1st respondent has therefore failed to establish that any irreparable damage that he would have suffered if the injunction was refused; as the arbitral proceedings do not present any hindrance to hearing of the Originating Motion, the suit before the court.

Another cardinal principle of law to be considered in the grant of an interlocutory injunction, is the balance of convenience. In this determination, the plaintiff's need for protection is weighed against the corresponding need of the defendant to be protected against injury that he may suffer should the application for interlocutory injunction be granted. - *Ladunni v. Kukoyi & Ors* (1972) 1 All NLR (Pt 1) 136, see also *Shuaibu v. Muaza* (2007) 7 NWLR (Pt. 1033) 271 at 280; *Bello v. A.G Lagos State* (2007) 2 NWLR (Pt. 1017) 115 CA; *Colito (Nig) Ltd v. Daibu* (2010) 2 NWLR (Pt 1178) 213 at 277 paras B-F, 278 paras F-H.

In consideration of the balance of convenience, the court will weigh whether –

a) To protect the claimant against injury by violation of his rights for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial

b) The defendant's need to be protected against injury resulting

from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the claimant's undertaking in damages if the uncertainty were resolved in the defendant's favour.

The onus is squarely on the plaintiff to prove that the balance of convenience tilts in his favour. See the cited case of *Obeya Memorial Hospital & Anor v. A.G. Federation & Anor* (1987) 3 NWLR (Pt 60) 325 at 327 - 329. In this appeal as shown above, the respondent still anchored his argument on balance of convenience on the fact that the Federal Government will be jeopardized if the computation of Petroleum Tax Oil by the Partial Award of the Arbitral Tribunal is left with the appellant in which I have held that alleged damages to the Federal Government, notably, none to the 1st respondent can be adequately compensated by award of damages. I am therefore in agreement with the learned senior counsel for the appellant that the 1st respondent has woefully failed to show that he will suffer any irreparable damage if the injunction was refused. The learned trial Judge on this score was therefore wrong to have granted the interlocutory injunction. The balance of convenience is not in favour of the 1st respondent.

The issue of whether the lower court could exercise its regular jurisdiction to grant an injunction in this case was argued both in the lower court and in this court. It is the contention of the appellant that by virtue of S. 34 of the Arbitration and Conciliation Act, the lower court **"could not exercise its regular jurisdiction to grant an injunction, as nothing in the Arbitration and Conciliation Act confers in the lower court the power to grant an injunction restraining the continuation and finalization of arbitral proceedings."** The learned senior counsel for the 1st respondent thinks otherwise. He argued before us that "the jurisdiction of the lower court to grant an order of injunction in the matter it is consistent with inherent powers of the court as entrenched by Section 6(6)(b) of the 1999 Constitution as amended." Learned senior counsel noted that S. 34 of Arbitration and Conciliation Act, recognizes and provides for the intervention of a court where there is **"removal of an arbitrator for misconduct, setting aside of an award..."** Relying on *Kotoye v. CBN (supra)* he submitted that in view of the circumstances of this case, the learned trial Judge rightly exercised his discretion in granting the injunction. Indeed, the lower court held that S. 6 (6) (b) of the Constitution vested power in the court to make preservative orders and by combined effect of Sections 29 and 34 of the Arbitration and Conciliation Act, the court has jurisdiction to intervene where any of the parties is aggrieved (see pages 619 - 620 of the Record of Appeal).

Arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner by a person or persons other than a court of competent jurisdiction; whose decision is in general, final and legally binding on both parties appointed by a court, to hear the parties claims and render a decision. The process of arbitration derives its force

principally from an agreement of the parties and the law requires the parties to obey the rules, proceedings and awards of the arbitration panel. – *Commerce Assurance Ltd v. Alli* (1992) 3 NWLR (Pt 232) 710 SC; *Kano State Urban Dev. Board v. Fanz Construction Co Ltd* (1990) 4 NWLR (Pt 142) 1; *African Re Corp v. Aim Consultancy Ltd* (2004) 11 NWLR (Pt 884) 223.

Where parties choose to have their dispute settled by arbitration, then subject to certain limited exceptions the attitude of the court has been that parties should take the arbitration for better or worse. Thus the jurisdiction of the High Court to set aside an Arbitral Award is within very narrow confines. - See *Aye-Fenus Ltd v. Saipen Nig. Ltd* (2009) 2 NWLR (Pt 1126) 486 at 513 - 514; *Bake Marine (Nig) Ltd v. Danos 7 Curole Marina Contractor Inc.* (2001) 7 NWLR (Pt 712) 335.

Section 34 of the Arbitration and Conciliation Act (ACA) Cap A.18, Laws of the Federation of Nigeria, 2004 states specifically that –

> **"A court shall not intervene in any matter governed by this Act except where so provided in this Act."**

The exceptional circumstances under which an award can be set aside are restricted. They are stated in sections 29, 30 at 48 of the Act. The underlining principle of arbitration is to ensure that parties who have voluntarily elected independent umpires whom they trust to settle their matters should be bound by the decision of the arbitrator without resort to the courts. The essence of an award in arbitration is that it is binding on the parties. It is also implied that the parties will readily accept the decision of the arbitrators in normal circumstances.

However in Nigeria in the interest of justice and fair play, the Act provides certain exceptions for the court to intervene. On the import of Section 34 of A.C.A., J.O. Orojo and M.A. Ajomo the learned authors of LAWS AND PRACTICE OF ARBITRATION and CONCILIATION IN NIGERIA at p. 269 on the input of S.34 of A.C.A., stated thus -

> **"The Decree provides for the intervention of the court in certain aspects of the arbitral process such as stay of proceedings, issue of subpoena, appointing arbitrator where there is default, removal of an arbitrator for misconduct, setting aside of the award and enforcement of award. Where, however, the Decree does not provide for the intervention of the court, this should not be done. Thus, where, e.g. it is intended to remove an arbitrator for partiality, the challenge procedure should be adopted. It will be wrong to apply to court for an injunction to restrain him, except perhaps in the case of a recalcitrate (sic) sole arbitrator, or where he is charged with misconduct."**

It is clear from judicial decisions in this country and from other jurisdiction that the scheme of the statutes regulating arbitration generally limit the scope of courts intervention in arbitral proceedings. The learned senior counsel for the appellant also cited some foreign decisions to support his contention that the courts do not have power to intervene in private arbitral proceedings where such intervention is not sanctioned by the applicable arbitration proceedings. The decision of the High Court in England in the case of *Vale Do Rio Doce Navegacao SA v. Shanghai Bao Stell Ocean Shipping Co. Ltd* (2000) C.L.C. 1200 is persuasive and quite apposite.

In that case, the claimant, having served an arbitration claim form (i.e. a notice of arbitration), sought a declaration from the court to the effect that the 1st defendant was a party to the underlying contract of affreightment on the basis of which the arbitration was convened. The 1st defendant in that case had argued that it was not a party to the contract because the 2nd defendant which had purported to enter into the contract on its behalf did not have its authority to do so. In construing the effect of Section 1(c) of the Arbitration Act 1996, which provides that: "in matters governed by this Part the court should not intervene except as provided by this Part" (i.e. similar to Section 34 of the Arbitration and Conciliation Act, the court held in relevant part as follows:

> **"49. It is clear from the DAC report that this principle was included because of international criticism that the courts of England and Wales intervened more than it was thought they should in the arbitral process, and this was a discouragement to the selection of London as a forum for arbitration.**
>
> **.....**
>
> **51. In my view therefore the present application for the determination of whether there is an arbitral agreement is a matter regulated by Pt. 1 of the Act and in accordance with S. 1 (c), the court must approach the application on the basis it should not intervene except in the circumstances specified in that part of the Act.**
>
> **52. I accept the owners' submission that the use of the word 'should' as opposed to the word shall' shows that an absolute prohibition on intervention by the court in circumstances other than those specified in Pt. 1 was not intended. That submission seems to me to have force as the view is expressed in the DAC report that a mandatory prohibition of intervention in terms similar to act 5 of the Model Law was inapposite. However it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Pt. 1 of the Act."**

It is unusual for courts to grant an injunction to restrain the completion of an arbitral award. In the case of *Bremer Vulkan v. South Indian Shipping* (1981) AC 909 at 979, the House of Lords refused to grant an interlocutory injunction to restrain arbitral proceedings. The court (*per* Lord Diplock) held as follows:-

> **"I find myself unable to accept as will-founded the general proposition by Lord Denning M.R. that 'the High Court has an inherent jurisdiction to supervise the conduct of arbitrators. It is not confined to the statutory powers'.... For the moment I confine myself to rejecting the notion that the High Court has a general supervisory power over the conduct of arbitration more extensive than those that are conferred upon it by the Arbitration Acts; nor do I suppose that the assertion of such an open ended power of intervention in the conduct of consensual private arbitration would be likely to encourage resort to London arbitration under contracts between foreigners which have no other connection with this country than the arbitration clause itself."**

This court, (Lagos Division) very recently in the case of *Statoil Nig Ltd & Anor v. NNPC & 2 Ors* (2014) 14 NWLR (Pt 1373) 1 at pages 25 paras C - F, 28 para. H, 29 paras. F - H made a pronouncement on the limit of court's intervention in arbitral proceedings; specifically on the principles of propriety of the court to grant injunction in Arbitration proceedings. The court stated that the intention of the legislature in making the provision in section 34 of the Arbitration and Conciliation Act, Cap. A18, Laws of the Federation of Nigeria, 2004 is to protect the mechanism of arbitration and to prevent the courts from having direct control over arbitral proceedings or to prevent the courts from intervening in arbitral proceedings outside the circumstances specified in the Act. In other words, the intention of the legislature is to make arbitral proceedings an alternative to adjudication before the courts, and not an extension of court proceedings. In this case, the issuance of an *ex parte* order of interim injunction was not permitted under the Arbitration and Conciliation Act. In the circumstance, the trial court erred when it made the order sought by the 1st respondent.

In my humble view, since it is crystal clear that the courts are generally reluctant to intervene in the award of arbitral proceedings except in special circumstances as prescribed by the law, it appears to me that the courts will not encourage the grant of injunction to prevent the conclusion of the proceedings of an arbitral panel especially when an aggrieved party has the right to seek redress in court to set aside the Arbitral Award as provided by Sections 29, 30 and 48 of the Act.

I am in full agreement with the learned senior counsel for the appellant, Mr. Fagbohunlu, (SAN) that the circumstances of this case do not justify the award of an injunction. In this case, it is indisputable and in fact not contested that: -

i) The parties to this Appeal lawfully entered into the PSC, which contained an arbitration clause in its Clause 21.

ii) The 1st respondent participated fully in the arbitral proceedings convened pursuant to the said PSC.

iii) The aforesaid arbitral proceedings led to the issue of the Partial Award on 3 October, 2011, which award is final as to all issues of liability between the parties.

iv) The Final Award to be issued by the arbitral tribunal is only as to the quantum of damages due to the appellant and the 2nd respondent, consequent upon the arbitral tribunal's findings on liability as contained in the Partial Award.

In the prevailing circumstances, it is indeed inequitable for injunction to be granted in favour of the 2nd respondent which has voluntarily surrendered itself to arbitration and fully participated in its proceedings only to turn around to curtail its completion when it has avenue in law to ventilate any grievance it feels in the courts before the enforcement of the Final Award.

It is paramount to note that the 1st respondent has already availed himself with the right to set aside the award by instituting the substantive suit, the originating motion pending before the court. There is therefore no legal justification whatsoever for the grant of interlocutory injunction. Whatever grievance, either misconduct of the arbitrators or for whatever reason, will be determined in the substantive suit. There is no reasons to curtail or disrupt or stay the completion of the proceedings of the Arbitral Panel especially where the liabilities of the parties have already been determined and what is remaining to be concluded is the assessment of damages which is consequent upon the findings of the arbitral tribunal on liability as contained in the Partial Award.

The nature of modern commercial activities demand quick resolutions of disputed issues and so parties avoid the usual long and tenuous procedure in the courts. The Arbitration and Conciliation Act itself was made to provide for easy settlement of commercial disputes. As a general rule, therefore the law does not encourage the intervention of the court proceedings so as not to disturb the agreement by the parties to the jurisdiction of arbitral proceedings for quick resolutions of disputes.

The reluctance of courts to grant injunctions to restrain arbitral proceedings is evident and fortified by two other cited decisions of the English Court of Appeal. In *The Ithaka* (1939) Lloyds Law Reports, Vol. 64 p. 259, the court, like the instant case was invited to grant an injunction to restrain the continuation of arbitral proceedings. Lord Justice Scott at p. 262 of the report held thus –

> **"I therefore do not think that the owners of the Ithaka will really be prejudiced by the arbitration proceedings being held, and think that, on the other hand, it would involve an unfairness to the salvage company if the arbitration proceedings were held up indefinitely. As business people, it is a matter of importance to them that the arbitration proceedings under Lloyd's agreement, which we understand is the method by which they carry on the whole of their business should not be unduly postponed."**

In *THE 'ORANIE'* and *THE 'TUNISHIE'* (1966) 1 Lloyd's Law Reports Vol. 1. 4777 Sellers L. J. in rejecting the delivery of an arbitral award after the tribunal had concluded hearing, at page 484 held as follows:

> **"There must, I think, be the most unusual and exceptional circumstances for staying the publication of an award when the arbitration has been heard. I know of no precedent for so doing, and this case does not seem to me to justify creating one."**

These cases are quite illuminating and are apposite to the facts and circumstances of this appeal.

The 1st respondent in this case has not shown any special or exceptional circumstances why the discretionary power of a Judge to grant an injunction in a case should be exercised in its favour. Rather with the case as represented, the balance of convenience is in favour of the appellant for the court to have refused the grant of an interlocutory injunction. I am of the fervent view that the proceedings of an arbitral panel should not be unduly clogged by the grant of an injunction.

On the whole, having regard to the principles of law enunciated above and the facts of this case and the decided cases adumbrated above, I hold that the lower court failed to determine the 1st respondent's motion for interlocutory injunction on its merits. It also granted injunction in violation of settled principles relating to the conditions for the grant of interlocutory injunctions as espoused in this appeal. The learned trial Judge did not exercise his discretion judicially and judiciously.

In an application for injunction, though the powers of the court hearing it, is discretionary; the law enjoins the court to exercise the discretion judicially and judiciously. Where it is not so exercised, as in this case, the appellate court will interfere - *Ayoola v. Baruwa* (1996) 11 NWLR (Pt 628) 595. The lower court ought not to have granted the interlocutory injunction sought by the 1st respondent.

Issue 2 is hereby resolved in favour of the appellant. The interlocutory injunction granted in favour of the 1st respondent by Hon. Justice Abdul Kafari of the Federal High Court, Abuja Division on the 24th of October 2011 is hereby discharged.

ISSUE 3

Whether the lower court's ruling of 18 November, 2011 has not prejudiced the hearing of the 1st respondent's Originating Motion in such a way that this matter ought to be remitted to another judge of the Federal High Court for hearing of the substantive suit. (Ground 8)

It is trite law that in an application for the grant of an interlocutory injunction, pending the determination of the substantive claim, the Judge has a duty to ensure that he does not in the determination of the application determine the same issues or rights that arise for determination in the substantive suit. It is not proper for the court at that stage to express any opinion as to such rights as such an opinion might give the impression that the court has made up its mind on the substantive issues on trial before it - *Akapo v. Hakeem-Habeeb* (1992) 6 NWLR (Pt 247) 266; *Orji v. Zaria Ind. Ltd* (1992) 1 NWLR (Pt 216) 124 at 141; *Ogunro v. Duke* (2006) 7 NWLR (Pt 978) 133; *Ogbonnaya v. Adapalm* (1993) 5 NWLR (Pt 292) 142 at 157.

In the application to discharge the interim injunction in the lower court, one of the grounds relied upon by the appellant is that the court granted the *ex parte* order on a suppression or misrepresentation of material facts in the affidavit of the 1st respondent to the effect that the substantive issue submitted to arbitration was to determine the "actual PPT (Petroleum Profits Tax) liability" to be computed by the contractor under the PSC. (See pages 539 - 541 of the Record of Appeal).

The lower court at 618 of the record accepted the 1st respondent's argument that the facts stated by the 1st respondent in its affidavit were not misrepresented. The 1st respondent, indeed, in paragraph 5.52 of the 1st respondent's Brief admitted in effect that the trial Judge found as a fact in its ruling, that the Partial Award prevents the 1st respondent from paying Petroleum Profits Tax (PPT) as assessed by Federal Inland Revenue Service (FIRS).

It is pertinent to note that this decision was arrived at the interlocutory stage of the matter in the lower court.

Now a perusal of the grounds in support of the Originating Motion before the court evinces the fact that these are the substantive issues before the court. See Ground 1 (c, d, e) and Ground 4 (e) of the Originating Motion at pages 4, 5 and 10 of the Record of Appeal. It is thus clear that the question of whether the partial award by its terms precludes the 1st respondent from paying tax assessed by FIRS is a key question relevant to the determination of the substantive suit before the lower court. It is immaterial, as contended by the 1st respondent that the trial court was responding to an issue presented to it by the appellant. The court ought to have refrained from making a pronouncement on it since it touched on the substantive suit before the court. In my view this conclusion has put the appellant in a position of prejudice. In the circumstances, it is just and fair to remit the case for trial by

another Judge. - See *Ojukwu v. Governor of Lagos State* (1986) 3 NWLR (Pt 26) 39 at 45. It is indisputable that it is in the interest of justice that a neutral Judge should in the circumstances of this case hear the substantive suit. None of the parties can claim prejudice by such an order.

Issue 3 is hereby also resolved in favour of appellant. Having resolved all the extant issues in favour of the appellant, the appeal succeeds and it is hereby allowed. I hereby make the following orders –

(i) I hereby dismiss the respondent's Motion on Notice for Interlocutory Injunction granted in favour of the 1st respondent by Hon. Justice Abdul Kafarati, of the Federal High Court Abuja on the 24th of October 2011.

(ii) The Chief Judge of the Federal High Court shall assign the 1st respondent's Originating Motion to another Judge of the Federal High Court for hearing.

The parties shall bear their costs.

SANUSI, JCA: The Judgment just delivered by my learned brother Akomolafe-Wilson, JCA was made available to me before now. On perusing same, I am at one with her reasoning and the conclusion that the appeal is meritorious and ought to be allowed. I too accordingly allow it.

I abide by the consequential orders made in the lead judgment. I decline to award any costs, therefore each party is to bear its own costs.

TINE TUR, JCA: I read an advance copy of the lead judgment just delivered by my learned brother, Tinuade Akomolafe-Wilson, JCA and I concur that the learned trial Federal Judge had no jurisdiction to have entertained the *exparte* interim injunction and subsequently the interim injunction in favour of the 1st respondent. I shall refer to the provisions of Section 34 of the Arbitration and Conciliation Act, Laws of the Federation of Nigeria, 2004 which reads as follows:

"34. Extent of Court Intervention:

A Court shall not intervene in any matter governed by this Act, except, where so provided in this Act."

Section 57 (1) of the Act *(supra)* defines **"Court"** to mean **"the High Court of a State, the High of the Federal Capital Territory, Abuja or the Federal High Court."** The Federal High ought not to have intervened by entertaining the motion *exparte* for interim injunction dated 19th October, 2011 which sought the following reliefs to wit:

"3. AN ORDER of interim injunction restraining the claimants in the Arbitral proceeding (the subject matter of the substantive application to set aside the award) from taking and or continuing to take any further step in the Arbitral proceedings and particularly from submitting any updated and revised damages in accordance with the terms of the Partial Award or any other monetary claims pursuant to the award dated 3rd October, 2011 pending the hearing and determination of the motion on Notice for interlocutory injunction filed before this Honourable Court.

4. AN ORDER directing that the parties to the Arbitral proceedings maintain the status quo ante the delivery of the partial award pending the hearing and determination of the motion on Notice filed before this Honourable Court."

The Motion on Notice is at pages 466 - 468 of the printed record of proceedings and the remedies prayed for were as follows:

"1. An order of interlocutory injunction directing that the parties to the Arbitral proceedings (the subject matter of the application to set aside filed before this Honourable Court) either by themselves or their privies, agents, servants or any person or persons acting for and on their behalf desist from and or stop taking any further steps/actions in respect of the Arbitral proceedings, including but not limited to the taking of any steps or doing anything whatsoever towards reconvening, reconstituting and or concluding the partial award dated 3rd October, 2011 delivered by the majority of the Arbitral panel (Sir Anthony Colman & General Aksen, Chairman) and/or by any means including email communication, video conferencing, tele-conferencing or by any such electronic means continue with the Arbitral proceedings pending the hearing and determination of the Motion on Notice seeking to set aside the Arbitral award dated 3rd October, 2011 filed before this Honourable Court.

2. An order directing that the parties to the Arbitral proceedings maintain the status quo ante the delivery of the Arbitral award pending the hearing and determination of the Motion on Notice filed before this Honourable Court.

3. And for such further and or other orders as the Honourable Court may deem fit to make in the circumstances.

***AND FURTHER TAKE NOTICE** that the grounds for this application are:*

"i. By partial award dated 3rd October, 2011, the Arbitral Tribunal determining the liabilities of the parties thereto and thereafter reserved the decision as to cost, damages and interest for the final award.

ii. The Applicants has filed an application before this Honourable Court seeking to set aside the Arbitral Award on several grounds including lack of jurisdiction.

iii. The claims before the Arbitral Tribunal clearly demonstrate that the dispute submitted by the claimants/respondents to the Arbitral Tribunal is not arbitrable and the Arbitral Tribunal lacked the jurisdiction to entertain same.

iv. The Arbitration proceedings was amongst other means conducted by way of Tele-conferencing, email communication and other electronic communication between the Arbitral panel and the parties.

v. The partial award was first published (notified to the parties) by means of email communication sent on 3rd October, 2011 before the hard copies of the award were sent to the parties.

vi. By email sent on 10th October, 2011, the Chairman of the Arbitral Tribunal, Gerald Aksen, requested that the claimants/respondents should furnish their updated and revised damages in accordance with the terms of the partial award, with a view to continuing with the Arbitral proceedings before delivering the final award.

vii. It is necessary to maintain the status quo in the Arbitral proceedings pending the hearing and determination of the application to set aside the Arbitral award.

viii. Unless by an order of the Honourable Court, the Arbitral Tribunal may proceed with further hearing in the Arbitral proceedings and deliver its final award and finally resolve the rights of the parties before the hearing and determination of the Originating Motion filed before this Honourable Court which seeks to set aside the Arbitral Award dated 3rd October, 2011.

ix. Unless by an order of the Honourable Court, the Arbitral Tribunal will re-convene to consider the updated and revised damages which it requested from the claimants/respondents and thereafter deliver a final award notwithstanding the pendency of the application to set aside the Arbitral award before this Honourable

Court and thereby face this Honourable Court with a fait accompli.

x. It is just, right and in the interest of justice to stay further proceedings in the Arbitration and maintain the res to enable this Honourable Court exercise its jurisdiction over the substantive application to set aside the Arbitral award pending before this Honourable Court."

I have scanned the entire pages of the Arbitration and Conciliation Act, Cap.A18, Laws of the Federation of Nigeria, 2004 but I am unable to find the Section that provides for the Federal High Court to exercise the powers of entertaining and granting *exparte* interim or interlocutory injunctions as the case may be to restrain arbitral proceedings taking place or continuing to finality. The Federal High Court or any High Court for that matter is not to exercise jurisdiction in arbitral causes and matters ***"...except, where so provided for in this Act"*** according to the provisions of Section 34 of the Act (supra).

The Arbitration and Conciliation Act, Cap.A18 is titled -

"An Act to provide a unified legal frame work for the fair and efficient settlement of commercial disputes by arbitration and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration."

Every modern day statute has a short or long title giving a fairly full description of the general purpose of the Act or statute. It is now well settled that the title of the statute or Act is an important part of the Act and may be referred to for the purpose of ascertaining its general scope, and of throwing light upon its construction. See *Fenton v. J. Thorley & Co. Ltd*. (1903) A.C. 443.

Section 1 and 2 of the Arbitration and Conciliation Act (supra) reads as follows:

"1. Form of Arbitration Agreement:

(1) Every arbitration agreement shall be in writing contained:-

(a) in a document signed by the parties; or

(b) in an exchange of letters, telex, telegrams or other means of communication which provide a record of the arbitration agreement; or

(c) in an exchange of points of claim and of defence

in which the existence of an arbitration agreement is alleged by one party and not denied by another.

(2) Any reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if such contract is in writing and the reference is such as to make that clause part of the contract.

2. Arbitration Agreement Irrevocable Except by Agreement or Leave of Court:

Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the Court or a Judge."

It is the contracting parties that usually opt to settle their commercial differences or disputes by submitting to arbitration proceedings. Unless a contrary intention is expressed therein, an arbitration agreement shall be irrevocable except by agreement of the parties or by leave of the Court or a Judge. The legislative intention by virtue of Section 34 of the Act (supra) is that except where so provided under the Arbitration Act, no Court of law should intervene in arbitration proceedings. The power of the Court to interfere in arbitral proceedings is limited to well defined situations or circumstances. The Court may at times do so by invoking her inherent jurisdiction as provided under Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 and as pointed out in Halsbury's Laws of England, Vol.2, 4th edition, page 266 paragraph 518 to wit:

"Injunction restraining arbitration proceedings:

The Court, in the case of a Judge-arbitrator (see paragraph 506, ante), the power to grant an injunction can only be exercised by the Court of Appeal: Administration of Justice Act, 1970, Section 4 (5) has an inherent power jurisdiction to restrain arbitration proceedings by injunction directed to the arbitrator or the other party. Kitts v. Moore (1895) 1 QB 253, CA. This jurisdiction, however, will be exercised with considerable caution. See e.g. Jackson v. Bar y Rly Co. (1893) 1 Ch.238, where the arbitrator was charged with bias and prejudice. It has been exercised to restrain the reference when an action was pending impeaching the agreement containing the reference to arbitration. Kitts v. Moore (1895) 1 QB 253, C.A.; Mylne v. Dickinson (1815) Coop G. 195, DC; Sissons v. Oates (1894) 10 TLR 392; Maunsell v. Midland Great Western (Ireland) Rly Co. (1863) 1 Hem & M 130; Edward Grey & Co. v. Tolme and Runge (1914) 31 TLR 137; C.A, where the question was whether on the outbreak of war the contract

providing for arbitration was suspended or dissolved; and cf. McHarg v. Universal Stock Exchange (1895) 2 QB 81, CA; Smith, Coney and Barrett v. Becker, Gray & Co. (1916) 2 Ch. 86, CA; Scott & Sons v. Del Sel (1923) SC (HL) 37. But see now Heyman v. Darwins Ltd. (1942) AC 356, (1942) 1 All E.R. 337, HL, which, although not affecting the principle of these decisions, might clearly affect the application of the principle. But it seems that even so the Court will make some inquiry into the merits of the proceedings, The Ithaka (1939) 3 All E.R. 630, CA, where the Court refused to restrain arbitration proceedings in this country, despite the pendency of an action in the Turkish Courts impugning the agreement containing the arbitration clause as having been obtained by duress; and the Court will not as a rule restrain an arbitrator from proceeding with a reference solely on the ground that the award will be inoperative. North London Rly Co. v. Greath Northern Rly (1883) ll QBD 30, CA; London and Blackwall Rly Co. Ltd. v. Cross (1886) 31 Ch.D. 354 at 368, CA; Den of Airlie SS Co. Ltd. v. Mitsui & Co. Ltd. and British Oil and Cake Mills Ltd. (1912) 106 LT 451, CA. And see Farrar v. Cooper (1890) 44 Ch.D. 323; Great Western Rly Co. v. Waterford and Limerick Rly Co. (1881) 17 Ch.D. 493, CA."

Again in paragraph 519 at page 266 of Halsbury's Law (supra) appears the following statement of the law:

"Declaration: The Court, in the case of a Judge-arbitrator (see paragraph 506, ante), the power to make a declaration can be exercised only by the Court of Appeal: Administration of Justice Act, 1970, Section 4 (5), has also an inherent power to make a declaration that the arbitrator has no jurisdiction to hear or determine any claim in question, whether or not an injunction would be granted. Government of Gibraltar v. Kenney (1956) 2 QB 410, (1956) 3 All E.R. 22; The Phonizien (1966)1 Lloyd's Rep.150. The exercise of this power is, however, discretionary. Government of Gibraltar v. Kenney (1956) 2 QB 410 at 424, (1956) 3 All E.R. 22 at 27, per Sellers, J."

In my humble view none of the situations or circumstances for invoking the inherent powers arose for the lower Court to have descended into the arena to grant an *exparte* interim or interlocutory injunction in favour of the 1st respondent. I shall refer to *Oloba v. Akereja* (1988) 7 SCNJ (Pt.1) 56 where Obaseki, JSC held at page 63 - 64 as follows:

"The issue of jurisdiction is very fundamental as it goes to the competence of the Court or tribunal. If a Court or tribunal is not competent to entertain a matter or claim or suit, it is a waste of valuable time for the Court to embark on the hearing and

determination of the suit, matter or claim. It is therefore an exhibition of wisdom to have the issue of jurisdiction or competence determined before embarking on the hearing and determination of the substantive matter. The issue of jurisdiction being a fundamental issue, it can be raised at any stage of the proceedings in the Court of first instance or in the appeal Court. This Issue can be raised by any of the parties or by the Court itself suo motu. When there are sufficient facts ex facie on the record establishing a. want of competence or jurisdiction in the Court it is the duty of the Judge or Justice to raise the issue suo motu if the parties fail to draw the Court's attention to it, see Odiase v. Agho (supra).

There is no justice in exercising jurisdiction where there is none. It is injustice to the law, to the Court and to the parties so to do. I am therefore unable to accept appellant's counsel's submission that the Court of Appeal should not have entertained ground 1(b) which raised the issue of jurisdiction simply because it was not so raised in the High Court. Once an issue of jurisdiction is raised, it should be examined in all its ramifications. It should not be compartmentalized and subjected to piecemeal examination and treatment. The very many faces of jurisdiction should come under the searchlight and pronounced upon.

I agree with learned counsel for the respondent that it is only the issue of jurisdiction that has dominated proceedings in this matter in all the three Courts below. The jurisdiction of a Customary Court is not one that should have posed such a complex problem as the Courts below have made it appear."

For these and the fuller reasons given in the lead judgment I also allow the appeal. I abide by all the orders made by my learned brother.

Cases cited in the judgment

7Up Bottling Company Ltd & Ors v. Abiola & Sons Ltd (1995) 3 NWLR (Pt. 383) 257
African Re Corp v. AIM Consultancy Ltd (2004) 12 CLRN 107
Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt. 247) 266
Aye-Fenus Ent. Ltd v. Saipem Nig. Ltd (2008) 1 CLRN 85
Ayoola v. Baruwa (1999) 11 NWLR (Pt. 628) 595
Baker Marine (Nig) Ltd v. Danos & Curole Marina Contractors Inc. (2001) 7 NWLR (Pt. 712) 335
Bello v. A.G Lagos State (2007) 2 NWLR (Pt. 1017) 115 CA
Colito (Nig) Ltd v. Daibu (2010) 2 NWLR (Pt 1178) 213
Commerce Assurance Ltd v. Alli (1992) 3 NWLR (Pt. 232) 710 SC
Ejiofor v. Uzodike (2008) 17 NWLR (Pt. 117) 470

Ezebilo v. Chinwuba (1997) 7 NWLR (Pt. 511) 108
Group Danone v. Voltic (Nig) Ltd (2008) 4 CLRN 1
KSUDB v. Fanz Construction Co Ltd (1990) 4 NWLR (Pt. 142) 1
Kotoye v. CBN (1989) 1 NWLR (Pt 98) 419
Ladunni v. Kukoyi & Ors (1972) 1 All NLR (Pt 1) 133
Missini v. Balogun (1968) 1 All N.L.R. 318
Nwanganga v. Military Government of Imo State (1987) 3 NWLR (Pt. 59) 185
Obeya Memorial Hospital & Anor v. A.G. Federation & Anor (1987) 3 NWLR (Pt. 60) 325
Ogbonnaya v. Adapalm (1993) 5 NWLR (Pt. 292) 142
Ogunro & Ors v. Ogedengbe & Anor (1960) NSCC 98
Ogunro v. Duke (2006) 7 NWLR (Pt. 978) 133
Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt. 26) 39
Okechukwu v. Etukokwu (1998) 8 NWLR (Pt. 562) 513
Oloba v. Akereja (1988) 7 SCNJ (Pt.1) 56
Orji v. Zaria Ind. Ltd (1992) 1 NWLR (Pt. 216) 124
Ras Pal Gazi Construction Co. Ltd v. F.C.D.A. (2001) 10 NWLR (Pt. 722) 559
Shell Trustees (Nig) Ltd v. Imani & Sons Ltd (2000) 6 NWLR (Pt. 662) 639
Statoil Nig Ltd & Anor v. NNPC & 2 Ors (2013) 7 CLRN 72
Shuaibu v. Muaza (2007) 7 NWLR (Pt. 1033) 271
Usiobaifo v. Usiobaifo (2005) 3 NWLR (Pt. 913) 665

Foreign cases cited in the judgment

African Fertilizers & Chemicals (Nig) Ltd v. B.D. Shipsnavo Gmbh & Co. Reederi KG (2011) EWHC 2452; (2011) 2 Lloyds Report 53
Bremer Vulkan v. South India Shipping (1981) AC 909
Den of Airlie SS Co. Ltd. v. Mitsui & Co. Ltd. and British Oil and Cake Mills Ltd. (1912) 106 LT 451
Edward Grey & Co. v. Tolme and Runge (1914) 31 TLR 137
Farrar v. Cooper (1890) 44 Ch.D. 323
Fenton v. J. Thorley & Co. Ltd. (1903) A.C. 443
Government of Gibraltar v. Kenney (1956) 2 QB 410, (1956) 3 All E.R. 22
Great Western Rly Co. v. Waterford and Limerick Rly Co. (1881) 17 Ch.D. 493, CA
Heyman v. Darwins Ltd. (1942) AC 356, (1942) 1 All E.R. 337
Jackson v. Barry Rly Co. (1893) 1 Ch.238
Kitts v. Moore (1895) 1 QB 253
London and Blackwall Rly Co. Ltd. v. Cross (1886) 31 Ch.D. 354 at 368
Maunsell v. Midland Great Western (Ireland) Rly Co. (1863) 1 Hem & M 130
Mcharg v. Universal Stock Exchange (1895) 2 QB 81
Mylne v. Dickinson (1815) Coop G. 195, DC;
North London Rly Co. v. Great Northern Rly (1883) Il QBD 30
Sissons v. Oates (1894) 10 TLR 392
Scott & Sons v. Del Sel (1923) SC (HL) 37
Smith, Coney and Barrett v. Becker, Gray & Co. (1916) 2 Ch. 86, CA
The Ithaka (1939) 3 All E.R. 630

THE 'ORANIE' and *THE 'TUNISHIE'* (1966) 1 Lloyd's Law Reports Vol. 1. 4777
The Phonizien (1966)1 Lloyd's Rep.150
Vale Do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co. Ltd (2000) C.L.C. 1200
West Tankers Inc. v. Allianz SPA & Anor (2012) EWCA 27

Statutes cited in the judgment
Section 1(c) of the Arbitration Act 1996 (England)
Sections 15 and 33 of the Petroleum Profits Tax Act, No 15 of 1959
Sections 29, 31 and 34 of the Arbitration and Conciliation Act Cap. A18, LFN 2004
Section 34 of the Federal Inland Revenue Service (Establishment) Act No 13 of 2007
Section 4 (5), Administration of Justice Act, 1970
Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999

Books referred to in the judgment
Dicey on Conflict of Laws (6th Ed. P 86)
Halsbury's Laws of England, Vol.2, 4th Edition
J.O. Orojo and M.A. Ajomo Laws and Practice of Arbitration and Conciliation in Nigeria

History:

HIGH COURT
Federal High Court, Abuja
Abdul Kafarati, J.

COURT OF APPEAL (Abuja Division)
Amiru Sanusi, OFR, JCA *(Presided)*
Joseph Tine Tur, JCA
Tinuade Akomolafe-Wilson, JCA *(Read the lead Judgment)*

Counsel:
Babatunde Fagbohunlu, SAN with C. Ikwazom Esq. and Charles Abalaka Esq. for the appellant
P.I.N. Ikwueto, SAN with Isaah Bozimo Esq. and C.P. Eze Esq. for the 1st respondent
Oluyele Delano, SAN with Ahmed Oyegbami Esq. for the 2nd respondent

EMIRATES AIRLINE v. UZOAKU KENECHUKWU NGONADI

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/198/2012
THURSDAY 19TH DECEMBER, 2013

(AUGIE, IKYEGH, OSEJI, JJ.CA)

CARRIAGE BY AIR – International Travel – Claims can only be brought under the Montreal Convention as codified by local legislation.

CARRIAGE BY AIR – Applicable Law – Domestic law cannot be applied to an international contract of carriage by air.

CARRIAGE BY AIR – Carrier's Liability – Carrier may be liable for delayed or denied boarding.

CARRIAGE BY AIR – Damages – Claimant may be entitled to damages above the statutory limit if it can establish willful misconduct or recklessness by carrier or its agent.

DAMAGES – Punitive/Exemplary Damages – are awarded as punishment or deterrent.

DAMAGES – Damages at Large – are determined subjectively.

CONTRACT – Limitation Clause – reduces or eliminates liability for damages.

CONTRACT – Damages – are intended to restore claimant to the position it would have been but for the breach.

DAMAGES – Double Compensation – Court will refuse to award damages were a party had been fully compensated for injury under another head of damages.

DAMAGES – General and Special Damages – differ to the extent that general damages are natural and probable consequence of an act complained of; while special damages are awarded on the basis of particularization of loss or injury.

DAMAGES – Compensatory Damages – are not intended to be punitive.

DAMAGES – Special Damages – Requires establishment of facts indicating particular losses and depends on the nature of the acts that caused the damage.

APPEAL – Ground of Appeal – will not be discountenanced merely because it contains legal arguments and citation of authority except they add or subtract from it.

APPEAL – Evaluation of Evidence – Appellate court will not interfere with findings except there is a substantial error which could result in a different decision.

EVIDENCE – Burden of Proof – is not static and rests upon the person whose case will fail if no evidence is adduced in support.

EVIDENCE – Hearsay Evidence – is inadmissible.

EVIDENCE – Evaluation – Trial court must assess, evaluate and give reasons why it believes or disbelieves evidence of contending parties to a suit.

COMMERCIAL LITIGATION – Costs – Claim for costs is a claim for special damages and requires strict proof.

COMMERCIAL LITIGATION - Claims – Court cannot award more than what is claimed.

Facts:

The respondent purchased a return ticket to Canada through a travel agent. The appellant conveyed her to Canada *via* Dubai. On the return leg, she had successfully checked in at the airport in Canada but was not allowed to board the aircraft on the ground that she did not have a paper ticket. The respondent wrote to the appellant through her solicitor demanding compensation.

When the appellant failed to pay the sum demanded, the respondent commenced an action at the Federal High Court, Lagos claiming among other things, the sum of ₦200,245.00 (Two Hundred Thousand Two Hundred and Forty Five Naira) for breach of the terms of contract of carriage of passenger by air being the total sum of the ticket; general damages for breach of the contract of carriage and costs of the action assessed at ₦10,000,000 (Ten Million Naira).

The trial court found the appellant liable and granted all the claims of the respondent except the amount covering the cost of ticket which it granted half of the sum being the cost for the return leg of a failed contract of carriage.

Dissatisfied, the appellant appealed to the Court of Appeal.

Held *(Unanimously allowing the appeal in part):*

[1] ***Carriage By Air – Damages – Claims can only be brought under the***

Montreal Convention as codified by local legislation.

The object of an international treaty like the Montreal Convention is to provide a uniform international code in the areas that it covers - see Cameroon *Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512, where Rhodes-Vivour, JSC, added that *"all countries that are signatories to it apply it without recourse to their respective domestic law"*, and *Harka Air Services (Nig.) Ltd. v. Keazor* (supra), where the Supreme Court per Adekeye, JSC, further explained that –

> ***"The Warsaw Convention is an international treaty, an international agreement, a compromise principle which the High Contracting States have submitted to be bound by the provisions. They are therefore an autonomous body of law whose terms and provisions are above domestic legislation. Thus, any domestic legislation in conflict with the Convention is void. The purpose and intention of the Warsaw Convention is to remove those actions governed by the Warsaw Convention as amended by the Hague protocol from the uncertainty of the domestic laws of the member States. The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right and not the domestic/common law. Hence, an air passenger is not at liberty to choose as between the provisions of the Convention and the domestic/common law for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to the terms and conditions of the Convention and cannot be pursued under any other law".***

The lower Court was, therefore, on a frolic on its own when it dragged the constitutional right of the respondent into the equation because her action is governed by the Montreal Convention and she cannot eat her cake and have it; her claims can only be asserted in accordance with and subject to the terms and conditions of the Convention, and cannot be pursued under any other law. **(P. 230 lines 15 - 38)**

[2] ***Carriage By Air – Applicable Law – Domestic law cannot be applied to an international contract of carriage by air.***

Section 48 (1) of the Act states that the provisions of the Montreal Convention "SHALL from the commencement of this Act [in 2006] have the force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply..... and SHALL subject to the provisions of this Act govern the rights and

liabilities of carriers, passengers, consignors, consignees and other persons".

The incident involving the respondent occurred in 2008, and it concerns an ***international carriage by air*** from Nigeria to Canada and back to Nigeria.

The Supreme Court made it clear that "an air passenger is not at liberty to choose as between the provisions of the Convention and the domestic/ common law for claims against the carrier" - see *Harka Air Services v. Keazor* (supra). So, the authority she relied on - *Kabo Air Ltd. v. Tarfa* (supra) decided in 2004, is of no moment in this appeal. However, I will consider the issue on its merit. **(P. 232 lines 31 - 45; P. 233 line 1)**

[3] ***Carriage By Air – Carrier's Liability – Carrier may be liable for delayed or denied boarding.***

To start with, airlines do incur liability for *"delayed or denied boarding"* –

See *Harka Air Services (Nig.) Ltd. v. Keazor* (2011) 13 NWLR (Pt. 1264) 320 SC, where the Supreme Court per Adekeye, JSC, very aptly observed as follows –

"There are laws regulating the liability of the carrier to its passengers. An airline's liability to its passengers or customers could arise as a result of –

.....
.....
.....

d) Delayed or denied boarding or

(P. 220 line 44; P. 221 lines 1 - 13)

[4] ***Carriage By Air – Damages – Claimant may be entitled to damages above the statutory limit if it can establish willful misconduct or recklessness by carrier or its agent.***

In this case, the question that rears its head is whether the act of denying the respondent carriage on the flight from Canada, qualifies as willful misconduct on the part of the appellant, to warrant her being awarded damages at large.

This is a completely different issue from whether it is liable to her or not. It is liable, but the liability falls within the ambit of the limitation clause in its Conditions of Carriage as contained in the Montreal Convention, which insists in its Article 29 that in any action for damages, "punitive, exemplary

and any other non-compensatory damages SHALL not be recoverable".

In effect, for the respondent to be awarded damages at large in excess of the liability limits, she must show that the official, who stopped her from boarding the flight at the airport in Canada, knew that what he was doing was wrong; and yet, he persisted in doing so regardless of the consequences or acted with reckless indifference as to what the result may be - see *Harka Air Services (Nig.) Ltd. v. Keazor* (supra) and Cameroon *Airlines v. Abdul-Kareem* (supra). **(P. 226 lines 34 - 45;P. 227 lines 1-20)**

[5] ***Damages – Punitive/Exemplary Damages – are awarded as punishment or deterrent.***

Damages are said to be punitive or exemplary when they are awarded as punishment for the defendant or as a deterrent and are for his loss - see *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd*. (2006) 13 NWLR (Pt. 997) 276 SC, *G.K.F. Investment (Nig.) Ltd. v. Nitel Plc*. (2009) 15 NWLR (Pt. 1164) 344 and *Odiba v. Azege* (1989) 9 NWLR (Pt. 566) 370, where the Supreme Court held that –

> ***"The primary object of an award of damages is to compensate the plaintiff for harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit: exemplary damages, punitive damages. Vindictive damages, even retributory punishment and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like."*** **(P. 226 lines 42 - 45;P. 227 lines 1 - 13)**

[6] ***Damages – Damages at Large – are determined subjectively.***

IT Law Wiki, and **damages at large** is an award that there is no exact measurement for, such as for pain and suffering - see USLegal.com where the term is defined as follows –

> ***"Damages at large are compensation for other than for material loss.*** *The term refers to general damages consisting of non-economic loss; and exemplary damages in appropriate cases. They may include, among others, elements for loss of reputation, injured feelings, bad or good conduct by either-party, or punishment, and therefore no precise amount can be determined.* ***The amount of damages at large are based on a subjective***

determination made on a case-by-case basis, after taking all the facts and circumstances involved into account".
(P. 214 lines 12 - 23)

[7] ***Contract – Limitation Clause – reduces or eliminates liability for damages.***

A **limitation of liability clause** permits contracting parties to reduce or eliminate the potential for **direct, consequential, special, incidental** and **indirect damages** should there be a breach of contract.
(P. 214 lines 10 - 13)

[8] ***Contract – Damages – are intended to restore claimant to the position it would have been but for the breach.***

In other words, the basic object of an award of damages is to compensate the plaintiff for the damage, loss or injury he has suffered. The guiding principle is *restitutio in integrum* [i.e. returning everything to the state as it was before].

The principle envisages that a party who has been damnified by the act, which is called in question, must be put in the position in which he would have been if he had not suffered the wrong for which he is now being compensated - see *NEPA v. Alli* (1992) 8 NWLR (Pt. 259) 279.
(P. 237 lines 22 - 29)

[9] ***Damages – Double Compensation – Court will refuse to award damages were a party had been fully compensated for injury under another head of damages.***

The respondent herein claimed the full sum of her ticket but she was awarded half of it "to cover the return leg of a failed contract", which is as it should be.

She also claimed ₦10m and was awarded the full sum as general damages for breach of the terms of said contract of carriage, which is unjustifiable in law, not only because her action was governed by the Montreal Convention but also because it amounted to double compensation, which the law frowns on - See *Tsokwa Motors (Nig.) Ltd. v. UBA Plc.* (2008) 2 NWLR (Pt. 1071) 347 SC, where the Supreme Court per Aderemi, JSC, said in no uncertain terms that –

"It has been repeatedly held by this Court that where a victim of an injury has been fully compensated under one head of damages, it is improper to award him damages in respect of

the same injury under another head.....”
(P. 233 lines 24 - 37)

[10] ***Damages – General and Special Damages – differ to the extent that general damages are natural and probable consequence of an act complained of; while special damages are awarded on the basis of particularization of loss or injury.***

“General damages” are such, as the law will presume to be the direct, natural or probable consequence of the act complained of, while “special damages” are such as the law will not infer from the nature of the act; the main difference is that in the former case, the Court can make an award when it cannot point out any measure of assessment except what it can hold in the opinion of a reasonable man. In the latter case, all the losses claimed on every item must have crystalized in terms and value before trial - see *Shodipo & Co. Ltd. v. Daily Times* (1972) All NLR 842, where Elias, ON, observed as follows –

“I fail myself to see any difference in principle between a claim for special damages and a claim for general damages. One, of course has to be proved as completely as does the other. The only difference is that where one is claiming special damage, the circumstances are such that one is able to put one’s finger on a particular item of loss and say, ‘I can prove that I lost so much there, so much there, and so much there’, whereas a claim for general damages means this: ‘We cannot prove particular items, but we can prove beyond all possible doubt that there has been pecuniary loss’. Once that has been proved, I cannot myself see any difference in principle between special damage and general damage”.
(P. 233 lines 3 - 22)

[11] ***Damages – Compensatory Damages – are not intended to be punitive.***

Parties are not disputing the fact that the said contract of carriage is subject to Article 29 of the Montreal Convention that forbids *punitive, exemplary or any other non-compensatory damages.* Compensatory damages is a sum of money awarded by a Court to indemnify a person for the particular loss, detriment injury suffered as a result of the unlawful conduct of another; it provides a plaintiff with the monetary amount necessary to replace what was lost, and nothing more. They differ from “punitive damages”, which punish a defendant for his or her conduct as a deterrent to the future commission of such acts.
(P. 229 lines 43 - 45; P. 230 lines 1 - 5)

[12] ***Damages – Special Damages – Requires establishment of facts indicating particular losses and depends on the nature of the acts that caused the damage.***

Strict proof does not imply unusual proof, rather it is basically "proof that would bend or lend itself to quantification" - see *Skye Bank v. Kudus* (2011) LPELR-CA/1/191/08, *Momodu v. University of Benin* (1997) 7 NWLR (Pt. 512) 325, and *Orient Bank (Nig.) Plc. v. Bilante Int. Ltd.* (1997) 8 NWLR (Pt. 515) 37, where per Tobi, JCA (as he then was) explained the requirements as follows –

> *"The degree of "strict proof" required in relation to special damages depends on the character of the acts which produce the damage and the circumstances under which the acts were done..... Strict proof required in proof of special damages means no more than that the evidence must show the same particularity as is necessary for its pleading. It should, therefore, normally consist of evidence of particular loss which are exactly known or accurately measured before trial. Strict proof does not mean unusual proof, but simply implies that a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible..... Strict proof in the context of special damages can mean no more than such proof as would readily lend itself to quantification or assessment..... Special damages can only be awarded if a Court trying the case gives adequate consideration to the evidence in support and accepts it as having probative value so as to preponderate in favour of the person claiming".*
> **(P. 234 lines 44 - 45; P. 235 lines 1 - 7)**

[13] ***Appeal – Ground of Appeal – will not be discountenanced merely because it contains legal arguments and citation of authority except they add or subtract from it.***

In this case, the Particulars of Error highlighted above contain legal arguments and citation of authorities, which can be fatal sometimes, but in this case they add nothing and subtract nothing from their Grounds, and it is settled that the application of such rules should not be reduced to a matter of mere technicality - see *Aderounmu v. Olowu* (2000) 4 NWLR (Pt. 652) 253, wherein it was held –

> *"The rules.....are primarily designed to ensure fairness to the other side..... The prime purpose of the rules.....that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal;*

and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the other side of the precise nature of the complaint of the appellant and.....of the issues that are likely to arise on the appeal. ***Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form".*** **(P. 212 lines 5 - 20)**

[14] ***Appeal – Evaluation of Evidence – Appellate court will not interfere with findings except there is a substantial error which could result in a different decision.***

Evidently, the lower Court did not do any evaluation of the evidence before it, but that is not enough to say that its finding is wrong and to allow the appeal.

We still have to determine whether it could have reached a different decision - see *Onajobi v. Olanipekun* (1985) 4 SC (Pt. II) 156 and *Anyanwu v. Mbara* (1992) 6 SCNJ 90 where the Supreme Court per Nnaemaka-Agu, JSC, observed –

"It is the law - that the fact that a party has established an error in the proceedings does not necessarily mean that the appeal must be allowed. Such an error will be a ground for allowing the appeal if and only if, it is substantial in the sense that if he had directed himself correctly he would have reached a different conclusion".
(P. 218 lines 25 - 36)

[15] ***Evidence – Burden of Proof – is not static and rests upon the person whose case will fail if no evidence is adduced in support.***

Then again, the burden of proof is not static in civil cases; it does shift - see *Zubairu v. Mohammed* (2009) LPELR-5124 (CA) where Oredola, JCA, said –

"By Section 137 (of the Evidence Act) the burden of proof is not static. It fluctuates between the parties. Subsection (1) places the first burden on the party against whom the Court will give Judgment if no evidence is adduced on either side. .....the onus probandi is on the party who would fail if no evidence is given in the case. ***Thereafter, the second burden goes to the adverse party..... and so the burden changes place almost like the colour of a chameleon until all the issues in the pleadings have been dealt with. By Section 137(2), the burden of proof***

shifts between the parties in the course of giving evidence in the proceedings. From the language of the subsection, there is some amount of versatility in the shifting process of the burden. The shifting process, in the language of the subsection, will be so on until all the issues in the pleadings have been dealt with. Thus, as firmly established, the standard of proof in civil cases.....is on the balance of probabilities or preponderance of evidence. Hence, where evidence adduced is loaded or tilted to one side and there is nothing forthcoming on the imaginary scale from the other side, the evidence proffered from the former will satisfy the requirement of proof".

In other words, all a plaintiff needs to establish is that his story is more likely to be true than the respondent's. As Dr. Akinola Aguda explained in his book –

"It is not enough for a party to a case who has the onus of establishing a particular fact to say that his own evidence is just as good as that of his opponent. For what the law says that he must do to discharge the onus of proof on him is to prove by evidence which convinces the Court..... of the probability of his case rather that of his opponent on the point in issue". [Law and Practice relating to Evidence in Nigeria]
(P. 216 lines 26 - 45; P. 217 lines 1 - 11)

[16] ***Evidence – Hearsay Evidence – is inadmissible.***

Obviously, what PW1 had to say about what happened in Canada and what her daughter had said to the official is hearsay and is therefore inadmissible – see *Ijioffor v. the State* (2001) 4 SC (Pt. 11) 1, wherein it was explained that –

"Hearsay is generally regarded as one of the most complex subjects in the law of evidence. It was reformulated by Rupert Cross as follows: "Assertions of persons other than the witness who is testifying (including statements relied on as equivalent to assertions, although not primarily intended as such by their maker, and conduct relied on as conduct equivalent to the actor's assertion of any fact other than his contemporaneous state of mind or physical sensation, although not so intended by him) ***are inadmissible as evidence of the truth of that which are asserted".*** **(P. 228 lines 22 - 34)**

[17] ***Evidence – Evaluation – Trial court must assess, evaluate and give***

reasons why it believes or disbelieves evidence of contending parties to a suit.

The lower Court found that the respondent *"utilized the paper ticket with which she was issued by the said travel agent to embark on her outward journey on the defendant",* and in questioning the justification for the finding, the appellant argued that it is not enough and not acceptable in law for a trial Judge to simply say - *"I believe"* or *"I didn't believe a witness"*; he must state and ought to state the reasons for believing or not believing each. That is true; evaluation of evidence entails assessing evidence to give value or quality to it.

It involves a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other.

There must be on record how the Court arrived at its conclusion of preferring one piece of evidence to the other - see *Oyekola v. Ajibade* (2004) 17 NWLR (Pt. 902) 356 and *Idakwo v. Nigerian Army* (2004) 2 NWLR (Pt. 857) 249. **(P. 217 lines 44 - 45; P. 218 lines 1 - 12)**

[18] ***Commercial Litigation – Costs – Claim for costs is a claim for special damages and requires strict proof.***

The respondent urged us to hold that she is entitled to costs as claimed but that is not likely because, as the appellant rightly submitted, her claim for "cost of this action" is a claim for special damages, and the position of the law is that special damages must be specifically claimed and proved strictly. **(P. 234 lines 28 - 31)**

[19] ***Commercial Litigation - Claims – Court cannot award more than what is claimed.***

Once again, the issue of discretion or no discretion does not arise in the circumstances of this case. It is settled law that "a Court may award less and not more than what the parties have claimed" - see *Abenga v. Benue State Judicial Service Commission* (2005) All FWLR (Pt. 321) 1327, *African Petroleum v. Aborisade & Anor* (2013) LPELR-20362 (CA), where Mbaba, JCA, held that –

> ***"It is the law..... that a Court is barred from making an award or granting a relief, outside what was claimed in the pleadings and proved by evidence at trial. This is because, being regulated by laws and principles relating to pleadings, and due to the need to be disciplined, predictable and act on***

evidence before it, the Court cannot afford to stray to play the comic role of a "father Christmas" who doles out gifts, unsolicited, to whoever he delights to please".
(P. 240 lines 17 - 29)

Obiter:

[20] ***Commercial Litigation - Appeal - Complaint that judgment is against the weight of evidence connotes an appeal on facts.***

The position of the law, as stated by the respondent, is very correct - the appellant's complaint in Ground 8 of its Grounds of Appeal is that the *"Judgment is against the weight of evidence"*, and when an appellant makes such a complaint, what he means is that when the evidence adduced by him is balanced against that adduced by the respondent, the Judgment given is against the weight that should have been given to the totality of the evidence.

So, an appeal against weight of evidence is basically on facts - see *Agbamu v. Ofili* (2004) 5 NWLR (Pt. 867) 540. **(P. 216 lines 13 - 21)**

[21] ***Commercial Litigation – Additional Authorities – Party can forward additional authorities to court even after the matter has been adjourned for judgment.***

...it is counsel's prerogative to forward such authorities - see *African Re. Corp. v. JDP Const. (Nig.) Ltd*. (supra), where Tobi, JSC, observed –

"It is trite law that where counsel comes across relevant authorities after a matter has been adjourned for Judgment or Ruling, he must make the letter indicating the authorities available to opposing counsel for a possible input. That is the essence of our adversary system of adjudication".
(P. 220 lines 22 - 29)

AUGIE, JCA (Delivering the lead Judgment): The respondent, a student at a Canadian University, purchased a return ticket to Canada from the appellant through a registered travel agency in Nigeria - Bits Travel and Tours Ltd., in the sum of ₦200,425.00. She was issued a ticket with Reference No. EDTMDF on the 27th May 2008, and had no problems boarding the appellant's aircraft on the 29th of May 2008 to Canada *via* Dubai. However, her return trip on the 22nd of December 2008 was a different story.

She arrived at the Pearson Airport in Canada and was duly checked in.

After airport security screening and passport control protocols, she proceeded to board the aircraft with other passengers, but it was at the point of entering the aircraft that an official of the appellant denied her entry on the ground that she did not have a proper paper ticket to enable her return back to Lagos.

She explained to the official that the ticket was purchased in Nigeria and was the same ticket she had used for the first trip from Lagos-Dubai-Canada, but he insisted she must be escorted out of the airport by security officials.

She had to take a taxi to and pay for her accommodation in Ontario, Canada.

She reported to the appellant at its Canadian Office, and when it failed to take any steps, her Lawyers - Messrs. Ricky Tarfa & Co., wrote a letter dated 6/1/2009 to the appellant at its Nigeria Office; the last four paragraphs reads –

> *"We have carefully chronicled the above facts to give you a complete picture of the circumstances in which our client was denied to travel by officials of your airline despite having a valid and subsisting ticket and thereby exposing her and her family to considerable expense, trauma and hardship. It is important to note that our client being 18 years of age was put in a very difficult position as a result of the acts of your officials.* ***It is consequent upon the above that we have our client's instruction to demand for the immediate payment of the sum of ₦5,000,000 only by you being the value of her ticket, taxi fares, payment for an apartment as well as the risk, emotional, physical and psychological shock suffered by both Our client as well as her family and occasioned by the actions of your officials.*** *Should you fail to respond to this demand within 14 days of this letter, we have our client's further instruction to issue a writ against you and seek further legal redress including damages. We believe you will take steps to redress this demand accordingly".*

In a reply dated 10/2/2009, it's Finance and Admin Manager wrote that the matter had been forwarded to the "Customer Affairs Dept. in Dubai for their immediate investigation. They will get back to you". Not hearing from them, her lawyers wrote a reminder dated 20/4/2009, wherein they indicated that –

> *"Since we cannot wait indefinitely for your clients, we are constrained to by this letter to give to (sic) your clients 7 days' notice of our intention to seek legal redress against your client and also claim for damages on behalf of our client".*

The appellant's Lawyers - Messrs. Giwa Osagie & Co., replied the respondent's Lawyers - Messrs. Ricky Tarfa & Co.; part of the letter dated 6/7/2009, reads –

> *"Our client has informed us that Miss Uzoaku Ngonadi [the respondent]*

did not have her paper ticket with her at the point of boarding the aircraft..... The Emirates agent at the check in counter mistakenly checked [her] in without her paper ticket, and issued her two boarding passes..... One of the boarding passes was for the Toronto-Dubai leg of the flight while the other was for the Dubai-Lagos leg. At the boarding gate, a member of Emirates staff noticed that [her] boarding pass did not state her ticket number. The staff then asked [her] for her paper ticket, which she could not produce. Emirates staff at the airport offered to help [her] call her hall of residence in the event that she forgot the ticket there; she declined to have the call made. Being sympathetic to her plight, the staff asked her to buy another ticket to enable her board the flight and she could sort the issue of the missing ticket on her arrival in Lagos. [She] insisted that she would not buy another ticket. After delaying the flight for nearly 15 minutes on account of one passenger, Emirates had no other option than to offload [her] luggage and allow the plane takeoff without her".

The appellant's Lawyers concluded the said letter of 6/7/2009, as follows –

"You may be aware that it is standard practice in the airline industry to refuse carriage to anyone who cannot produce a valid ticket for the flight. In the light of the above, it is our client's position that it is not liable for the inconveniences suffered by Miss Uzoaku for its refusal to carry her. However, this does not preclude your client from applying for a voluntary refund of the cost of the unused part of her ticket upon presenting the requisite proof of purchase. See Articles 3.1.1, 3.1.2., 4.2.5., and 10.2 of the Emirates Conditions of Carriage".

Convinced that it had - "breached its responsibilities to her as covered by the terms of the ticket with Reference No. EDTMDF", the respondent filed a Suit against the appellant at the Federal High Court, Lagos, wherein she claimed –

(i) The sum of ₦200,245.00 for breach of the terms of contract of carriage of passenger by air as contained in ticket with reference EDTMDT being the total sum the plaintiff used to purchase the ticket with reference EDTMDT from the defendant.

(ii) General damages for breach of the terms of contract of carriage of passenger by air as contained in ticket with reference EDTMDT in the sum of ₦10,000,000 only

(iii) Interest on the above stated sums at the rate of 21% per annum from 23/12/2008 till Judgment is given and thereafter at the rate of 10% per annum till final liquidation.

(iv) Cost of this action assessed at ₦10,000,000.00

(v) Other reliefs.

Pleadings were duly filed; the respondent as the plaintiff at the lower Court filed a 39 - paragraph Statement of Claim while the appellant as the defendant filed 26-paragraph Statement of Defence, wherein it absolutely denied liability for the respondent's claims, and further averred in its paragraphs 23 to 26 –

23. That this contract of carriage is governed by Emirates Conditions of Carriage for Passengers and baggage, 2006 and the Montreal Convention 1999 as domesticated by the Civil Aviation Act 2006.

24. That Article 3 of the said Conditions of Carriage provides as follows –

3.1.1. We will provide carriage only to persons who possess a valid ticket (which includes the Flight Coupon for the flight, unused Flight Coupons for subsequent flights recorded in the Tickets, and the Passenger Coupon), provided that, for each passenger, such person is named as the Passenger in the Ticket and he or she produces a valid passport which, in the case of an Electronic Ticket, must bear a serial number that matches the number specified in the e-Ticket/itinerary.

3.1.2. In the case of an Electronic Ticket, you are required to bring your e-Ticket Receipt/Itinerary or Passenger Receipt with you to the airport as it may be necessary for you to present it to us and to airport immigration and security personnel.

25. That the said Contract of carriage has made adequate provisions for refund in the case of denied boarding. In Article 9, it provides as follows:

Denied Boarding

9.3.1. If we cannot carry you in your ticketed class of service on a flight for which you have a confirmed reservation and have met all applicable check-in and boarding deadlines, we will carry you on one of our later flights in your ticketed class of service, or, if you choose, we will carry you on another of our flights in a different class of service and will refund you the difference between the applicable fare, taxes, fees, charges and surcharges paid

for your ticketed class of service and, if lower, the fare, taxes, fees, charges and surcharges applicable to the class of service in which you are actually carried. Alternatively, you may choose to receive an involuntary refund in accordance with Article 10.2. This Article 9.3.1. will not apply if we refuse to carry you for reasons permitted by these Conditions of Carriage (see for example Articles 6.4., 7, 8.6.1., 11.4.2., 11.4.3., 13.1.6.)

26. The defendant denies that it was in breach of any contract of carriage and avers that it is not the cause of any embarrassment caused the plaintiff.

WHEREOF.....*the defendant states that the plaintiff is not entitled to her claims against the defendant, same being speculative, frivolous and unsustainable under the law and that the matter be dismissed with substantial costs.*

The respondent filed a Reply to the Statement of defence, where she averred-

"In response to paragraph 24 of the Statement of Defence, the plaintiff states that she presented both the receipt bearing her name as well as her Nigerian International passport as well as the ticket to the defendant's staff in Canada".

At the trial itself, the respondent called two witnesses and tendered 8 Exhibits, while the appellant called 1 witness and tendered only 1 Exhibit. Thereafter, the parties filed their respective Final Written Addresses, and in his Judgment delivered on the 7th of February 2012, the learned trial Judge, Archibong, J., set out the evidence before the Court and found "as facts" the following –

"The [respondent] did purchase a ticket for her travels on the defendant airline from a travel agent BIT TRAVELS & TOURS LIMITED duly authorized in that regard for a round journey from Lagos to Canada and back through Dubai, with the itinerary detailed on the print out - Exhibit B".

"The [respondent] utilized the paper ticket with which she was issued by the said travel agent to embark on her outward journey on the [appellant]".

"The (respondent] was duly processed for travel by an Agent of the [appellant] Airline who satisfied with her travel documents including her paper ticket issued the [respondent] with her boarding passes and feeding card coupon to cover her flight back to Nigeria and amenities in Dubai en-route.

The [respondent] was halted at the Boarding Gate on that 22nd December, 2008 in Canada by a Staff of the [appellant] Airline, and prevented from boarding her contracted flight back to Lagos, Nigeria".

"The [respondent] at all times interacted directly with the Airline or with duly appointed/authorized agent and/or staff of the [appellant] Airline".

He further held and concluded as follows [see pages 209 - 211of the Record]-

"It is also my finding that the [appellant] Airline had a particular duty of care to facilitate the return leg on contract of carriage for a plaintiff who is a foreign national at the Port of scheduled departure upon representation of papers given by duly constituted Authorities with any requirement for certification or authentication the defendant Airlines responsibility to perform (sic). I also held (sic) that any passions to the contrary in any contract of carriage to be an abdication of responsibility and a duty of care. More pertinently any such negating provision would be a violation of Section 34 of the 1999 Constitution. No citizen of this Country has the capacity to agree to his or her dignity being degraded as a voluntary act, endangering the rights of others who would not subject themselves to such diminution by the same terms in a Contract of Carriage. I find as fact the plaintiff was deeply embarrassed and traumatized by the events of 22nd December, 2008 suffered at the hands of the [appellant] Airline's Staff; and the plaintiff did incur unexpected and inadvertent emergency expenses related to be her need to secure accommodation in Canada in harrowing circumstances. Consequently, I make the following awards –

a. ₦100,212.60k to cover the return leg of a failed contract of carriage.

b. The Naira equivalent of CD$1,670 for expenses incurred as a result of the plaintiff being prevented from boarding her flight back to her native Country.

c. ₦10,000,000.00 in general damages.

d. The legal costs of this action set at ₦2,000.000.

e. Interest at 21% per annum to run on all the above amounts from the date of Judgment till date of final liquidation".

Aggrieved, the appellant has appealed to this Court with a Notice of Appeal containing 8 Grounds of Appeal. I have gone through the Grounds of Appeal, and even if the respondent did not object, I will, certainly, not turn a blind eye to the anomalies in Grounds 1 to 5 of the Grounds of Appeal, which complain –

GROUND ONE:

The learned trial Judge erred in law when he failed to apply the limitation of liability as contained in the appellant's Terms and conditions of carriage of Passengers and baggage 2006 and the Montreal Convention 1999 as domesticated by the Civil Aviation Act, 2006.

PARTICULARS OF ERROR

i. It is not in contention that the contract between the parties was an International Contract of Carriage by air and governed by the Montreal Convention as domesticated by the Civil Aviation Act, 2006. The trial court erred by going outside the provisions of the Montreal Convention with regards to limitation of liability.

ii. Aviation contracts are *sui generis* contracts strictly governed by the provisions of the Montreal Convention as domesticated by the Civil Aviation Act 2006.

iii. The respondent neither showed that the appellant's conduct was reckless nor done with the knowledge that damage would probably result to enable the trial court to award damages outside the liability limits.

In the decided case of Cameron Airlines v. Jumai Abdul-Kareem (2003) 1l NWLR (Pt. 850) 1, the Court of Appeal per Chukwuma Eneh J.C.A held as follows: -

"For damages awardable against the carrier to be at large in accordance with the provisions of Article 25 of the convention as amended at the Hague, it is not sufficient for act or omission that is relied on to have done recklessly; it must also be shown to have been done with knowledge that damages would probably result."

iv. Article 29 of the Montreal Convention provides as follows: -

> "In the carriage of passengers, baggage and cargo, any action for damages however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring the suit and what are their respective rights. In any such action, punitive, exemplary or any other non-

compensatory damages shall not be recoverable."

v. Notwithstanding this clear provision of statute and authorities the trial Court awarded to the respondent damages in excess of the liability limits.

GROUND TWO

The learned trial Judge erred in law when he awarded the sum of ₦10 Million in general damages to the respondent after awarding them the sum of ₦100,212.60k to cover the return leg of a failed contract of carriage and also the Naira equivalent of CD$1,670 for expenses incurred as a result of the respondent being prevented from boarding her flight back to her native Country.

Particulars

(i) It is trite law that where there is a breach of contract the measure of damages is the loss as may fairly and reasonably be considered either arising naturally according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach.

(ii) The trial court erred in law when it did not take into consideration the guiding principles of measure of damages for breach of contract.

(iii) General damages awarded by the Court did not arise naturally from the purported breach of contract of carriage between the parties and therefore cannot reasonably be supposed to have been within the contemplation of both parties at the time they made the contract as the probable result of the breach of it.

(iv) General damages are not awardable in ordinary breach of contract cases when special damages have been awarded without the prior agreement of parties.

(v) The award of both special and general damages in breach of contract cases amounts to double compensation.

(vi) The trial court having awarded the respondent the sum of ₦100,212.60k to cover the return leg of a failed contract of carriage and also the naira equivalent of CD$1,670 proceeded to award general damages of ₦10 Million.

(vii) In G. Chitex Ind. Ltd. O.B.I (Nig) Ltd. (2005) NWLR (Pt. 945) p. 392 at 395 the Supreme Court held as follows:

"On the need to avoid double compensation in award of damages for breach of contract - A party in an action for damages arising from breach of damages for breach of contract (sic) is not entitled to double compensation. In this case, the only damages recoverable within the contemplation of the parties was the difference in the exchange rate the appellant was obliged to pay i.e. the sum of ₦66,000.00 which was the presumed normal consequence of the respondent's breach of the contract. It would amount to double compensation to pay a further sum of ₦3.5 million (*Armels Transport Co. Ltd. v. Transco (Nig) Ltd* (1974011 SC 237 referred to "On whether claim or special and general damages appropriate for breach of contract - A claim for both special and general damages is not appropriate in an action for breach of contract, but there are special circumstances where the parties do make contracts and bind themselves knowing that a breach of contract under the special circumstance would also attract damages which the parties agreed at the time of the contract. (*Agbaje v. National Motors* (1971) 1 UILR 119 referred to)

GROUND THREE

The learned trial Judge erred in law when he awarded the respondent the Naira equivalent of CD$1,670 for expenses incurred as a result of the respondent being prevented from boarding her flight back to her native Country' when it was not claimed by the respondent.

Particulars

i. The respondent did not claim for refund of the expenses incurred in any sum.

ii. The trial court awarded the sum of CD$1,670 damages to the respondent.

iii. The trial court cannot give to the respondent what she has not asked for more than what she has asked for.

In *Ndika v. Chiejina* (2003) 1 NWLR (Pt 802, page 451 at 458, ratio 7, the court held as follows:

"On award of relief in excess of the claim of a party:

A Court of law has no power to award to a claimant what he did not claim or more than what he asked for. In the instant case, the relief granted to the respondent by trial Judge was more than what he asked for. However an appellate court is not precluded from modifying the award to bring in the line with the relief sought if it can be done."

In *NDIC v. S.B.N. Plc.* (2003) 1 NWLR (Pt. 801) 311 at 330 ratio 22 the Court held:

"On Duty on Court not to grant relief not sought and rationale therefore –

A court has no power to make an order or grant relief which has not been asked for. A court may award less but not more than what the parties claimed. The court should never award what was not claimed. This is so because a court is not a charitable institution; its duty in civil cases is to render to everyone according to his proven claims. This is based on the principle of adjudication that a party must be given opportunity to answer the claim against him and if need be to resist the claim..."

GROUND FOUR

The learned trial Judge erred in law when he raised constitutional provisions (*suo motu*) in determining this case when the respondent did not base her case on a breach of her constitutional rights. The court therefore made a case for the respondent on its own.

Particulars

i. The respondent did not plead nor did she lead any evidence with regards to breach of her constitutional rights.

ii. In *Summit Fin Co. Ltd. v. Iron Baba & Sons Ltd.* (2003) 17 NWLR (Pt 848) page 89 at 104 ratio 22 the Court stated as follows:
"A party is bound by his pleadings and cannot deviate from it. So the court is bound by the pleadings before it. It follows therefore that evidence must be led in accordance with the pleadings. Evidence led not in accordance with pleadings and/or upon fact not pleaded goes to no issue. To allow a party to adduce evidence contrary to his pleadings is to allow that party to make a different case at the trial from which he set out to prove. The court is bound to disregard such evidence for not belonging to issues raised..."

iii. *A court cannot plead or make a case for a party or deviate from*

the case of the party or base its judgment on grounds not canvassed by a party.

GROUND FIVE

The lower court erred in law when it awarded the sum of ₦2,000,000 to the respondent as legal fees when the respondent asked for ₦10,000,000 and did not lead evidence on its entitlement to either the sum of ₦2,000,000 or the sum of ₦10,000,000 as claimed.

Particulars

(i) *There is no shred of evidence adduced by the respondent in support of the claim for legal fees - a claim in special damages.*

(ii) *Special damages must not only be pleaded, it must be particularized and strictly proved.*

(iii) *The respondent only pleaded a claim for ₦10,000,000 but led no evidence on it.*

(iv) *The respondent never claimed for ₦2,000,000 nor was evidence led in proof of ₦2m*

(v) *The trial Court proceeded to award the respondent a sum of ₦2m in legal fees.*

In *Hassan v. Maiduguri Mgt. Committee* (1991) 8 NWLR (Pt. 212) page 738 at 741 ratio 4 the court held as follows: "On need for a litigant to plead and prove his claim –

> "A litigant can only get what he claimed if both on the pleadings and the evidence he has successfully made out and proved his claim."

(vi) Costs of legal fees are not awarded under Nigerian law. Cost of legal fees is in the nature of special damages and must be proved strictly. The respondent led no evidence on the cost of ₦2,000,000 or ₦10,000,000. (vii) There is no basis for awarding the head of claim when it was not proved strictly.

In Guinness (Nig) Plc. v. Nwoke (2000) 15 NWLR Pt. 689 p. 140, the Court of Appeal per Ibiyeye JCA held as follows: On propriety of joining a claim for solicitor's fee in an action for detinue. "The crucial question is; did this head of claim arise as a result of

damage suffered by the cross-appellant in the course of any transaction between him and the cross-appellant? This is the question that ought to pre-occupy the mind of any reasonable tribunal dealing with the circumstances of the instant head of claim. A reasonable tribunal, such as this court, will definitely opine that the this score fell below the standard of acceptability because the circumstances making up the so called "special damages" occurred after the cause of action in this case had arisen. The seemingly financial inconvenience of the Solicitor's fee of staggering ₦500,000.00 to the cross-appellant did not form part of the basis of the tort of detinue on which the cross-appellant pivoted his course of action. In addition, the character of the act forming the said Solicitor's fee of ₦500,000.00 made as head of claim by the cross-appellant is obviously not cumulative to the tort of detinue committed by the cross respondent. It is outside it. I am of the strong view that this type of claim is outlandish to the operation of the principle of special damages and it should not be allowed. It is absolutely improper to allow the cross appellant to pass his financial responsibility couched as "special damages to the cross-respondent."

Now, the rules regarding brief writing does not require setting arguments in support of Grounds of Appeal; that is, obviously, the function of the brief itself - see *Ezewusim v. Okoro* (1993) 5 NWLR (Pt. 294) 478 and *Idika v. Esiri* (1988) 2 NWLR (Pt. 78) 563, wherein Nnaemeka-Agu, JSC, observed quite aptly that –

"Counsel will do well to remember that a ground of appeal is intended to be a concise statement of the head of complaint of an appellant in an appeal, and that he should leave the argument and citation of authorities for his client's brief. It is contrary to the rules to argue a party's case first in his grounds of appeal and, later, in his brief and oral argument".

The essence of a ground of appeal is to avail the opposite party of the nature of the appellant's complaint in words that are not vague, and the purpose of particulars of error is to elucidate and advance reasons for the said complaints in the grounds of appeal - see *Abiodun v. FRN* (2009) 7 NWLR (Pt. 1141) 489.

Particulars of error highlight the complaint against the Judgment on appeal - see *Diamond Bank Ltd. v. P.I.C. Ltd.* (2009) 18 NWLR (Pt. 1172) 67 and *Amuda v. Adelodun* (1997) 5 NWLR (Pt. 506) 480 SC, where Adio, JSC, observed that –

"The law is that the particulars and nature of the error or misdirection alleged in relation to a ground of appeal should be the specific reasoning, findings or observations in the judgment or ruling in

question relating to the error or misdirection complained of. They should be the enumeration of the error or misdirection in the Judgment or Ruling".

In this case, the Particulars of Error highlighted above contain legal arguments and citation of authorities, which can be fatal sometimes, but in this case they add nothing and subtract nothing from their Grounds, and it is settled that the application of such rules should not be reduced to a matter of mere technicality - see *Aderounmu v. Olowu* (2000) 4 NWLR (Pt. 652) 253, wherein it was held –

> *"The rules.....are primarily designed to ensure fairness to the other side..... The prime purpose of the rules.....that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal; and that such grounds should not be vague or general in terms and must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the other side of the precise nature of the complaint of the appellant and.....of the issues that are likely to arise on the appeal.* ***Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form".***

All the same, the rules also require parties to raise Issues for Determination from the Grounds of Appeal. The said issues are meant to be a guide to the arguments and submission to be advanced in support of the Grounds of Appeal - see *Angyu v. Malami* (1992) 9 NWLR (Pt. 264) 242 at page 250. In this case, the appellant formulated 7 Issues for Determination in his brief prepared by Osayaba Giwa-Osagie, Esq., Joseph I. Ogunu, Esq., and Ike Nwachukwu, that is –

1. *Whether the learned trial Judge erred in law when he failed to apply the limitation of liability provisions as contained in the appellant's Terms and conditions of carriage of Passengers and baggage 2006 and the Montreal Convention 1999 as domesticated by the Civil Aviation Act, 2006.*

2. *Whether there was any justifiable ground for the learned trial Judge to have held –*

   > *"I find as facts the following:*
   >
   > *.....The plaintiff utilized the paper ticket with which she was issued by the said travel agent embark on her outward journey on the defendant."*

3. *Whether the learned trial Judge was right when he awarded the sum of ₦10 Million in general damages to the respondent after*

awarding ₦100,212.60 to cover the return leg of a filed contract of carriage and also the Naira equivalent of CD$1,670 for expenses incurred as a result of the respondent being prevented from boarding her flight back to her native Country.

4. *Whether the learned trial Judge was right when he awarded the respondent the Naira equivalent of CD$1,670 for expenses incurred as a result of the respondent being prevented from, boarding her flight back to her native Country when it was not claimed by the respondent.*

5. *Whether the learned trial Judge was right when he awarded the sum of ₦2,000,000 to the respondent as legal fees when the respondent asked for ₦10,000,000 and did not lead evidence on its entitlement to either the sum of ₦2,000,000 or the sum of ₦10,000,000 as claimed.*

6. *Whether the learned trial Judge was right when he awarded interest on the Judgment sum at a rate higher that that claimed by the respondent.*

7. *Whether the trial Judge was right when in determining this case, he (suo motu) raised constitutional provisions when the respondent did not base her case on a breach of her constitutional rights.*

The respondent submitted in her brief prepared by Olatunde Oladele, Esq., and Oladipo Osinowo, Esq., that the Issues that call for determination in this appeal, as distilled from the appellant's Grounds of Appeal, are as follows -

1. *Whether the limitation of liability as contained in the appellant's term and condition of carriage of passengers and baggage 2006 and the Montreal Convention 1999, as domesticated by the Civil Aviation Act, 2006 is applicable in this suit and the award of damages in the sum of ₦10,000,000.00 and $1,670.00 is within the jurisdiction and or powers of this Hon. Court.*

2. *Whether Section 34 of the Constitution of the Federal Republic of Nigeria, 1999 (AS AMENDED) is applicable in this suit.*

3. *Whether the respondent has proved her claim for solicitor's fees, and entitled to be awarded the sum of ₦2,000,000.00 as solicitor's fee granted by the Hon. Court.*

4. *Whether or not the Judgment of the Hon. Court is against the weight of evidence led before the Hon. Court.*

5. Whether or not the respondent is entitled to the award of interest on the Judgment sum.

The focal point of the appellant's grouse is that the lower Court failed to apply the **limitation of liability** as contained in its Terms and Conditions of Carriage of Passengers 2006 [hereinafter referred to as **Conditions of Carriage**] and the Montreal Convention 2006, as domesticated by the Civil Aviation Act 2006, and proceeded to award the respondent damages at large, which is unjustifiable.

A **limitation of liability clause** permits contracting parties to reduce or eliminate the potential for **direct, consequential, special, incidental** and **indirect damages** should there be a breach of contract - see IT Law Wiki, and **damages at large** is an award that there is no exact measurement for, such as for pain and suffering - see USLegal.com where the term is defined as follows –

> ***"Damages at large are compensation for other than for material loss.*** *The term refers to general damages consisting of non-economic loss; and exemplary damages in appropriate cases. They may include, among others, elements for loss of reputation, injured feelings, bad or good conduct by either-party, or punishment, and therefore no precise amount can be determined.* ***The amount of damages at large are based on a subjective determination made on a case-by-case basis, after taking all the facts and circumstances involved into account".***

The respondent's Issue 1 captures the essence of the appellant's grievance, but we cannot consider the issue of limitation of liability without ascertaining whether the lower Court was right to find the appellant liable in the first place.

To this end, I think we should determine the question raised by the appellant's Issue 2, which is in line with the respondent's Issue 4, before anything else.

The appellant's contention is that there was no evidence that it wrongly refused the respondent carriage and there is no basis for believing her claim.

It argued that it denied that she presented her paper ticket on demand; that it persistently insisted that she was denied boarding because she did not present her paper ticket upon demand, which is all that it was required to do; that the onus of proof shifted to her but she failed to lead acceptable evidence to support her claim or rebut its claim; that he who asserts must prove but she did not discharge that burden other than the bare assertion that she presented her paper ticket, which is not sufficient to satisfy the burden on her or for the Court to believe her and proceed to give judgment in her favour; and that –

> *"PW2....admitted that she was told at the point of denial of boarding that the reason for the denial of boarding was that she did not possess a*

paper ticket.....that there would have been no need to inform [her] which she admitted that the reason for denying her boarding was because she did not possess a paper ticket if she actually had her ticket as it is beyond contemplation that [its] officials in Canada would deliberately deny a young student traveling home for holidays her right of boarding. It is also beyond contemplation to imagine that they derived any particular satisfaction from such a conduct. It is implausible, illogical and irrational as she was neither a target nor the only person travelling on that flight to Nigeria en-route Dubai for her to be singled out for such treatment.....that if she had her paper ticket on her, she could easily have shown same to the officials upon request.....that [her] claim ought to have been established by a preponderance of evidence - that this was lacking and absent and the Court had no justification at all to have relied or believed such a piece of evidence.....".

Furthermore, that there is no basis for the lower Court to hold that its refusal to carry her amounted to a breach of contract when it adduced admissible and justifiable evidence to show that its refusal was proper and she was unable to show that its refusal was unjustified; and that it is settled that a trial Court must give reasons for believing or disbelieving a witness, citing *Atanda v. Ajani* (1989) 3 NWLR (Pt. 111) 511 & *Nwoke v. Okere* (1994) 5 NWLR (Pt. 343) 159.

The respondent cited authorities on weight of evidence/burden of proof - *Duru v. Nwosu* (1989) 4 NWLR (Pt. 113) 24, *B.O.N. Ltd. v. Saleh* (1999) 9 NWLR (Pt. 618) 331, Sections 135, 136 (1) & (2), and 137 of the Evidence Act.

Further citing *SPDC (Nig.) Ltd. v. Emehuru* (2007) 5 NWLR (Pt. 1027) 347, she submitted that she established that the ticket she used to leave Nigeria was the same she presented at the Airport in Canada before the appellant's agent proceeded to clear and check her in, and that the agent who denied her access to board the airplane did not have any justification to do what he did to her. She cited *AD v. Fayose* (2005) 10 NWLR (Pt.932) 209, where the Court held –

"Where there are conflicting presumptions, the case is the same as if there were conflicting evidence".

And argued that Exhibit B - the ticket with Ref. No. EDTMDF is documentary evidence establishing that the paper ticket is acceptable to the appellant, and can be used by the Court to ascertain and clear the conflict in the evidence of party as to ascertain whether or not it is the paper ticket which she presented at the Airport; that the appellant's witness also admitted that said Exhibit B is a valid paper ticket and the law is that facts admitted need no further proof; and that the lower Court was right to conclude that she utilized the said ticket.

She also referred us to the position of the law on evaluation of evidence by the trial

Court and an appellate Court, citing *Olodo v. Josiah* (2010) 18 NWLR (Pt. 1225) 653, *Ogbechie v. Onochie (NO 2)* (1988) 1 NWLR (Pt. 70) 37, *Onwugbufor v. Okoye* (1996) 1 NWLR (Pt. 424) 252, *Oyediran v. Oke* (1997) 11 NWLR (Pt. 530) 606, *Ebba v. Ogodo* (1984) 1 SCNLR 372, *Kopek Const. Ltd. v. Ekisola* (2010) 3 NWLR (Pt. 1182) 618, *Jau v. State* (2010) 4 NWLR (Pt. 1184) 217, *Ogbiri v. N.A.O.C. Ltd.* (2010) 14 NWLR (Pt. 1213) 208, *Ajibulu v. Ajayi* (2001) 11 NWLR (Pt. 885) 458, *S.P.D.C. (Nig). Ltd. v. Edamkwue* (2009) 14 NWLR (Pt. 1160) 1 and *Unilorin v. Adesina* (2010) 9 NWLR (Pt. 1199) 331, and the gist of it is that she led credible evidence to support her case; that the lower Court's findings in her favour has not occasioned miscarriage of justice; and that this Court cannot interfere with the findings made by the lower Court.

The position of the law, as stated by the respondent, is very correct - the appellant's complaint in Ground 8 of its Grounds of Appeal is that the *"Judgment is against the weight of evidence"*, and when an appellant makes such a complaint, what he means is that when the evidence adduced by him is balanced against that adduced by the respondent, the Judgment given is against the weight that should have been given to the totality of the evidence.

So, an appeal against weight of evidence is basically on facts - see *Agbamu v. Ofili* (2004) 5 NWLR (Pt. 867) 540. It is also elementary law that - *"he who asserts must prove"* - see *Famfa Oil Ltd. v. AG Fed.* (2003) 9 - 10 SC 31, where Belgore, JSC (as he then was) insisted - *"the evidential principle of who asserts must prove has stayed with us too long that it is too late to change the rule".*

Then again, the burden of proof is not static in civil cases; it does shift - see *Zubairu v. Mohammed* (2009) LPELR-5124 (CA) where Oredola, JCA, said –

> *"By Section 137 (of the Evidence Act) the burden of proof is not static. It fluctuates between the parties. Subsection (1) places the first burden on the party against whom the Court will give Judgment if no evidence is adduced on either side.....the onus probandi is on the party who would fail if no evidence is given in the case.* ***Thereafter, the second burden goes to the adverse party..... and so the burden changes place almost like the colour of a chameleon until all the issues in the pleadings have been dealt with. By Section 137(2), the burden of proof shifts between the parties in the course of giving evidence in the proceedings. From the language of the subsection, there is some amount of versatility in the shifting process of the burden. The shifting process, in the language of the subsection, will be so on until all the issues in the pleadings have been dealt with. Thus, as firmly established, the standard of proof in civil cases.....is on the balance of probabilities or preponderance of evidence. Hence, where evidence adduced is loaded or tilted to one side and there is nothing forthcoming on the imaginary scale from the other side, the evidence***

proffered from the former will satisfy the requirement of proof".

In other words, all a plaintiff needs to establish is that his story is more likely to be true than the respondent's. As Dr. Akinola Aguda explained in his book –

> *"It is not enough for a party to a case who has the onus of establishing a particular fact to say that his own evidence is just as good as that of his opponent. For what the law says that he must do to discharge the onus of proof on him is to prove by evidence which convinces the Court - - of the probability of his case rather that of his opponent on the point in issue". [Law and Practice relating to Evidence in Nigeria]*

In this case, the respondent adopted her Written Statement on Oath wherein she asserted as follows in paragraphs IV, V, VII, IX, XIII, XIV, XV and XVIII that - "she boarded the appellant's aircraft and departed from Lagos on 29/5/08 "after properly being checked into the aircraft and her ticket was endorsed by the staff of the [appellant]"; she called its office in Canada on 21/12/08 and confirmed she was a passenger with it for 22/12/08; she arrived at the Airport in Canada on the said 22/12/08 "and proceeded to the check-in counter where an officer of the - airline checked her in with two luggages"; "after checking in she proceeded through the usual airport security screening and passport control protocols and thereafter proceeded to the flight gate to await the boarding announcement"; "when the flight was announced she proceeded with other passengers to board the aircraft and it was at the point of entering the aircraft that a male official of the [appellant] who had a name tag addressed as Mr. Wright denied her entry on the ground that she did not have a proper ticket to enable her make the trip back to Lagos"; she explained to the official *"that the ticket was originally purchased in Nigeria and that it was the same ticket that she had already used for the 1st trip which was from Lagos-Dubai-Canada and that this was the return trip"*; and that the appellant's official –

> ***"Instead of ascertaining that she was duly enlisted to travel on Flight EK242 from Pearson International Airport to Dubai international Airport on 22/12/08 thereafter called the airport security guards and directed that she should he escorted out of the airport like a criminal or someone who had violated the laws".***

The appellant's witness - Okechukwu Iro, a Supervisor with the Airline, agreed that the respondent "purchased tickets to enable her embark on the journey" but insisted that "the said ticket was not presented on demand on the second leg of the journey", and that the respondent was "mistakenly checked in by the [appellant]'s agent at the counter, who issued her with 2 boarding passes and a hotel accommodation/feeding card without presentation of her paper ticket".

The lower Court found that the respondent *"utilized the paper ticket with which she was issued by the said travel agent to embark on her outward journey on the*

defendant", and in questioning the justification for the finding, the appellant argued that it is not enough and not acceptable in law for a trial Judge to simply say - *"I believe"* or *"I didn't believe a witness"*; he must state and ought to state the reasons for believing or not believing each. That is true; evaluation of evidence entails assessing evidence to give value or quality to it.

It involves a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one version to the other.

There must be on record how the Court arrived at its conclusion of preferring one piece of evidence to the other - see *Oyekola v. Ajibade* (2004) 17 NWLR (Pt. 902) 356 and *Idakwo v. Nigerian Army* (2004) 2 NWLR (Pt. 857) 249.

In this case, the lower Court did not give any reasons for finding against the appellant; it merely set out the questions put to its witness under cross-examination and his replies thereto and then said *"I find as fact the following"* –

> *"The plaintiff did purchase a ticket for her travels on the defendant airline from a travel agent BIT TRAVELS & TOURS LIMITED duly authorized in that regard for a round journey from Lagos to Canada and back through Dubai, with the itinerary detailed on the print out - Exhibit B".* ***The plaintiff utilized the paper ticket with which she was issued by the said travel agent to embark on her outward journey on the defendant".***

Evidently, the lower Court did not do any evaluation of the evidence before it, but that is not enough to say that its finding is wrong and to allow the appeal.

We still have to determine whether it could have reached a different decision - see *Onajobi v. Olanipekun* (1985) 4 SC (Pt. II) 156 and *Anyanwu v. Mbara* (1992) 6 SCNJ 90 where the Supreme Court *per* Nnaemaka-Agu, JSC, observed –

> ***"It is the law - that the fact that a party has established an error in the proceedings does not necessarily mean that the appeal must be allowed. Such an error will be a ground for allowing the appeal if and only if, it is substantial in the sense that if he had directed himself correctly he would have reached a different conclusion".***

In this case, the respondent did establish that she used the ticket purchased in Nigeria on the first leg of her journey to Canada; that she was checked in by an official of the appellant on the second leg of her journey from Canada; that she went through airport security screening and passport control protocols; and that she actually proceeded to board the aircraft before she was denied entry. The appellant is not contesting these facts, however, its defence is that she was mistakenly checked in by its agent at the counter, and its official was right to stop her at the boarding gate because she did not have a valid paper ticket. On whose

side does the evidence preponderate? The respondent, of course, and what this means is that the burden shifted to the appellant to justify why the respondent, who had used a ticket on the first leg of her journey, and who had been checked in by its agent at the airport counter on her journey back, was denied boarding by one of its officials at the point of entering the aircraft.

It denied her boarding in circumstances that leave much to be desired, and contrary to its position that she did not discharge the burden on her other than the bare assertion that she presented her paper ticket, it is the appellant that failed to discharge the burden on it other than its bare assertion that she was denied boarding because she did not present her paper ticket on demand.

She flew out of Lagos to Canada through Dubai on its flight; she was checked in by its agent at the Airport in Canada; and she actually got to the boarding gate. With the scales weighing in her favour, there was a definite shift of the burden that initially lay on her onto the appellant, who had a lot of explaining to do, but it failed to discharge that burden because there is nothing on its side of the scale to outweigh all that the respondent placed on her own side of the scales.

The lower Court could not have reached a different conclusion - the appellant is liable for denying the respondent boarding. This issue is resolved against it.

This appeal was argued on 9/10/2013, and Judgment fixed for 6/12/13, however, our attention was drawn to correspondence from counsel addressed to the Deputy Chief Registrar. The letter from respondent's counsel reads –

> *"In line with the settled principle as confirmed in..... African Reinsurance Corporation v. JDP Construction Nig. Ltd. (2003) 13 NWLR (Pt. 838) 609 that parties can after a matter has been adjourned for Judgment still forward any further useful authority to the Court to assist the Court in the determination [it forwarded the following] -*
>
> i. <u>On applicability of Limitation of Liability as per the Terms and Condition of carriage and Montreal Convention 1999.....</u>
>
> (a) The appellant did not plead limitation of liability particularly in paragraphs 23-25 of the Statement of Defence.....and submission of counsel cannot be a substitute for un-pleaded facts. See the cases of *Gbadamosi v. Tolani* (2011) 5 NWLR (Pt. 1240) 352 at 369 and *Daramola v. A.G. Ondo State* (2000) 7 NWLR (Pt. 665) 440
>
> (b) The Terms and Condition of Carriage is not applicable at all because it was not available at the time of the contract. *Kabo Air Ltd. v. Tarfa* (2004) 6 WRN A 134 at 149.

(c) Articles 18, 19, 20, 21 24 and 29 of the Convention did not limit liability when the carrier refused to carry a passenger. The limitation of liability applies for damages sustained as result of delay, death, injury or loss or damage to baggage or cargo. *Kabo Air Ltd. v. Tarfa* (supra)

ii. On double compensation; the Supreme Court in *Cameroon Airlines v. Otutuizu* (2011) 8 WRN 1 and the Court of Appeal in *Kabo Air Ltd. v. Tarfa* (supra) granted both the special and general damages at the same time.

The appellant's counsel objected to this line of action, and in his letter, said –

> ***"In as much as it is settled principle of law that parties can after a matter has been adjourned for Judgment, forward any further useful authority to the Court to assist the Court, we are of the view that in this particular instance, it is done in bad faith and with a view to having a second opportunity of addressing the Court....."***.

I refuse to be dragged into the issue of whether the said letter was written in bad faith or not; it is counsel's prerogative to forward such authorities - see *African Re. Corp. v. JDP Const. (Nig.) Ltd*. (supra), where Tobi, JSC, observed –

> ***"It is trite law that where counsel comes across relevant authorities after a matter has been adjourned for Judgment or Ruling, he must make the letter indicating the authorities available to opposing counsel for a possible input. That is the essence of our adversary system of adjudication".***

In that case, the Supreme Court "ignored the authorities" because the letter was not forwarded to opposing counsel, which is not the situation in this case; parties were requested to re-address the Court, which they did on 17/12/13.

Mr. M. Bamidele, for the respondent, referred to *Cameroon Airlines v. Otutuizu (supra)* and *Kabo Air Ltd. v. Tarfa (supra)*, and insisted that once a passenger is refused carriage by an airline, the airline is liable to pay the refund of the ticket and damages, which will not amount to double compensation; and that denying the respondent boarding is not a ground for its liability.

Mr. Ike Nwachukwu, for the appellant, informed the Court that they had nothing to add to what had been said in the appellant's Brief of argument.

To start with, airlines do incur liability for *"delayed or denied boarding"* –

See *Harka Air Services (Nig.) Ltd. v. Keazor* (2011) 13 NWLR (Pt. 1264) 320 SC, where the Supreme Court per Adekeye, JSC, very aptly observed as follows –

> "There are laws regulating the liability of the carrier to its passengers. An airline's liability to its passengers or customers could arise as a result of –
>
> a) Injury sustained on board an aircraft or
>
> b) Death arising from the course of a journey or
>
> c) Damage or loss of goods
>
> d) Delayed or denied boarding or
>
> e) Interactions in the course of preparing for or the actual conduct of flight operation. - Section 48 of the Civil Aviation Act 2006. Warsaw Convention 1929. Montreal Convention 1999".

The Montreal Convention 1999 (the Convention for the Unification of Certain Rules for International Carriage by Air) is a multilateral treaty adopted by a diplomatic meeting of the International Civil Aviation Organization [ICAO] Member States in 1999, which attempts to re-establish uniformity and predictability of the rules relating to international carriage of passengers, baggage and cargo. Article 29 of the Montreal Convention 1999 provides –

> ***"In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring the suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable."***

Coming home to Nigeria, Section 48(1) of the Civil Aviation Act 2006, provides –

> ***"The provisions contained in the convention for the unification of certain rules relating to international carriage by air signed at Montreal on 28th May 1999 set out in the Second Schedule II of this Act and as amended from time to time, shall from commencement of this Act have the force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage, and shall subject to the provisions of this Act, govern the rights and liabilities of carriers, passengers,***

consignors, consignees and other persons."

The appellant argued in its brief that the lower Court misdirected itself when it went outside the limitation of liability provisions of the Montreal Convention and awarded damages in excess of the liability limits; that it "was not justified to have awarded the respondent damages at large", citing Section 48(1) of the Civil Aviation Act and *Cameroon Airlines v. Abdul-Kareem* (2003) 11 NWLR (Pt. 830) 1; that she did not show that its conduct was reckless or done with the knowledge that damage would probably result so as to award damages outside the liability limits; that the lower Court cannot on its own impute recklessness or establish or attempt to establish a case of recklessness on its part, citing *Hassan v. Maiduguri Mgt. Committee* (1991) 8 NWLR (Pt. 212) 738; that notwithstanding the clear provision of Article 29 of the Montreal convention, it awarded her damages in excess of the liability limit; that aviation contracts are sui generis contracts possessing a life of their own, and any claim for damages must be brought within the provisions of enabling statutes, citing *Sobayo v. Cameroun Airlines* (CA/l/275/03) (Unreported); that her claim is governed by subject to conditions and limits set out by the Convention as domesticated by the Civil Aviation Act and its Conditions of Carriage, citing *Cameroon Airlines v. Abdul-Kareem (supra)*; that her case is one of denied boarding and it ought to have limited itself to the relevant provision in its Conditions; and failure to apply the limitation of liability as contained in its Terms and Condition and the said Montreal Convention as domesticated occasioned a miscarriage of Justice.

On her part, the respondent gave us the history, including the origin and all that of the Montreal Convention 1999 and further submitted as follows –

"Under the Montreal Convention 1999 air carriers are strictly liable for proven damages up to 113,100 Special Drawing Rights (SDR) (up dated from 100,000.00 SDR on December 31, 2009) a mix of currency values established by the International Monetary fund (IMF) approximately $138,000.00 per passenger at the time of its ratification by the United states in 2003 (as of December, 2011 around $175,800). Where damages of more than 113,100 SDR are sought, the airline may avoid liability by proving that the accident which caused the injury or death was not due to their negligence or was attributable to the negligence of a third party. This defence is not available where damages of less than 113,100 SDR are sought. The Convention also amended the jurisdictional provisions of Warsaw and now allows the victim or their families to sue foreign carriers where they maintain their principal residence, and requires all air carriers to carry liability insurance. The Montreal Convention 1999 which the appellant has made heavy weather of states that air carrier are strictly liable for proven damages up to 113,100 Special Drawing Rights which is approximately $138,000.00 per passenger at the time of its ratification

by the United States In 2003. It is humbly submitted that the Judgment of the Honourable Court is within the limitation of the damages that may be awarded for a passenger under the Montreal Convention 1999 as it relates to claims for damages".

The appellant was quick to argue in its Reply Brief that the above submission "is a deliberate attempt to mislead [this Court] and a desperate attempt to secure victory at all cost". Referring to Chapter III of the Montreal Convention on Liability of the carrier and Extent of Compensation for damage; Article 17 - Death and Injury of Passengers - Damage to Baggage; Article 21 -Compensation in Case of Death or Injury of Passengers, it submitted that contrary to the position stated by the respondent, the limit of liability refers only to damages arising from death or bodily injury of the passenger and not for delay or refusal of boarding, as in the present case, which entitles the passenger to a refund of the ticket. To drive its contention home, it referred us to the following authorities on the duty of counsel not to mislead the Court - *B & B Construction Ltd. v. Ahmed* (1998) 9 NWLR (Pt. 566) 486, *Okomo Oil Palm Ltd. v. Okpame* (2007) 3 NWLR (Pt. 1020) 71, *Abacha v. The State* (2002) 11 NWLR (Pt. 779) 437, and *Tsume v. Peverega* (2001) 2 NWLR (Pt. 698) 556.

The appellant is right; the respondent's argument is predicated on the provisions of the Montreal Convention dealing with - "Compensation in case of death or injury of passengers", which is certainly not what this case is all about.

The respondent was just denied boarding on her journey back from Canada, and it will really be asking too much of us to follow her on a wild goose chase by looking into other provisions that have nothing to do with the case at hand - that will not assist the Court. See *Momodu & Ors v. Momoh & Another* (1991) 1 NWLR (Pt. 169) 608, relied on by this Court [*per* Shoremi, JCA] in *Okomo Oil Palm Ltd. v. Okpame (supra)*, where the Supreme Court held –

"It is a very serious matter and indeed sad for counsel whose burden and inescapable duty is to assist the Court to appear to be intent in misleading the Court. Such an attitude of counsel, which is unethical and reprehensible, calls for condemnation by the Court in no uncertain terms".

See also *Tsume v. Peverega (supra)*, cited by the appellant, where this Court *per* Chukwuma-Eneh, JCA (as he then was), hit the nail on the head as follows –

"It is a task fitted for counsel to bring to the notice of the Court all relevant laws and authorities so as to enable the Court reach a fair decision in the matter before it".

Surely, that is what is expected of counsel that wrote the respondent's brief - point the Court to the relevant provisions of the said Montreal Convention, and not

obfuscate matters by bringing in aspects that will lead to a dead end.

However, she also argued that it is clear from the provisions of Article 29 of the said Montreal Convention, which is the relevant provision in this case, that compensatory damages can be claimed and recovered from an air carrier; that it only forbids action for punitive, exemplary or other non-compensatory damages; and that the lower Court awarded her general and special damages.

It is her contention that the award of special and general damages by the lower Court is within its jurisdiction as allowed by the Montreal Convention and based on its particular findings; she is entitled to a refund of expenses and compensated for the hardship suffered as a result of the acts of the appellant.

The respondent forwarded the following authorities to buttress her argument - *Gbadamosi v. Tolani (supra)*, where Fasanmi, JCA, observed at page 369 –

> *"The Court observes that there was no pleading or evidence to the fact that the respondent destroyed the crops on the land in dispute on the record. Therefore, it goes to no issue and must be disregarded.....it is also the law that address by counsel as in the reply brief..... is not a substitute for pleadings nor evidence".*

Daramola v. A.G. Ondo (supra), where Onnoghen, JCA (as he then was) said –

> *"It is also the law that addresses of learned counsel are designed to assist the Court in arriving at a just decision in the case but they are no substitute for cogent and credible evidence proffered by the parties on the issues that call for determination".*

I cannot fathom what the respondent's contention is about; the appellant may not have expressly used the words "limitation of liability" but it did say that the contract of carriage between them is governed by its Conditions of Carriage and the Montreal Convention as domesticated by the Civil Aviation Act 2006, and its case is that she is not entitled to ***damages at large*** because of that fact.

The Supreme Court did not touch on the Montreal Convention itself but the Warsaw Convention is the forerunner of the said Convention, and its decisions in the above stated cases, provides answers to the nagging question before us.

In *Cameroon Airlines v. Otutuizu (supra)*, the appellant's agent sold two tickets to the Respondent - Lagos to Doula, Cameroon to Harare, Zimbabwe to return on the same route to Lagos, and the second one Harare to Manzini, Swaziland and back to Harare. On arrival at Zimbabwe, he was kept in the transit hall and the next morning flown to Johannesburg, South Africa, instead of to Manzini, Swaziland. On arrival at Johannesburg, he was arrested and his personal effects and briefcase

containing 20,000 US Dollars were removed from him and never returned to him. He was then deported to Zimbabwe where he spent 7 days in jail before he was flown to Nigeria. The trial Court held that he was entitled to compensation as general damages but refused to grant the claim in relation to his briefcase containing 20,000 US Dollars.

On appeal, this Court ordered the appellant to pay him the 20,000 US Dollars, and in dismissing the appeal to it, the Supreme Court held as follows –

> ***"..... The appellant was in breach of contract as principal and agent in not flying the respondent to Manzini, Swaziland. It is reasonably foreseeable that a passenger arriving in South Africa without a transit visa would be arrested, with grave consequences for the passenger. Consequently, the act of the appellant flying the respondent to South Africa with no justifiable reason for doing so and knowing fully well that the respondent did not have a transit visa, apart from being a clear breach of the agreed route, it amounts to a negligent breach of contract. A willful misconduct in the extreme. By the provision of Article 25 of the Convention, a carrier loses its entitlement to rely on the limit set on its liability by Article 22(1) where a briefcase containing 20,000 US Dollars and valuables of the respondent is taken away (and never returned) by South African Immigration officials as a result of the willful act by the appellant, in flying the respondent to South Africa, when it knew that the respondent did not have a South African transit visa. When the carrier commits willful misconduct, the respondent is entitled to more damages than the limit set in Article 22 of the Convention".*** [*Per* Rhodes-Vivour, JSC]

In the case of *Harka Air Services (Nig.) Ltd. v. Keazor (supra)*, the respondent was on the appellant's aircraft from Kaduna that crash-landed at Lagos Airport. He suffered serious injuries and body pains; lost his hand luggage and personal items; and received treatment at the Hospital. With particular reference to the issue of Limitation of liability, the Supreme Court *per* Adekeye, JSC, held that –

> *"....The carrier shall not be entitled to avail himself of the provisions of this Convention which limit or exclude his liability if the damage is adjudged by a Court seised of the case to be caused by his willful misconduct. Similarly, the carrier shall not be entitled to avail himself of the provisions if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment. Where there is default of such magnitude that it amounts to a willful misconduct, the limits provided by the Convention to the liability of the carrier are not applicable".*

In the same case - *Harka Air Services v. Keazor* (supra), Fabiyi, JSC, added that-

*"To be guilty of misconduct, the person concerned must appreciate that he is acting wrongly and yet persists in so acting regardless of the consequences, or acts with reckless indifference as to what the result may be ..... **For damages awarded against a carrier to be at large, it is not sufficient for the act or omission that is relied upon to have been done recklessly, it must be shown to have been done with knowledge that damage would probably result.** It is extant in the record..... and rightly found by the learned trial Judge that the appellant operated its flight..... from Kaduna to Lagos when other safety conscious airlines refused to do so and cancelled their flights as it rained early that day. The pilot was not given any clearance to land by the Air Traffic Controller when he reached the threshold. The aircraft was at a height above the normal and regular height. The pilot did not respond to the inquiry of the Air Traffic Controller whether he was landing or carrying out a missed appproach. At the time the aircraft came in contact with the runway, it had already passed more than 60% of the runway distance. **The learned trial Judge.....rightly found that willful misconduct was established to make damages at large**. At every turn of event during the ill-fated journey, the.....pilot embarked upon risky venture. He appreciated that he was acting wrongly and yet persisted in so acting regardless of the consequences. He acted with reckless indifference as to what the result maybe".*

Rhodes-Vivour, JSC, also held in *Harka Air Services v. Keazor (supra)* that –

> "Willful misconduct is a deliberate wrong act by a pilot, airline staff or its agent, which gives rise to a claim for damages by passengers. When staff of an airline act with reckless indifference, such unacceptable behavior especially by a professional person amounts to willful misconduct. A pilot that lands his plane without clearance from the control tower to my mind is guilty of willful misconduct...."

In this case, the question that rears its head is whether the act of denying the respondent carriage on the flight from Canada, qualifies as willful misconduct on the part of the appellant, to warrant her being awarded damages at large.

This is a completely different issue from whether it is liable to her or not. It is liable, but the liability falls within the ambit of the limitation clause in its Conditions of Carriage as contained in the Montreal Convention, which insists in its Article 29 that in any action for damages, "punitive, exemplary and any other non-compensatory damages SHALL not be recoverable". Damages are said to be punitive or exemplary when they are awarded as punishment for the defendant or as a deterrent and are for his loss - see *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd*. (2006) 13 NWLR (Pt. 997) 276 SC, *G.K.F. Investment (Nig.) Ltd. v. Nitel Plc*.

(2009) 15 NWLR (Pt. 1164) 344 and *Odiba v. Azege* (1989) 9 NWLR (Pt. 566) 370, where the Supreme Court held that –

> ***"The primary object of an award of damages is to compensate the plaintiff for harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit: exemplary damages, punitive damages. Vindictive damages, even retributory punishment and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like."***

In effect, for the respondent to be awarded damages at large in excess of the liability limits, she must show that the official, who stopped her from boarding the flight at the airport in Canada, knew that what he was doing was wrong; and yet, he persisted in doing so regardless of the consequences or acted with reckless indifference as to what the result may be - see *Harka Air Services (Nig.) Ltd. v. Keazor (supra)* and *Cameroon Airlines v. Abdul-Kareem (supra)*.

The appellant contends that she did not show that its conduct was reckless or done with the knowledge that damage would result, and that the lower Court cannot on its own impute recklessness or establish or attempt to establish a case of recklessness on its part and proceed to give judgment on that basis.

I agree with the appellant; this time, the burden rested squarely on the respondent to show that its official acted wrongly when he refused to allow her board the flight in Canada; not only that, she must also show he did it with reckless indifference as to the consequences or what she would suffer from it.

But she merely stated in paragraph 18 to 21 of her Statement on Oath that –

> ***18. I explained my ticket itinerary to the [appellant]'s Official and stated that the ticket originally purchased in Nigeria and that it was the same ticket that I had already used it (sic) for the 1st trip, which was Lagos-Dubai-Canada and that this was the return trip.***
>
> ***19. I further directed the [appellant]'s official to make the necessary clarification by calling the Nigeria Office or alternatively check the flight data base for my name and flight details, but my requests were rebuffed by the officer.***
>
> ***20. I immediately called my parents in Nigeria to inform them of***

the problem and my parents also tried to talk to the official but he equally rebuffed them.

21. The [appellant]'s official instead of ascertaining that I was duly enlisted to travel on Flight EK242 from Pearson International Airport to Dubai International Airport on 22nd December 2008 thereafter called the airport security guards and directed that I should be escorted out of the airport like a criminal or someone who had violated the laws.

Her mother, Ngozi Ngonadi, who testified as PW1, also stated as follows –

XVI. She further directed the [appellant]'s official to make the necessary clarification by calling the Nigeria Office or alternatively check the flight data base for her name and flight details, but her requests were rebuffed by the officer.

XVII. She called us (her parents) in Nigeria to inform us of the problem and myself and her father also tried to talk to the official but he equally rebuffed us.

Obviously, what PW1 had to say about what happened in Canada and what her daughter had said to the official is hearsay and is therefore inadmissible – see *Ijioffor v. the State* (2001) 4 SC (Pt. 11) 1, wherein it was explained that –

> *"Hearsay is generally regarded as one of the most complex subjects in the law of evidence. It was reformulated by Rupert Cross as follows: "Assertions of persons other than the witness who is testifying (including statements relied on as equivalent to assertions, although not primarily intended as such by their maker, and conduct relied on as conduct equivalent to the actor's assertion of any fact other than his contemporaneous state of mind or physical sensation, although not so intended by him)* ***are inadmissible as evidence of the truth of that which are asserted".***

The only testimony from the PW1 that is relevant to this case is her assertion that she and the respondent's father tried to talk to the official on the phone "but he equally rebuffed" them. The respondent did say he rebuffed her and that her parents were also rebuffed when they tried to talk to the said official. But the issue is not whether she or her parents were rebuffed; the appellant is liable for whatever its official did or said that led to her being denied boarding.

The issue is whether his action on that day amounted to willful misconduct, and what she did say is not sufficient to discharge the burden that was on her to show that the official acted deliberately or recklessly or with malice when he refused to

allow her board the said flight from Canada to Nigeria that day.

The respondent failed to discharge the burden on her to prove this aspect of her case and is not entitled to damages at large, but the lower Court held that –

> *"..... The defendant Airline had a particular duty of care to facilitate the return leg on contract of carriage for a plaintiff who is a foreign national at the Port of scheduled departure upon representation of papers given by duly constituted Authorities with any requirement for certification or authentication the defendant Airlines responsibility to perform. I also held (sic) that any passions to the contrary in any contract of carriage to be an abdication of responsibility and a duty of care. More pertinently any such negating provision would be a violation of Section 34 of the 1999 Constitution. No citizen of this Country has the capacity to agree to his or her dignity being degraded as a voluntary act, endangering the rights of others who would not subject themselves to such diminution by the same terms in a Contract of Carriage. No citizen of this Country has the capacity to agree to his or her dignity being degraded as a voluntary act, endangering the rights of others who would not subject themselves to such diminution by the same terms in a Contract of Carriage ".*

The appellant argued under its Issue 7 that the respondent did not raise the issues of duty of care or contravention of the Constitution; that it did not also raise or allude to them; and that the lower Court raised and determined the issues *suo motu* and based its Judgment on it, citing *Onyeama v. Obodo* (2008) 16 NWLR (Pt. 1114) 446. It is the appellant's contention that the lower Court erred by raising the issue of Section 34 *suo motu*, and relying on same to reach a conclusion without giving counsel the opportunity to address the said Court.

The respondent cited *Adeyanju v. WAEC* (2002) 13 NWLR (Pt. 785) 479, *Akpan v. Udoh* (2008) 3 NWLR (Pt. 1075) 590, *Nwarata v. Egboka* (2005) 10 NWLR (Pt. 933) 241, *Adeogun v. Ekunrin* (2003) 2 NWLR (Pt. 856) 52, *Ikenta Best (Nig.) Ltd. v. A.G. Rivers State* (2008) 6 NWLR (Pt. 1084) 612, and argued that her claims fall within Section 34 of the Constitution so the lower Court did not raise the issue *suo motu*, that it did not solely base its Judgment on the provision as stated by the appellant; and that the finding on which it based its Judgment is from her pleadings and the testimony of her witnesses in this suit.

This issue in easily resolved; in certain cases, the lower Court's reference to the said Section 34 of the Constitution would be apt or even commendable, but in this case, its reference to the said Section is irrelevant and uncalled-for.

Parties are not disputing the fact that the said contract of carriage is subject to Article 29 of the Montreal Convention that forbids *punitive, exemplary or any other non-compensatory damages.* Compensatory damages is a sum of money awarded

by a Court to indemnify a person for the particular loss, detriment injury suffered as a result of the unlawful conduct of another; it provides a plaintiff with the monetary amount necessary to replace what was lost, and nothing more. They differ from "punitive damages", which punish a defendant for his or her conduct as a deterrent to the future commission of such acts.

In this case, the lower Court did not even refer to the said Convention, not to mention apply it to its decision. It merely made some findings of fact, and went on to pontificate about abdication of responsibility and duty of care; violation of Section 34 of the 1999 Constitution; and the fact that - *"no citizen of this Country has the capacity to agree to his or her dignity being degraded as a voluntary act, endangering the rights of others who would not subject themselves to such diminution by the same terms in a Contract of Carriage":*

The object of an international treaty like the Montreal Convention is to provide a uniform international code in the areas that it covers - see Cameroon *Airlines v. Otutuizu* (2011) 4 NWLR (Pt. 1238) 512, where Rhodes-Vivour, JSC, added that *"all countries that are signatories to it apply it without recourse to their respective domestic law"*, and *Harka Air Services (Nig.) Ltd. v. Keazor (supra)*, where the Supreme Court *per* Adekeye, JSC, further explained that –

> ***"The Warsaw Convention is an international treaty, an international agreement, a compromise principle which the High Contracting States have submitted to be bound by the provisions. They are therefore an autonomous body of law whose terms and provisions are above domestic legislation. Thus, any domestic legislation in conflict with the Convention is void. The purpose and intention of the Warsaw Convention is to remove those actions governed by the Warsaw Convention as amended by the Hague protocol from the uncertainty of the domestic laws of the member States. The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right and not the domestic/common law. Hence, an air passenger is not at liberty to choose as between the provisions of the Convention and the domestic/common law for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to the terms and conditions of the Convention and cannot be pursued under any other law".***

The lower Court was, therefore, on a frolic on its own when it dragged the constitutional right of the respondent into the equation because her action is governed by the Montreal Convention and she cannot eat her cake and have it; her claims can only be asserted in accordance with and subject to the terms and conditions of the Convention, and cannot be pursued under any other law.

But that is not all, it is clear from the lower Court's conclusion that it was because of its conviction that her rights were violated that it awarded her-

a. ₦100,212.60k to cover the return leg of a failed contract of carriage.

b. The Naira equivalent of CD$1,670 for expenses incurred as a result of the plaintiff being prevented from boarding her flight back to her native Country.

c. ₦10,000,000.00 in general damages.

d. The legal costs of this action set at ₦2,000.000.

e. Interest at 21% per annum to run on all the above amounts from the date of Judgment till date of final liquidation.

The appellant argued under Issue 3 that general damages are not awardable in breach of contract cases when special damages have been awarded without the prior agreement of parties; that their agreement provides only for a ticket refund and the Montreal Convention expressly prohibits non compensatory or punitive damages; and that the award of both special and general damages in breach of contract cases amounts to double compensation, citing *G Chitex Ind Ltd v. O.B.I. (Nig.) Ltd.* (2005) NWLR (Pt. 945) 392; *CBN v. Ahmed* (2004) 15 NWLR (Pt. 897) 591 and *Joseph v. Abubakar* (2002) 5 NWLR (Pt. 759) (sic).

The respondent referred us to the law on general and special damages, citing *Elf. Pet. (Nig.) Ltd. v. Umah* (2007) 1 NWLR (Pt. 1014) 44, *UAC (Nig.) Plc v. Sodolu* (2007) 6 NWLR (Pt 1030) 368, *Uman v. Owoeye* (2003) 9NWLR (Pt 825) 221, *CBN v. Ahmed* (2004) 15 NWLR (Pt 897) 591, on general damages, and *Okeke v. Aondoakaa* (2000) 9 NWLR (Pt. 673) 501, *Ijebu Ode Local Govt. v. Adedeji Balogun & Co. Ltd.* (1991) 1 NWLR (Pt. 166) 136, *UTB (Nig.) v. Ozoemenam* (2007) 3 NWLR (Pt 1022) 448, *Nicon Hotels Ltd. v. NDC Ltd*. (2007) 13 NWLR (Pt. 1051) 237, *Uman v. Owoeye (supra)*, *Gamboruwa v. Borno* (1997) 3 NWLR (Pt. 495) 53, *Oshinjinrin v. Elias* (1970) 1 All NLR 153, *Chukwu v. Makinde* (2007) 9 NWLR (Pt. 1038) 195 and *C&C Const. Co. Ltd. v. Okhai* (2003) 18 NWLR (Pt. 851) 79, on special damages. She urged us to hold that the damages awarded to her by the lower Court are within its jurisdiction.

In his re-address, the respondent's counsel referred us to *Kabo Air Ltd. v. Tarfa (supra)*, to buttress her argument that she is entitled to both special and general damages, and this would not amount to double compensation. The incident involving the respondent in *Kabo Air Ltd. v. Rickey Tarfa (supra)*, occurred in 2004, and it concerned a domestic flight from Lagos to Maiduguri.

He was awarded ₦1,000,000 general damages. On appeal, this Court held –

> *"There was a contract of carriage entered into by parties because of the act of purchasing of a ticket. Evidence of PW1 showed that the flight did not come by 6.00pm but 7.00pm. The boarding process was very rowdy and this resulted in the sale of more tickets than the available seat and this made the staff to assist some preferred or selected passengers. After a long waiting, respondent's ticket was founded on the disorderly queue preparatory to boarding the plane but the appellant's officers without warning moved the stairs away thus denying the plaintiff and other passengers the opportunity of boarding the plane. The Court considered the purpose of the trip of the respondent, which was the primary object of an award of damages, which is to compensate the respondent and the harm done to him, including the embarrassment and humiliation caused by the appellant's officers on duty at the airport, which is the secondary object, that is, to punish the appellant for her officer's conduct. I am guided by the principles laid down laid down in a plethora of cases in awarding general damages..... Much as I feel that the learned trial Judge was justified in awarding general damages against the appellant. I am of the opinion the award of ₦1,000,000.00 is quite excessive..... However, while I resolve this issue in favour of the respondent, I hold that the sum of ₦250,000 is adequate for the respondent in the circumstances. This is in consideration of the fact that the respondent is entitled to the refund of ₦7,000.00 being cost of the air ticket".*

On the face of it, the above decision may appear to favour the respondent but the decision of this Court in that case cannot avail her because that case was decided in 2004 under the domestic law on damages, and this case involves the Montreal Convention 1999, as domesticated by the Civil Aviation Act 2006.

Section 48 (1) of the Act states that the provisions of the Montreal Convention "SHALL from the commencement of this Act [in 2006] have the force of law and apply to international carriage by air to and from Nigeria, in relation to any carriage by air to which those rules apply..... and SHALL subject to the provisions of this Act govern the rights and liabilities of carriers, passengers, consignors, consignees and other persons".

The incident involving the respondent occurred in 2008, and it concerns an ***international carriage by air*** from Nigeria to Canada and back to Nigeria.

The Supreme Court made it clear that "an air passenger is not at liberty to choose as between the provisions of the Convention and the domestic/common law for claims against the carrier" - see *Harka Air Services v. Keazor* (supra).

So, the authority she relied on - *Kabo Air Ltd. v. Tarfa* (supra) decided in 2004, is

of no moment in this appeal. However, I will consider the issue on its merit.

"General damages" are such, as the law will presume to be the direct, natural or probable consequence of the act complained of, while "special damages" are such as the law will not infer from the nature of the act; the main difference is that in the former case, the Court can make an award when it cannot point out any measure of assessment except what it can hold in the opinion of a reasonable man. In the latter case, all the losses claimed on every item must have crystalized in terms and value before trial - see *Shodipo & Co. Ltd. v. Daily Times* (1972) All NLR 842, where Elias, ON, observed as follows –

> ***"I fail myself to see any difference in principle between a claim for special damages and a claim for general damages. One, of course has to be proved as completely as does the other. The only difference is that where one is claiming special damage, the circumstances are such that one is able to put one's finger on a particular item of loss and say, 'I can prove that I lost so much there, so much there, and so much there', whereas a claim for general damages means this: 'We cannot prove particular items, but we can prove beyond all possible doubt that there has been pecuniary loss'. Once that has been proved, I cannot myself see any difference in principle between special damage and general damage".***

The respondent herein claimed the full sum of her ticket but she was awarded half of it "to cover the return leg of a failed contract", which is as it should be.

She also claimed ₦10m and was awarded the full sum as general damages for breach of the terms of said contract of carriage, which is unjustifiable in law, not only because her action was governed by the Montreal Convention but also because it amounted to double compensation, which the law frowns on - See *Tsokwa Motors (Nig.) Ltd. v. UBA Plc.* (2008) 2 NWLR (Pt. 1071) 347 SC, where the Supreme Court per Aderemi, JSC, said in no uncertain terms that –

> ***"It has been repeatedly held by this Court that where a victim of an injury has been fully compensated under one head of damages, it is improper to award him damages in respect of the same injury under another head....."***

In addition, she claimed the sum of ₦10m as "cost of this action", and the lower Court awarded her "the legal cost of this action set at ₦2,000,000.00".

The appellant argued under Issue 5 that there is no shred of evidence adduced in support of this head, which is a claim in special damages; that she only pleaded a claim for ₦10m and never claimed for ₦2m nor was evidence led in proof of ₦2m but curiously, the lower Court awarded her ₦2m in legal fees, citing *Hassan v.*

Maiduguri Mgt Committee (1991) 8 NWLR (Pt.212) 738; that she did not tender documents showing evidence of such payment so there was no basis for awarding this head of claim, citing *Guinness v. Nwoke* (2000) 15 NWLR (Pt. 689) 140, *Haway V. Mediowu (Nig.) Ltd.* (2000) 13 NWLR (Pt.683); and she ought to lead evidence in strict proof if it is capable of being awarded.

The respondent, however, submitted that the law is that cost normally follows an event, and a successful party in any event is entitled to his cost, citing *Adelakin v. Oruku* (2006) 11 NWLR (Pt. 992) 585; that Order 25 Rule 7 of the Federal High Court Rules empowers the Court to grant cost to a party who is in the right, to enable him to be indemnified for the expenses to which he has been unnecessarily put as well as compensated for his time and effort; that the grant of costs in a civil trial is purely discretionary and where a trial Judge exercises his discretion judicially and judiciously, this Court has no business to question such exercise of discretion, and it is not also the role of this Court to ask the lower Court the reasons why it exercised its discretion the way it did, citing *Nicon Ins. Corp. v. Olowofoyeku* (2006) 5 NWLR 244 @ 258, *Adelakin v. Oruku* (supra), *Trade Bank Plc. v. Yisi (Nig.) Ltd.* (2006) 1 NWLR (Pt 960) 101.

She further argued that the principle of fixing costs is not limited or restricted to consideration of official expenses only and the cost for the suit and for each proceeding is at the discretion of the trial Court, citing *U.L.G.C. v. Inwang* (2010) 4 NWLR (Pt. 1185) 529; and that the exercise of discretion by the lower Court in awarding her solicitor's fees in the sum of ₦2m was judicious and the appellant did not place any material facts to deny her claim for solicitors fee, citing *Admin v. NBC Ltd.* (2010) 9 NWLR (Pt. 1200) 543 SC.

The respondent urged us to hold that she is entitled to costs as claimed but that is not likely because, as the appellant rightly submitted, her claim for "cost of this action" is a claim for special damages, and the position of the law is that special damages must be specifically claimed and proved strictly. Strict proof does not imply unusual proof, rather it is basically "proof that would bend or lend itself to quantification" - see *Skye Bank v. Kudus* (2011) LPELR-CA/1/191/08, *Momodu v. University of Benin* (1997) 7 NWLR (Pt. 512) 325, and *Orient Bank (Nig.) Plc. v. Bilante Int. Ltd.* (1997) 8 NWLR (Pt. 515) 37, where per Tobi, JCA (as he then was) explained the requirements as follows –

> *"The degree of "strict proof" required in relation to special damages depends on the character of the acts which produce the damage and the circumstances under which the acts were done..... Strict proof required in proof of special damages means no more than that the evidence must show the same particularity as is necessary for its pleading. It should, therefore, normally consist of evidence of particular loss which are exactly known or accurately measured before trial. Strict proof does not mean unusual proof, but simply implies that a plaintiff who has the advantage*

of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible..... Strict proof in the context of special damages can mean no more than such proof as would readily lend itself to quantification or assessment - Special damages can only be awarded if a Court trying the case gives adequate consideration to the evidence in support and accepts it as having probative value so as to preponderate in favour of the person claiming".

See *Oshinjinrin & Ors v. Elias & Ors* (1970) 1 ANLR 158, wherein it was held –

"What is required is that the person claiming should establish his entitlement to that type of damages by credible evidence of such a character as would suggest that he indeed is entitled to an award under that head, otherwise the general law of evidence as to proof by preponderance or weight usual in civil cases operates".

In other words, a claimant must establish his entitlement by credible evidence, which is evidence "worthy of belief", and "evidence to be worthy of credit must not only proceed from a credible source but must, in addition, be "credible" in itself, by which is meant that it should so natural, reasonable and probable in view of the transaction which it describes or to which it relates as to make it easy to believe it - see Black's Law Dictionary, 6th Ed., and *S.P.D.C. (Nig.) Ltd. v. Tiebo VII & Ors* (2005) 9 NWLR (Pt. 931) 439 where Oguntade, JSC, explained –

"In some cases, it may be necessary to show documentary proof of loss sustained while In others it may be unnecessary. The important thing is that the evidence proffered must be qualitative and credible and such as lends itself to quantification. Each case depends on its own facts and circumstances. There are cases where it will be impossible to pass the test required unless documentary proof is produced to show the loss sustained. In others, oral evidence, which is credible, may be sufficient. The character of the evidence called must measure up to the circumstances of the occasion or the expectation of a reasonable man".

In this case, there is not an iota of evidence to support the respondent's claim for ₦10m as cost of the action or the ₦2m as legal costs of the action that was awarded to her by the lower Court. Apart from the bare claim in her pleadings, she made no mention of any legal fees in her Written Statement on Oath, and her mother, PW1, did not allude or refer to any such claim in her testimony.

The issue of its discretion does not arise because there was nothing before the lower Court on which it could exercise its discretion to grant ₦2m as legal fees.

In any event, an appellate Court can interfere with the exercise of its discretion

where it is NOT exercised in accordance to law or it was exercised in a perverse manner - see *Osakwe v. FGN* (2004) 14 NWLR (Pt. 893) 305, *Likita v. C.O.P*. (2002) 11 NWLR (Pt. 777) 145, *Atiku v. The State* (2002) 4 NWLR (Pt. 757) 265.

In this case, the respondent did not make out her claim for costs of the action, which had to be proved strictly, and the lower Court definitely erred when it awarded her ₦2m as legal fees with no evidence from her to back the claim.

This issue is resolved in favour of the appellant and against the respondent.

We come to the issue of whether the lower Court was right to award her the Naira equivalent of CD$1,670 for expenses. The lower Court found that –

> ***"The [respondent] did incur unexpected and inadvertent emergency expenses related to her need to secure accommodation in Canada in harrowing circumstances".***

The appellant's contention is that the lower Court awarded the respondent a relief or claim that was not asked for, and it referred us to the case of *Ndika v. Chiejina* (2003) 1 NWLR (Pt. 802) 451 at 458, where the Court held as follows –

> ***"A Court of law has no power to award to a claimant what he did not claim or more than what he asked for. In the instant case, the relief granted to the respondent by the trial Judge was more than what he asked for. However, an appellate court is not precluded from modifying the award to bring it in line with the relief sought if it can be done".*** (See page 15 of the appellant's brief)

And *NDIC v. S.B.N. Plc*. (2003) 1 NWLR (Pt. 801) 311 where it was held that –

> *"A court has no power to make an order or grant relief which has not been asked for. A Court may award less but not more than what the parties claimed. The Court should never award what was not claimed. This is so because a Court is not a charitable institution, its duty in civil cases is to render to everyone according to his proven claims. This is based on the principle of adjudication that a party must be given opportunity to answer the claim against him and if need be to resist the claim".*

Citing *Summit Fin. Co. Ltd v. Iron Baba & Sons Ltd* (2003) 17 NWLR (Pt. 848) 89, it submitted that she only claimed for a refund of the cost of her flight ticket; she is only entitled to a refund of the cost of the unused part of the ticket; she did not claim for a refund of the cost of accommodation and the Court cannot give what she is not entitled to receive contractually. Also that a Court cannot make contracts for parties; that its duty is to interpret the agreement of the parties according to their expressed intentions; where parties have entered into a contract, such a

contract is governed by its terms and conditions, and a Court must enforce their rights and obligations of the parties in accordance with the terms of the contract; and a Court is not permitted to go outside the contract or make a new contract for the parties, citing *Omega Bank (Nig.) Plc. v. OBC Ltd*. (2005) 8 NWLR (Pt. 928) 457, *Arjay Ltd. v. AMS Ltd* (2003) 7 NWLR (Pt. 820) 577 and *Larmie v. DPMS Ltd*. (2005) 18 NWLR (Pt. 958) 438 at 442.

The respondent did not address this Issue in her brief but I will quickly say that the Issue will have to be resolved in her favour. The law is settled that once a breach of contract is established, damages flow. General damages are losses that flow naturally from the adversary; it is generally presumed by law "as it need not be pleaded or proved" - see *UBN Ltd. v. Odusote Bookshop* (1995) 9 NWLR (Pt. 421) 558 and *Cameroon Airlines v. Otutuizu (supra)*, where the Supreme Court *per* Adekeye, JSC, reiterated the position of the law –

> ***"In awarding damages in an action founded on breach of contract, the rules to be applied is restitutio in integrum that is, in so far as the damages are not too remote, the plaintiff shall be restored as far as money can do it, to the position in which he would have been if the breach had not occurred".***

In other words, the basic object of an award of damages is to compensate the plaintiff for the damage, loss or injury he has suffered. The guiding principle is *restitutio in integrum* [i.e. returning everything to the state as it was before].

The principle envisages that a party who has been damnified by the act, which is called in question, must be put in the position in which he would have been if he had not suffered the wrong for which he is now being compensated - see *NEPA v. Alli* (1992) 8 NWLR (Pt. 259) 279. In this case, the respondent, who testified as PW2, narrated what she went through after she was kicked out of the airport in Canada in paragraphs 22 - 32 of her Written Statement on Oath –

> *22. I was in a state of shock as a result of the [appellant] official's action and I had to call my parents again to inform them of my predicament.*
>
> *23. My parents immediately took steps to make an alternative preparation for me because I had vacated the School hostel accommodation I had at Columbia International college where I undertook my foundation course.*
>
> *24. My parents called the International Student Administrator at Columbia International School one Miss Priscilla Tamako, to enable me secure an alternate accommodation because it was an awkward time of the night at about 00.20hrs Eastern Time.*

25. *The said Mrs. Priscilla Tamako immediately sent an alarm mail to the students at Columbia International College and also copied my parents.* [Admitted as Exhibit D]

26. *My parents also called the Nigerian Office of the [appellant] but it was in the early hours of the morning at about 05.30hrs Nigerian Local Time, there was nobody to pick the call and/or attend to my parents.*

27. *When there was no response from the school my parents directed me to proceed back to Hamilton, Ontario, Canada to secure accommodation in a serviced apartment where my parents usually lodged anytime they visit Canada, which is about 1 hour 30 minutes' drive from the airport.*

28. *I had to make a part payment in the sum of CD$400.00 to enable me obtain this alternative accommodation.*

29. *I suffered considerable embarrassment and emotional distress as a result of the [appellant] when they forced me out of Pearson International Airport, Canada.*

30. *I was physically assaulted by the security operatives of the [appellant] when they forced me out of Pearson International Airport, Canada.*

31. *I incurred the following expense as a result of the [appellant]'s act;*

- Transportation to the Airport CD$70
- Transportation back to town from the airport CD$100
- Accommodation in Canada from the 22/12/2008 to 3/1/200913 days @ CD$100 per night CD$1,400
- Costs of re-entry visa CD$100

32. I was denied the privilege of celebrating the Christmas and New Year seasons with the members of my family in Nigeria as a result of the actions of the [appellant].

Her Mother, PW1, attested to exactly the same facts in paragraphs XIX to XXIX of her Written Statement on Oath. DW1, the appellant's witness merely said –

10. ***Emirates was not the cause of any embarrassment whatsoever as the incident was self-inflicted by the [respondent] who could not present a valid ticket to enable her embark on the said journey.***

11. *It is not true that the [respondent] was physically assaulted by the [appellant]'s security operatives or anybody at all.*

12. ***If any costs were incurred by the [respondent], they were at best self-inflicted as the [respondent] did not produce on demand, a valid ticket to enable her embark on the said journey.***

The question of the incident being self-inflicted by the respondent or not does not arise at all because the appellant is liable for denying her boarding, and since it is settled law that once breach of contract is established damages flow, it follows that it must compensate her by repaying the expenses she incurred.

She was denied an opportunity of spending Christmas with her family at home; she took a taxi from the airport; and had to make alternative arrangements to enable her stay in Canada. The appellant has not disputed any of these facts, and she does not have to prove anything to be awarded this sort of damages.

The long and short of it is that the award complained against will be affirmed.

As to the last issue, the appellant's issue 6 and the respondent's Issue 5, the appellant submitted that the lower Court erred when it awarded post Judgment interest at 21% per annum whereas the respondent asked for 10%. It adopted its earlier arguments in Issue 4, set out above, and submitted that the Court cannot make an award higher than what was claimed by a party.

The respondent, cited *Diamond Bank v. P.I.C. Ltd.* (2004) 18 NWLR (Pt. 1172)67 SC, *U.L.G.C. v. Inwang (supra)*, and argued that it did not challenge the interest claimed at the lower Court; and that where an appellant fails to challenge such a Claim, it should not be allowed to be raised before this Court.

We were urged to strike out ground 7 of the Notice of Appeal and arguments thereon- for being an issue raised by the appellant without seeking the leave of court, citing *Petgas Res Ltd. v. Mbanefo* (2007) 6 NWLR (Pt. 1031) 545.

The respondent's objection to this issue totally lacks merit; it appears that she misunderstood the appellant' complaint, which is that the lower Court awarded the said interest at 21%, over and above 10% that she had asked for.

So, it is not complaining about the post judgment interest itself but against the

fact that the lower Court awarded a higher rate of interest than she asked for - these are two different things. The respondent had claimed as follows –

> *Interest on the above stated sums at the rate of 21% per annum from 23/12/2008 till* ***Judgment is given and thereafter at the rate of 10% per annum till final liquidation****.*

The lower Court awarded her - "interest at 21% per annum.....from the date of Judgment till date of final liquidation", and the appellant's contention is that it erred because a Court cannot make an award higher than what was claimed.

But the respondent also argued that a trial court has jurisdiction to award such interest at its discretion, as in this case, and that this Court is enjoined not to interfere by substituting the discretion exercised by the trial judge with ours, where a trial Court has judiciously and judicially exercised its discretion.

Once again, the issue of discretion or no discretion does not arise in the circumstances of this case. It is settled law that "a Court may award less and not more than what the parties have claimed" - see *Abenga v. Benue State Judicial Service Commission* (2005) All FWLR (Pt. 321) 1327, *African Petroleum v. Aborisade & Anor* (2013) LPELR-20362 (CA), where Mbaba, JCA, held that –

> ***"It is the law..... that a Court is barred from making an award or granting a relief, outside what was claimed in the pleadings and proved by evidence at trial. This is because, being regulated by laws and principles relating to pleadings, and due to the need to be disciplined, predictable and act on evidence before it, the Court cannot afford to stray to play the comic role of a "father Christmas" who doles out gifts, unsolicited, to whoever he delights to please".***

In this case, the respondent asked for the said interest at the rate of 10%, and the lower Court awarded her the interest at the rate of 21%, which is higher than what she had asked for, and that award will not be allowed to stand.

At the end of the day, the only awards made by the lower Court that will not be set aside are *"₦100,212.68 to cover the return leg of a failed contract"* and the *"Naira equivalent of CD$1, 670 for expenses incurred as a result of the [respondent] being prevented from boarding her flight back to her - Country".*

In the final analysis, this appeal is allowed in part. The award of ₦10m in general damages and ₦2m in legal fees made by the lower Court is set aside.

The award of ₦100,212.60 and the Naira equivalent of CD$1, 670 are affirmed.

The interest rate awarded by the lower Court is set aside, and in its place I do

hereby enter an interest rate of 10% per annum till date of final liquidation.

IKYEGH, JCA: I was privileged to read in draft the exhaustive and painstaking judgment of my learned brother, Amina Adamu Augie, J.C.A., (Hon. P. J.), with which I fully agree and adopt as my judgment with nothing useful to add.

OSEJI, JCA: I have had the opportunity of reading in draft the judgment of my learned brother Amina Adamu Augie, JCA. His lordship engaged in a thorough and in depth consideration of all the issues in contention and I entirely agree with the reasoning and conclusions reached therein. But just to add by way of emphasis that if a party to a contract is in breach of its terms the other party is entitled to bring an action for damages so as to be placed in the same financial position as if the contractual terms had been duly carried out. In other words, damages are recoverable by the injured party if the loss may be reasonably considered to arise naturally. See *Hadley v. Baxendale* (1854) 9 EXCH 341; *Olagunju v. Raji* (1986) 5 NWLR (Pt 42) 408 and *SBN Plc v. Opanubi* (2004) 15 NWLR (Pt 896) 437.

In the instant case, the act of the appellant in refusing the respondent her right under the contract of carriage, to board its flight from Canada to Nigeria in spite of the fact that she booked and obtained a confirmed return ticket and for first leg she had duly utilized constitutes a breach for which reasonable or restitution should be made.

More so that it invited security officials to forcefully remove the respondent at the point she was to board the flight after having gone through all the necessary security and airline checks without regard to what befalls her thereafter is very unfair. The respondent was then forced to incur further expenses as a result of that unfortunate event. These were detailed by the respondent's evidence which was not challenged as follows:

-	Transportation to the Airport	CD$70
-	Transportation back to town from the airport	CD$100
-	Accommodation in Canada from the 22/12/2008 to 3/1/2009 13 days @ CD$100 per night	CD$1,400
-	Costs of re-entry visa	CD$100

To my mind, the above expenses including the amount for the flight ticket to cover the return leg of the journey reasonably flow from the denial of a passenger in a foreign land the right to board a flight she had duly paid for and it deserve to be awarded as damages arising from the breach of the contract of carriage. For this and the fuller reasons detailed in the lead judgment, I too allow this appeal in part and I abide by the consequential orders made therein.

Cases cited in the judgment

Abacha v. The State (2002) 11 NWLR (Pt. 779) 437
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Abiodun v. FRN (2009) 7 NWLR (Pt. 1141) 489
AD v. Fayose (2005) 10 NWLR (Pt.932) 209
Adelakin v. Oruku (2006) 11 NWLR (Pt. 992) 585
Adeogun v. Ekunrin (2003) 2 NWLR (Pt. 856) 52
Aderounmu v. Olowu (2000) 4 NWLR (Pt. 652) 253
Adeyanju v. WAEC (2002) 13 NWLR (Pt. 785) 479
Admin V. NBC Ltd. (2010) 9 NWLR (Pt. 1200) 543
African Petroleum v. Aborisade & Anor (2013) LPELR-20362
African Reinsurance Corporation v. JDP Construction Nig. Ltd. (2003) 13 NWLR (Pt. 838) 609
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Ajibulu v. Ajayi (2001) 11 NWLR (Pt. 885) 458
Akpan v. Udoh (2008) 3 NWLR (Pt. 1075) 590
Amuda v. Adelodun (1997) 5 NWLR (Pt. 506) 480
Angyu v. Malami (1992) 9 NWLR (Pt. 264) 242
Anyanwu v. Mbara (1992) 6 SCNJ 90
Arjay Ltd. v. AMS Ltd (2003) 7 NWLR (Pt. 820) 577
Armels Transport Co. Ltd. v. Transco (Nig) Ltd (1974) 11 SC 237
Atanda v. Ajani (1989) 3 NWLR (Pt. 111) 511
Atiku v. The State (2002) 4 NWLR (Pt. 757) 265
B & B Construction Ltd. v. Ahmed (1998) 9 NWLR (Pt. 566) 486
B.O.N. Ltd. v. Saleh (1999) 9 NWLR (Pt. 618) 331
Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. (2006) 13 NWLR (Pt. 997) 276
C&C Const. Co. Ltd. v. Okhai (2003) 18 NWLR (Pt. 851) 79
Cameroon Airlines v. Abdul-Kareem (2003) 11 NWLR (Pt. 830) 1
Cameroon Airlines v. Otutuizu (2011) 1 CLRN 1
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Idakwo v. Nigerian Army (2004) 2 NWLR (Pt. 857) 249
Idika v. Esiri (1988) 2 NWLR (Pt. 78) 563
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Ijioffor v. the State (2001) 4 SC (Pt. 11) 1
Ikenta Best (Nig.) Ltd. v. A.G. Rivers State (2008) 6 NWLR (Pt. 1084) 612
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Joseph v. Abubakar (2002) 5 NWLR (Pt. 759) (sic)
Kabo Air Ltd. v. Tarfa (2004) 6 WRN 134
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Nicon Hotels Ltd. v. NDC Ltd. (2007) 13 NWLR (Pt. 1051) 237
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Odiba v. Azege (1989) 9 NWLR (Pt. 566) 370
Ogbechie v. Onochie (No. 2) (1988) 1 NWLR (Pt. 70) 37
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Okeke v. Aondoakaa (2000) 9 NWLR (Pt. 673) 501
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Onwugbufor v. Okoye (1996) 1 NWLR (Pt. 424) 252
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Orient Bank (Nig.) Plc. v. Bilante Int. Ltd. (1997) 8 NWLR (Pt. 515) 37
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Oyekola v. Ajibade (2004) 17 NWLR (Pt. 902) 356
Petgas Res Ltd. v. Mbanefo (2007) 6 NWLR (Pt. 1031) 545
S.P.D.C. (Nig). Ltd. v. Edamkwue (2009) 14 NWLR (Pt. 1160) 1
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Shodipo & Co. Ltd. v. Daily Times (1972) All NLR 842
Skye Bank v. Kudus (2011) LPELR-CA/1/191/08

Summit Fin. Co. Ltd. v. Iron Baba & Sons Ltd. (2003) 17 NWLR (Pt 848) 89
Trade Bank Plc. v. Yisi (Nig.) Ltd. (2013) 3 CLRN 49
Tsokwa Motors (Nig.) Ltd. v. UBA Plc. (2008) 3 CLRN 1
Tsume v. Peverega (2001) 2 NWLR (Pt. 698) 556
U.L.G.C. v. Inwang (2010) 4 NWLR (Pt. 1185) 529
UAC (Nig.) Plc v. Sobodu (2007) 6 NWLR (Pt 1030) 368
UBN Ltd. v. Odusote Bookshop (1995) 9 NWLR (Pt. 421) 558
Uman v. Owoeye (2003) 9NWLR (Pt 825) 221
Unilorin v. Adesina (2010) 9 NWLR (Pt. 1199) 331
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Statutes cited in the judgment
Section 34 of the 1999 Constitution of the Federal Republic of Nigeria
Section 48(1) of the Civil Aviation Act 2006
Sections 135, 136 (1) & (2), and 137 of the Evidence Act 2011

Rules of court referred to in the judgment
Order 25 Rule 7 of the Federal High Court Rules 2009

Book referred to in the judgment
Black's Law Dictionary, 6th Ed.

History:

HIGH COURT
Federal High Court (Lagos Division)
Archibong, J

COURT OF APPEAL (Lagos Division)
Amina Adamu Augie, JCA *(Presided & Read the lead Judgment)*
Joseph Shagbaor Ikyegh, JCA
Samuel Chukwudumebi Oseji, JCA

Counsel:
Ike Nwachukwu, Esq., for the appellant
M. Bamidele, Esq. and Oladipo Osinowo, Esq., for the respondent

MR. AKINWUNMI GIWA v. HON. OLA JONES JEJELOLA

COURT OF APPEAL
(AKURE DIVISION)

CA/B/294/2007
FRIDAY 11TH APRIL, 2014

(DENTON-WEST; OWOADE; JOMBO-OFO, JJ.CA)

DEFAMATION – Justification – Defendant must prove that the words published are true and contextual.

DEFAMATION – Qualified Privilege – Defendant must prove that statement was published in good faith on a subject which he had duty to communicate.

DEFAMATION – Qualified Privilege – Malice will not be inferred and action for defamation will fail.

DEFAMATION – Qualified Privilege – requires both the maker and the recipient of the statement to have a corresponding interest.

DEFAMATION – Qualified Privilege – Defence will not avail a party if the defamatory words are published to a person without authority.

DEFAMATION – Libel – Damages naturally flow from libel without proof of injury.

DEFAMATION – Publication – Communication of defamatory words to some other person(s).

TORT – Defamation – Publication of slanderous/libellous words to some other person(s).

DAMAGES – Nominal and General Damages – are used interchangeably but nominal damages are awarded when a legal right has been breached without substantial loss.

DAMAGES – Nominal Damages – Where a breach is inherently actionable, nominal damages may be awarded.

APPEAL – Ground of Appeal – on which no issue for determination is formulated is deemed as abandoned.

APPEAL – Ground of Appeal – Fresh ground raised without the leave is incompetent.

APPEAL – Preliminary Objection – Court will discountenance objection where respondent fails to file notice.

APPEAL – Perverse Findings – Appellate court will intervene in the findings of fact of a trial court where they are not supported by evidence or where the trial court failed to evaluate the evidence.

JUDGMENT – Delay in Delivery – must occassion miscarriage of justice for the judgment to be a nullity.

COMMERCIAL LITIGATION – Miscarriage of Justice – Party complaining must prove that there was a significant departure from the rules.

COMMERCIAL LITIGATION - Miscarriage of Justice - Act complained of must be such that it is reasonably probable that a different decision would have been reached.

COMMERCIAL LITIGATION – Justification - Lawful or sufficient reason for defendant's action.

Facts:

The appellant, a legal practitioner wrote a letter to the Chief Judge of Ondo State and copied the Chief Registrar of the court alleging that the respondent, a retired Chief Magistrate had demanded and received a bribe of ₦3,000 (Three Thousand Naira) in the course of his duty. As a result, the Chief Judge issued a query to the respondent.

Consequently, the respondent instituted an action against the appellant for libel at the Ondo State High Court seeking aggravated damages in the sum of ₦10,000,000 (Ten Million Naira) and an order for perpetual injunction restraining the appellant from further publishing defamatory statements regarding him.

During the trial, the respondent admitted being the author and the publisher of the letter but pleaded the defence of justification, qualified and absolute privilege and fair comment.

The trial judge found against the appellant and awarded nominal damages in the sum of ₦100,000 (One Hundred Thousand Naira) and granted the order of perpetual injunction.

Dissatisfied with the judgment of the trial court, the appellant appealed and the respondent cross-appealed.

Held (*Unanimously dismissing the appeal and allowing the cross-appeal):*

[1] ***Defamation – Justification – Defendant must prove that the words published are true and contextual.***

In the case of *Joseph Mangtup Din v. African Newspapers of Nigeria Ltd*. (1990) 3 NWLR (Pt. 139) 392 at 409, the Supreme relied on the *dictum* of Collins M.R in the case of *Digby v. Financial News Ltd* (1907) 1 K.B. 502 at 509 that:

> **"A plea of justification means that all the words were true and covers not only the bare statements of fact in the alleged libel but also any imputation which the words in their context may be taken to convey"**

In the instant case, the learned trial Judge was right to hold that to succeed in the plea of justification, the defendant must prove that the plaintiff did commit the offence of receiving bribe. That, the defendant can only enjoy the defense of justification if he could justify the precise imputation complained of. That it is strict proof and the defendant must prove all the material statements in the libel. **(P. 263 lines 4 - 17)**

[2] ***Defamation – Qualified Privilege – Defendant must prove that statement was published in good faith on a subject which he had duty to communicate.***

Again, in relation to the defense of qualified privilege, the appellant did not prove circumstances which could make the published statement Exhibit 'D' an exception to the rule of defamatory publication by showing that it was published ***bona fide*** on a subject matter in which he had a duty to communicate. **(P. 263 lines 19 - 22)**

[3] ***Defamation – Qualified Privilege – Malice will not be inferred and action for defamation will fail.***

Truly, it is trite law that a statement made about a person may be false and defamatory of him yet the person may not be able to maintain an action of defamation on it if such a statement is made on an occasion of qualified privilege.

In such a case, the law does not presume the existence of malice in the making of such a statement. **(P. 263 lines 24 - 29)**

[4] ***Defamation – Qualified Privilege – requires both the maker and the recipient of the statement to have a corresponding interest.***

A privilege occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist the occasion is a privilege one.

See, *Alhaji K.A. Giwa v. S.A. Ajayi & 3 Ors* (1993) 5 NWLR (Pt. 294) 423 at 425. **(P. 263 lines 29 - 35)**

[5] ***Defamation – Qualified Privilege – Defence will not avail a party if the defamatory words are published to a person without authority.***

In the instant case however, the appellant as defendant called DW1, Clement Olusola Agbede, the then Chief Registrar of the High Court of Justice, Ondo State. The witness not only confirmed, that a copy of Exhibit 'D' was given to him but also at cross-examination that **"I have no direct authority to discipline magistrates".** Unfortunately, I must say this statement by DW1 was in no way modified and or amended either in Re-examination or in fact throughout the proceedings in the court below.

The implication of the totality of the evidence of DW1 either in the court below or in this Honourable court is that though the parties seem to agree that the communication of Exhibit 'D' to the Hon. Chief Judge of Ondo State may well be privileged. However, that the publication of the same Exhibit 'D' to the Chief Registrar separately from the Hon. Chief Judge would not qualify for the defence of qualified privilege. This is because, **".....no privilege will attach to any such complaint or information, if addressed to a person, or body having no jurisdiction, or control over the person whose conduct is impugned or any power or duty to grant redress for or inquire into the abuse complained of".**

See: Gatley on Libel and Slander, 7th Edition Para. 492.

And as was said by Lord Loreburn in *Adam v. Ward* (1917) A.C 309 at 321

> **"A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact published it"**
> **(P. 263 lines 36 - 45; P. 264 lines 1 - 16)**

[6] ***Tort – Defamation – Publication of slanderous/libellous words to some other person(s).***

The attempt by the appellant in this case to argue that Exhibit D, the

letter submitted to the Hon. Chief Judge and Exhibit A, the copy of Exhibit D delivered to the Chief Registrar are one and the same, to my mind is not tenable. This is first because defamation generally means the communication of defamatory words to someone other than the person defamed. **(P. 264 lines 18 - 22)**

[7] ***Defamation – Publication – Communication of defamatory words to some other person(s).***

Publication on the other hand is the act of making the defamatory statement known to any person or persons other than the plaintiff himself. It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. And, a letter sent to a single individual is sufficient. **(P. 264 lines 24 - 28)**

[8] ***Defamation – Libel – Damages naturally flow from libel without proof of injury.***

One must however start with the trite proposition that libel is actionable *per se* in other words damages could be awarded on the establishment of the libel without proof of damages based on the discretion of the learned trial judge. **(P. 266 lines 43 - 45)**

[9] ***Damages – Nominal and General Damages – are used interchangeably but nominal damages are awarded when a legal right has been breached without substantial loss.***

I would have loved to agree with the appellant that the appellation of an award of 'general damages' rather than 'nominal damages' would have been more appropriate or would have at least shown clarity in the circumstances of the case.

But at the same time, I do not consider it an error to use the terms nominal damages in interchange for general damages. This is because there is actually nothing in the dictionary of law to suggest that the terms 'nominal damages' or 'general damages' could not be used interchangeably except for the fact that nominal damages may indeed express the idea of "a trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. The practical significance of a judgment for nominal damages is that the plaintiff thereby establishes a legal right". **(P. 267 lines 1 - 12)**

[10] ***Damages – Nominal Damages – Where a breach is inherently actionable, nominal damages may be awarded.***

From the above literature, it would seem that in claims that are actionable *per se* as in the instant case 'nominal damages' could be used as a specie of 'general damages' to denote the award of a trifling or token sum for the plaintiff in an action. This to my mind is precisely what the learned trial judge did in the instant case. The learned trial judge recognized that the award of damages to a plaintiff in a libel matter is not to be seen as a gold mine. That damages are awarded to a plaintiff to exonerate him and to make for the injury he had suffered to his person or character as a result of the libel. He thus, disallowed the respondent's claim of aggravated damages and instead awarded nominal damages of ₦100,000.00 (One Hundred Thousand Naira only). **(P. 268 lines 8 - 17)**

[11] ***Appeal – Ground of Appeal – on which no issue for determination is formulated is deemed as abandoned.***

I do agree with the submissions on the respondent's preliminary objection in its entirety. Appellant's Ground 2 has no issue based on it and it is liable to be struck out. A ground of appeal on which no issue is formulated is deemed abandoned. See: *Anie v. Chief Ugagbe* (1995) 6 NWLR (Pt. 102) 425 at 432, *R.T.A.A.N. v. NURTW* (1992) 2 NWLR 381 at 391. **(P. 255 lines 24 - 28)**

[12] ***Appeal – Ground of Appeal – Fresh ground raised without the leave is incompetent.***

Finally, on this score, Ground 7 of the appellant's grounds of appeal raises a fresh issue without leave of court.

Consequently, the said Ground 7 and issue 4 based on the incompetent ground 7 are incompetent and liable to be struck out.

See, *Agwam Obioha & Ors v. Chief Nwofor & Ors* (1994) 10 SCNJ 48, *Attorney General, Oyo State v. Fairlakes Hotels Ltd* (1988) 12 SC (Pt. 1) at 53 - 54, *Amadi v. Ovisakwe* (1997) 7 NWLR (Pt. 511) 161 at 170. **(P. 255 lines 37 - 45)**

[13] ***Appeal – Preliminary Objection – Court will discountenance objection where respondent fails to file notice.***

The first point raised by the cross-respondent is in the nature of a preliminary objection to the cross-appeal. However, it was not properly so raised. The provision of Order 10 Rules (1) and (3) of the Court of Appeal Rules 2011 is quite clear on the point. It reads.

"10 (1) A respondent intending to rely upon a preliminary objection

to the hearing of the appeal, shall give the appellant three clear days notice thereof before the hearing setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the Registrar within the same time".

(3) If the respondent fails to comply with this Rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the costs of the respondent or may make such other order as it thinks fit".

In the instant case, the cross-respondent has not complied with the provision of order 10 Rules 1 and 3 of the Court of Appeal Rules 2011 in raising an objection as to the cross-appellant's ground of appeal only in the cross-respondent's brief without filing a Notice of Preliminary Objection. The arguments in paragraph 5.01 at pages 1 and 2 of the cross-respondent's brief are liable to be discountenanced and are accordingly discountenanced. **(P. 273 lines 3 - 25)**

[14] ***Appeal – Perverse Findings – Appellate court will intervene in the findings of fact of a trial court where they are not supported by evidence or where the trial court failed to evaluate the evidence.***

It is obvious that the finding of fact complained of in the cross-appeal does not in fact flow from the copious evidence on record as a finding of fact on the issue of the proof of the bribe alleged. I do agree with the learned counsel for the cross-appellant that the finding complained of is perverse or perhaps in the minimum a printer's mischief. Either way, it is perfectly in order for this Honourable court to intervene and set aside that finding of fact. This is because, though an appellate court will very rarely, if at all interfere with the findings of facts made by trial court. However, the findings are not sacrosanct. Where the conclusions made from the findings are not supported by the evidence relied upon, or the proper conclusions or inferences are not drawn from the evidence, or where the trial court has failed to evaluate the evidence, the appellate court will in the interest of justice, be free to do so.

The appellate court is entitled to evaluate the evidence and come to the right decision supported by the evidence.

See: *Anthony Ibhafidon v. Sunday Igbinosun* (2001) 4 S.C. (Pt. 1) 96 at 104. *Gabreiel Iwuoha v. Nigerian Postal Services Ltd* (2003) 4 SCNJ 258 at 284 - 285. *Daniel Bassil & Anor v. Chief Lasisi Fajebe & Anor* (2001) 4 S.C. (Pt. II) 119 at 125. *Chief Kalada Nteogwuile v. Chief Isreal Otuo* (2001) 6 S.C. 200 at 211. **(P. 274 lines 27 - 45; P. 275 line 1)**

[15] ***Judgment – Delay in Delivery – must occassion miscarriage of justice for the judgment to be a nullity.***

It has since been understood since the introduction of sub-section (5) into the constitution that non-compliance with the Ninety day rule for the delivery of a judgment is no longer sacrosanct. The modern view by the introduction of sub-section (5) of section 294 is for the party relying on the non-compliance to satisfy the appeal court that he has suffered a miscarriage of justice by reason thereof. **(P. 258 lines 31 - 35)**

[16] ***Commercial Litigation – Miscarriage of Justice – Party complaining must prove that there was a significant departure from the rules.***

I have carefully gone through the records of proceedings in the instant case and I believe that the appellant has failed to discharge the burden that he has suffered a miscarriage of justice by the delivery of the judgment of the court 7 months after the taken of addresses by counsel. To constitute a miscarriage of justice there must be in the words of Ogundare JSC in the case of *Uka & Anor v. Irolo & Ors* (2002) 7 SC (Pt. 11) 77 at 108 "a departure from the rules which permit all judicial proceeding as to make what happened not in the proper sense of the word judicial procedure at all". **(P. 259 lines 5 - 12)**

[17] ***Commercial Litigation - Miscarriage of Justice - Act complained of must be such that it is reasonably probable that a different decision would have been reached.***

The Black's Law Dictionary 6th Edition page 999 defines the expression **"miscarriage of justice"** as **"a reasonable probability of more favourable outcome for the defendant"**.

The definition goes further to state what considerations would warrant a reversal of judgment by reason of miscarriage of justice as follows:

> **"a miscarriage of justice warranting reversal shall be declared only when the court after examination of the entire cause including evidence is of the opinion that it is reasonably probable that a result more favourable to the appealing party would have been reached in absence of the error". (P. 258 lines 37 - 45; P. 259 lines 1 - 3)**

[18] ***Commercial Litigation – Justification - Lawful or sufficient reason for defendant's action.***

PER DENTON-WEST, JCA:

Black's Law Dictionary 8th Edition at page 882 defines "justification" thus:

1. "A lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful."

2. "A showing in court of a sufficient reason why a defendant did what the prosecution charges the defendant to answer for."
(P. 274 lines 31 - 37)

OWOADE, JCA (Delivering the lead Judgment): This is an appeal and a cross-appeal against the judgment of B. A. Adejumo, J. of the High Court of Justice, Ondo sitting at Ondo delivered on 9/1/2003.

The respondent as plaintiff issued a writ of summons accompanied by a statement of claim dated 6/12/1999.

By paragraph 48 of the respondent's Statement of Claim, he claimed against the defendant/appellant as follows:

(a) A declaration that the letter written by the defendant as above pleaded referred to the plaintiff and is defamatory of him.

(b) An order for Aggravated Damages in the sum of ₦10,000.000.00 (Ten Million Naira Only) subject to court fees.

(c) An order of perpetual injunction restraining the defendant, his agents, and/or servant from writing and or publishing any further defamatory matter whatsoever and howsoever of and concerning the plaintiff.

Pleadings were filed and exchanged. The respondent gave evidence and called six (6) other witnesses to testify in his favour. The appellant did not witness but called six (6) witnesses who gave evidence in support of his case.

The case is an action for libel, contained in a letter, Exhibit D published of and concerning the respondent. The appellant, a Legal Practitioner, wrote Exhibit D alleging that the respondent, a retired Chief Magistrate, on contract demanded and received a bribe of ₦3,000 in the course of his official duty. The appellant admitted both the authorship and publication of Exhibit D but denied that the allegation therein contained was defamatory. He pleaded the defence of justification, absolute privilege, qualified privilege and fair comment.

The respondent was queried by the Hon. Chief Judge of Ondo State on the bribery allegation and the respondent replied to the query with a denial of the allegation. Both query and reply were never before the trial court.

The learned trial judge upon the totality of the evidence before him, held that the respondent had been libeled by the appellant.

He refused the claim of aggravated damages but awarded nominal damages of ₦100,000.00. He also made a restraining order of perpetual injunction.

Dissatisfied with this judgment, the appellant filed a Notice of Appeal [containing 10 (ten)] grounds of appeal before this court on 21/1/2008.

Also, by leave of the Honourable Court, the respondent filed a solitary ground of cross-appeal on 2/3/2010. The appellant nominated seven (7) issues for determination from the ten (10) grounds of appeal filed. They are:

(i) Whether the delivery of the judgment in this suit by the learned trial judge seven (7) months after address of both counsel with regard to the peculiar nature of this case has not occasioned a substantial miscarriage of justice.

(ii) Whether the learned trial judge was right in his judgment in this case by holding that the defence of justification cannot avail the appellant.

(iii) Whether the learned trial judge was right in his judgment in this case by holding that the defence of qualified privilege cannot avail the appellant.

(iv) Whether the learned trial judge has the right to have unilaterally transferred this case to himself from one judicial division to another judicial division without the *fiat* or consent of the Honourable Chief Judge of Ondo State.

(v) Whether the basis upon which the learned trial judge awarded a nominal damages (sic), sum of ₦100,000.00 (One Hundred Thousand Naira Only) in favour of the respondent is proper and known to law.

(vi) Whether the learned trial judge properly evaluated the evidence before him in this case before arriving at his judgment.

Learned counsel for the respondent filed a Notice of Preliminary Objection and argued as follows.

That Appeal Ground 2 is Vague, imprecise and without particulars. That it has no issue based on it for determination and should be struck out having been deemed

abandoned.

Also, that Appeal Grounds 3 and 9 have no issue(s) raised from them for determination of the appeal and therefore liable to be struck out as they are equally deemed abandoned.

Learned counsel submitted further that Ground 7 upon which issue 4 of the appellant's brief of argument depends is a fresh point never raised or canvassed throughout the trial at the lower court. He argued that for such fresh point to be competently raised on appeal, the prior leave of the appellate court is required. But, that the appellant neither sought nor obtained such leave.

Learned counsel for the respondent submitted further that following the objection in respect of Ground 7, the appellant's issue 4 based on the incompetent Ground 7 also fails for incompetence in tandem with the principle that issues must be predicated upon valid grounds of Appeal and if not such issues cannot stand.

In sum, the respondent prays this court to strike out Appeal Grounds 2, 3, 7 and 9 together with issue 4 (four) based on the incompetent ground 7.

The appellant did not furnish any reply to the preliminary objection of the learned counsel for the respondent.

I do agree with the submissions on the respondent's preliminary objection in its entirety. Appellant's Ground 2 has no issue based on it and it is liable to be struck out. A ground of appeal on which no issue is formulated is deemed abandoned. See: *Anie v. Chief Ugagbe* (1995) 6 NWLR (Pt. 102) 425 at 432, *R.T.A.A.N. v. NURTW* (1992) 2 NWLR 381 at 391.

Similarly Grounds 3 and 9 of the grounds of appeal have no issue(s) raised from them thus the grounds are equally deemed abandoned.

See also: *Osafile & Anor v. Paul Odi & Anor* (1994) 2 SCNJ 1 at 9, *Atoyebi & Anor v. Governor of Ondo State.* (1994) 2 SCNJ 62 at 78, *Are v. Ipaye* (1986) 3 NWLR 416.

Finally, on this score, Ground 7 of the appellant's grounds of appeal raises a fresh issue without leave of court.

Consequently, the said Ground 7 and issue 4 based on the incompetent ground 7 are incompetent and liable to be struck out.

See, *Agwam Obioha & Ors v. Chief Nwofor & Ors* (1994) 10 SCNJ 48, *Attorney General, Oyo State v. Fairlakes Hotels Ltd* (1988) 12 SC (Pt. 1) at 53 - 54, *Amadi v. Ovisakwe* (1997) 7 NWLR (Pt. 511) 161 at 170.

From the foregoing, the respondent's Notice of preliminary objection is upheld. Grounds 2, 3, 7 and 9 of the Notice and Grounds of Appeal together with issue four based on the incompetent ground 7 are struck out.

In dealing with the main appeal, having struck out appellant's issue 4, the appellant's issue 5 will be numbered as issue 4 while his issue 6 will be re-numbered as issue 5.

The learned counsel for the respondent adopted the appellant's issues as formulated.

On issue 1, appellant submitted that the judgment of the trial court in this case having been delivered seven (7) months after the address of counsel, contrary to section 294 of the 1999 constitution of the Federal Republic of Nigeria, it has occasioned a substantial miscarriage of justice as a result of the inordinate delay between the conclusion of the trial and the delivery of the said judgment.

He submitted that the learned trial judge could not have made use of the advantage of seeing and observing the demeanor of the witnesses who testified before the court as a result of undue delay and/or long intervals between the addresses of the counsel and the delivery of judgment.

Appellant submitted that on page 110 of the records, the counsel to the plaintiff (now respondent) completed his address during which the case was adjourned to the 27th day of March, 2002 for the appellant to reply on points of law which said reply was submitted to the trial court as a written address on 27/5/2002 as directed and which was the time the case was adjourned for judgment i.e. from 27/5/2002 to 9/1/2003 which is over seven (7) months.

Appellant further submitted that contrary to the statement by the learned trial judge at page 131 of the records, that there was no time and no where in the records that both counsel agreed to the delivery of the judgment in this suit outside the mandatory statutory period of three months. That, the appellant did not agree to such.

Appellant then made specific references to the evidence of PW1 at pages 32 to 38 of the records, DW1 at pages 47 to 48 of the records, DW3 at pages 122 to 123 of the records and also to aspects of the addresses of both counsel on page 88 to 109 of the records, which the appellant considered were not taken into consideration in the delivery of the judgment by the learned trial judge.

The appellant added that none of the legal authorities cited was utilized by the trial court in its judgment. Also, that as a result of delay in delivering the judgment in this suit, the court's evaluation of evidence does not bear the mark of freshness and its findings of facts were not supported by credible evidence. He referred to

the following cases. *James Ogundele v. Dare Julius Fasu* (1999) 9 SCNJ 105 at 107, *Danbaki Gufwat & 12 Ors v. The State* (1994) 2 NWLR (Pt. 327) page 435 at 445, *Ngozi Anyafulu v. Vincent Agazie* (2007) All FWLR (Pt. 334) 143 at 149, *Emmanuel Atunewu & 1 Ors. v. Chief Ada Ochekwu* (2005) 9 WRN 125 at 132 to 133, *Olokotintin v. Sarumi* (1997) NWLR (Pt. 480) 222 at 232, *Igwe v. Kalu* (2002) 26 WRN 58 also (2002) 5 NWLR (Pt. 761) 678.

He urged us on account of this issue to set aside the judgment of the trial court.

Learned counsel for the respondent started on issue 1 by saying that indeed as remarked by the Learned trial judge at page 131 of the records, the parties agreed to the delivery of the judgment outside of the three (3) months period stipulated by the 1999 constitution and the respondent supported and confirmed the authenticity of the record of proceedings in this regard. Counsel reproduced the provision of sections 294 (1) and (5) of the 1999 Constitution and argued that no judgment delivered in breach of section 294 (1) will be set aside, as a matter of course. He argued that section 294 (5) is the inevitable hurdle which the appellant, in this case has to cross before he can reap any benefit of section 294 (1) of the 1999 constitution. That, a duty is thus cast on the appellant to satisfy this court that he has by the delayed delivery of judgment, suffered a miscarriage of justice.

On this, learned counsel referred to the cases of *Chief Adegoke Ojagbamila & Ors v. Chief Lejuwa & Ors* (2005) 3 FWLR (Pt. 269) 13 at 23 - 24, *Rossek v. ACB Ltd* (1993) 8 NWLR (Pt. 312) 382 at 465, *Okonkwo v. Udoh* (1997) 9 NWLR (Pt. 519) 16 at 20 -21.

Learned counsel referred to the Black's Law Dictionary 6th Edition page 999 for a definition of "Miscarriage of justice" and then submitted in the words of Ogundare JSC (of blessed memory) in *Uka & Anor v. Irolo & Ors* (2002) 7 SC (Pt . II) 77 at 108 that to constitute a miscarriage of justice there must be such "a departure from the rules which permit all judicial proceeding as to make what happened not in the proper sense of the word judicial procedure at all".

He referred also to the case of *Ojo & Ors v. Anibire & Ors* (2004) 5 SCNJ 56.

Learned counsel noted that a search for a miscarriage of justice in any given case must require an in-depth examination of the cause of action, the evidence on record, the findings of fact and the judgment based on the findings. He argued that the cause of action in this case is libel to which the defendant/appellant pleaded the defense of justification among others. That, he was expected to prove his case by evidence that the respondent did receive a bribe of ₦3,000.00 in the course of his official duty as a Chief Magistrate.

Learned counsel then went through the evidence of the six defence witnesses DW1 - DW6 as evaluated by the learned trial Judge particularly from pages 47 - 60

of the records. By these, learned counsel submitted that the evidence of the defence witnesses demonstrated the irredeemable weakness of the case of the appellant which he said would not warrant calling in aid the provision of section 294 (1) of the 1999 Constitution on ground of delayed delivery of judgment. He furthered that in the poor state of evidence of the defence and the erroneous negative finding of the trial court on it, the appellant has suffered no miscarriage of justice by the delayed delivery of judgment.

He referred to the cases of *Ojokolobo v. Alamu* (1967) 3 NWLR (Pt. 61) 377, *Shaba Dauda Pita & Ors v. Daniuma Gunduma Kadara & Ors* (2005) FWLR (Pt. 270) 123 - 124.

In determining issue 1, we must remind ourselves that the provision of section 294 (1) of the 1999 Constitution (as Amended is subject to the provision of section 294 (5) of the same Constitution. The provision read as follows:

> **"294 (1) every court established under the constitution shall deliver its decisions in writing not later than Ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof".**

> **"294 (5) The decision of a court shall not be set aside or treated as a nullity solely on the ground of non - compliance with the provision of subsection (1) of this section unless the court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof".**

It has since been understood since the introduction of sub-section (5) into the Constitution that non-compliance with the Ninety day rule for the delivery of a judgment is no longer sacrosanct. The modern view by the introduction of sub-section (5) of section 294 is for the party relying on the non-compliance to satisfy the appeal court that he has suffered a miscarriage of justice by reason thereof.

The Black's Law Dictionary 6th Edition page 999 defines the expression **"miscarriage of justice"** as **"a reasonable probability of more favourable outcome for the defendant"**.

The definition goes further to state what considerations would warrant a reversal of judgment by reason of miscarriage of justice as follows:

> **"a miscarriage of justice warranting reversal shall be declared only when the court after examination of the entire cause including**

evidence is of the opinion that it is reasonably probable that a result more favourable to the appealing party would have been reached in absence of the error".

I have carefully gone through the records of proceedings in the instant case and I believe that the appellant has failed to discharge the burden that he has suffered a miscarriage of justice by the delivery of the judgment of the court 7 months after the taken of addresses by counsel. To constitute a miscarriage of justice there must be in the words of Ogundare JSC in the case of *Uka & Anor v. Irolo & Ors* (2002) 7 SC (Pt. 11) 77 at 108 "a departure from the rules which permit all judicial proceeding as to make what happened not in the proper sense of the word judicial procedure at all"

See also: *Ojo & Ors v. Anibire & Ors* (2004) 5 SCNJ 56. Issue 1 is resolved against the appellant.

On issues 2 and 3, appellant submitted that the sting of libel is the publications contained in Exhibits "A" and "D" which is an allegation of the collection of the sum of ₦3,000.00 bribe made by the appellant against the respondent. He submitted that the allegation was found to be true in accordance with the evidence of DW1, Mr. Clement Olusola Agbede as contained on page 47 - 48 of the records.

Furthermore, that the evidence given by DW3, DW4, DW5 and DW6 as contained on pages 49 to 60 of the records confirmed the truth of Exhibits A, D and F. In addition, said the appellant, the evidence of PW7 Mr. Gbenga Ajimuda under cross examination as contained on page 45 confirms the sting of the libel in the instant case.

Appellant argued that the gist of the libel continues to be the most relevant consideration. That, the moment the respondent proves the sting or gist of the libel to be true, a defence of justification has been established. He referred to the cases of *Joseph Mangtur Din v. African Newspapers of Nigeria Ltd* (1990) 3 NWLR (Pt. 139) 392 at 409, *Digby v. Financial News Ltd*. (1907) 1 K.B. 502 at 509.

Appellant submitted that based on the evidence of DW1, DW3, DW4, DW5 and DW6 as contained on pages 47 to 60 of the records that the respondent in this case has no right to a character free from that imputation and if he has no right to it, he cannot in justice recover damages for the loss of it, it is ***"damnum absque injuria"*** (loss without a wrongful act).

He referred to the case of *Agbon Ojeme v. Prince Mark Jimoh Momodu* (1994) 1 NWLR (Pt. 323) 685 at 700. He added that the evidence of DW1, DW3, DW4, Dw5 and DW6 as stated on pages 47 to 60 of the records has proved beyond reasonable doubt as required under section 138 of the Evidence Act the allegation of bribe taking against the respondent.

Furthermore, in relation to issue 3, appellant submitted that the defence of qualified privilege avails the appellant. The law, he said is that when a man believes that he has suffered a grievance to the notice of the person or body whose power or duty it is to grant redress or to punish or reprimand the offender or merely to inquire into the subject matter of the complaint and any statement so made is privileged if made in good faith and not for the purpose of slandering the plaintiff i.e. the respondent in the instant case.

He referred to the case of *Joseph Agbon Ojeme v. Prince Mark Jimoh Momodu* (Supra) at 701.

He submitted that the appellant in this case who is a legal practitioner has a legal duty and interest to publish the contents of Exhibits 'A' and 'D' to the person to whom it was addressed (i.e. The Chief Judge of Ondo State) against the respondent who was then a Chief Magistrate working under the control of the said Chief Judge of Ondo State as at the material time. He submitted that the evidence of PW2 Mr. Marcus Adefemi Ogunode as contained on pages 38 - 39 of the records confirmed that the said Exhibit A and D were written to the office of the Hon. Chief Judge of Ondo State. Similarly, that the evidence of PW1 (the respondent) as contained on pages 31 - 38 of the records shows that Exhibits 'A' and 'D' were addressed to the Chief Judge of Ondo State. And, that DW1 Clement Olusola Agbede in his evidence on page 47 of the records confirmed that Exhibit 'D' was written to his office and the office of the Chief Judge of Ondo State.

Appellant referred to the cases of *Chief I. Ekanem-Ita v. Professor B.I.A. Fetuga* (1991) 7 NWLR (Pt. 204) 449 at 454 and *Alhaji K.A. Giwa v. S.A. Ajayi & 3 Ors* (1993) 5 NWLR (Pt. 294) 423 at 425 to say that a defamatory material will be privileged where it is published by someone who made it "*bonafide"* on a subject matter in which he had a duty to communicate.

He submitted that the respondent did not establish any proof of malice against him by the appellant. Also, that Exhibit A and D are one and the same document. Exhibit A is the copy of Exhibit D while Exhibit D is the original copy of Exhibit A both Exhibits A and D are the same letter written by the appellant as a solicitor in the course of his duties to his client.

This, he said makes Exhibits 'A' and 'D' a qualified privilege in favour of the appellant. On this, appellant referred first to the decision of the Supreme Court in the case of *M.T. Mamman v. A.A. Salaudeen* (2006) 9 WRN 1 at 32 where Onnoghen, JSC held:

> **"There is no doubt that Exhibit 6 is a letter written by a solicitor in the course of his duties to his client.**
>
> **The law is that such a letter cannot be defamatory since it is written on a privilege occasion. See *Boxsus v. Goblet* (1891) 4 All ER P.**

1178 at P. 1180 where Kopes L.J stated thus: For the proposal of the present case, I am prepared to lay down this rule: that, if a communication made by a Solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client and in the interest of his client, the occasion is privilege".

Secondly, he referred to the book Nigerian law of Libel by Chief Gani Fawehinmi SAN where the learned author at page C 435 said:

"Qualified privilege of statement pursuant to public or private interest and Duty - A communication made *bona fide* upon any subject matter in which the party has an interest, or in reference to which he has a duty, is privilege, if made to a person having a corresponding interest or duty, although it contains a criminatory matter, which without this privilege would be actionable".

Learned counsel for the respondent treated issues 2 and 3 together in his brief of argument. Whilst in agreement with the appellant that the defense of justification hinges on proving the truth of the defamatory statement or matter, (which in this case is, Exhibit D) he disagreed with the appellant's conclusion that what he wrote and published was ever proved to be true, of and concerning the plaintiff.

The learned trial judge, said counsel, considering the appellant's defence of justification in his judgment stated at page 127 as follows:

"To succeed in the plea of justification, however, the defendant must prove that the plaintiff did commit the offence of receiving bribe. The defendant can only enjoy the defense of justification if he has justified the precise imputation complained of. It is strict proof. For the defendant to be avail (sic) of the defense of justification of the whole libel, the defendant must prove all the material statements in the libel".

After agreeing with the learned trial judge that the above statement represents the law, he further quoted the learned trial judge at page 131 that:

"The letter written by the defendant on 26/10/99 that is Exhibit 'D' which referred to the plaintiff is defamatory of the plaintiff".

He submitted that the trial court's findings that the evidence of DW3, DW4, DW5 and DW6 respectively relied on by the appellant was inadmissible hearsay, has already been noted in paragraph 4.02 of the respondent's brief showing that those four defence witnesses did not prove the truth of the libel. He added that every judgment of a court of record, as in this case, is presumed to be correct, valid, binding and subsisting until set aside by an appellant court.

He referred to the cases of *F.A.T.B. v. Ezegbu* (1994) 8 NWLR (Pt. 367) 149, *Isiyaku Musa Jikantoro & Ors v. Alhaji Haliru Dantoro & Ors* (2004) 5 SCNJ 152.

The learned trial judge, said counsel, not finding the defamatory content of Exhibit 'D' to have been proved to be true, quite rightly rejected the appellant's plea of justification. He urged this court to do the same.

On qualified privilege, respondent's counsel said they are in total agreement with the appellant's statement of the law on this point at page 10 of the appellant's brief quoting from the case of *Ronke Olapade v. Sketch Publishing Co. Ltd & Ors* (1987) Case No. C 435 reported in the book Nigerian Law of Libel and the Press (Supra). But, he hastened to draw our attention to the classic exception to that statement at page C 439 of the same report that:

> **"But no privilege will attach to any such complaint or information, if addressed to a person, or body having no jurisdiction, or control over the person whose conduct is impugned nor any power or duty to grant redress for or inquire into the abuse complained of".**

See: Gatley on Libel and Slander 7th Edition paragraph 492.

Learned counsel submitted that under cross-examination, DW1 (The Chief Registrar of the High Court) in answer to a question, admitted:

> **"I have no direct authority to discipline magistrates".**

Counsel argued that DW1 was one of persons to whom Exhibit 'D' was copied. That, his admission that he had no jurisdiction, authority or control over the respondent as a Chief Magistrate brings this case squarely within the exception above-noted, and in line with the *dictum* of Lord Loreburn in *Adam v. Ward* (1917) A.C. 309 at 321 where he said:

> **"A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact published it".**

In the instant case and in relation to issues 2 and 3. I do agree with the learned trial judge that neither the defence of justification nor qualified privilege could have availed the appellant.

I have carefully gone through the records in this case and I believe that the learned trial judge was indeed right to have said that the evidence of the various defendant's/appellant's witnesses on the allegation of receiving ₦3,000.00 bribe from the respondent by the appellant were inadmissible hearsay and that the appellant

failed to prove the defence of truth or justification in relation to the allegation of ₦3,000 bribe against the respondent.

In the case of *Joseph Mangtup Din v. African Newspapers of Nigeria Ltd*. (1990) 3 NWLR (Pt. 139) 392 at 409, the Supreme relied on the *dictum* of Collins M.R in the case of *Digby v. Financial News Ltd* (1907) 1 K.B. 502 at 509 that:

> **"A plea of justification means that all the words were true and covers not only the bare statements of fact in the alleged libel but also any imputation which the words in their context may be taken to convey"**

In the instant case, the learned trial Judge was right to hold that to succeed in the plea of justification, the defendant must prove that the plaintiff did commit the offence of receiving bribe. That, the defendant can only enjoy the defense of justification if he could justify the precise imputation complained of. That it is strict proof and the defendant must prove all the material statements in the libel.

Again, in relation to the defense of qualified privilege, the appellant did not prove circumstances which could make the published statement Exhibit 'D' an exception to the rule of defamatory publication by showing that it was published ***bona fide*** on a subject matter in which he had a duty to communicate.

Truly, it is trite law that a statement made about a person may be false and defamatory of him yet the person may not be able to maintain an action of defamation on it if such a statement is made on an occasion of qualified privilege.

In such a case, the law does not presume the existence of malice in the making of such a statement. A privilege occasion arises if the communication is of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist the occasion is a privilege one.

See, *Alhaji K.A. Giwa v. S.A. Ajayi & 3 Ors* (1993) 5 NWLR (Pt. 294) 423 at 425. In the instant case however, the appellant as defendant called DW1, Clement Olusola Agbede, the then Chief Registrar of the High Court of Justice, Ondo State. The witness not only confirmed, that a copy of Exhibit 'D' was given to him but also at cross-examination that **"I have no direct authority to discipline magistrates".** Unfortunately, I must say this statement by DW1 was in no way modified and or amended either in re-examination or in fact throughout the proceedings in the court below.

The implication of the totality of the evidence of DW1 either in the court below or in this Honourable court is that though the parties seem to agree that the

communication of Exhibit 'D' to the Hon. Chief Judge of Ondo State may well be privileged. However, that the publication of the same Exhibit 'D' to the Chief Registrar separately from the Hon. Chief Judge would not qualify for the defence of qualified privilege. This is because, **".....no privilege will attach to any such complaint or information, if addressed to a person, or body having no jurisdiction, or control over the person whose conduct is impugned or any power or duty to grant redress for or inquire into the abuse complained of".**

See: Gatley on Libel and Slander, 7th Edition Para. 492.

And as was said by Lord Loreburn in *Adam v. Ward* (1917) A.C 309 at 321

> **"A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so, or when there is no occasion for his publishing it to the persons to whom he in fact published it"**

The attempt by the appellant in this case to argue that Exhibit D, the letter submitted to the Hon. Chief Judge and Exhibit A, the copy of Exhibit D delivered to the Chief Registrar are one and the same, to my mind is not tenable. This is first because defamation generally means the communication of defamatory words to someone other than the person defamed.

Publication on the other hand is the act of making the defamatory statement known to any person or persons other than the plaintiff himself. It is not necessary that there should be any publication in the popular sense of making the statement public. A private and confidential communication to a single individual is sufficient. And, a letter sent to a single individual is sufficient.

See: *R.F. v. Heuston*. Salmond on the Law of Torts 17th Edition (1977) page 154, Rollins M. Perkins and Ronald N. Boyce Criminal Law 3rd Edition (1982) page 489 quoted in Black's Law Dictionary 8th Edition Page 1265.

In all the circumstances of the instant case, the learned trial judge was right to have disallowed the appellant's defences of justification and qualified privilege. Issues 2 and 3 are resolved against the appellant.

On issue 4, appellant submitted that the trial judge did not properly and judicially exercise his discretion in awarding nominal damages of ₦100,000.00 in favour of the respondent by basing his decision on a point or reason without affording opportunity to the counsel to address thereon when the issue of nominal damages was never a claim before the court.

Appellant noted that the claim and reliefs of the respondent as contained on pages 3 and 14 of the records is for the sum of ₦10,000.000.00 (Ten Million Naira)

aggravated damages as against the sum of ₦100,000.00 nominal damages awarded by the trial court. The law, he said is that the court should limit itself to the issues raised by the parties and that any relief or prayer not specifically asked for cannot be granted by the court since it lacks the power to grant such.

He referred on the above point to the cases of *UNTH MB & 1 Ors v. Hope Chinyelu Nnoli* (1994) 10 SCNJ 71 91, 92. *Henry O. Awoniyi & 1 Ors v. RTROR* (2002) 6 SCNJ 141 at 155.

He submitted that the principal claim having not been granted by the court, it cannot grant any incidental relief which was never sought by the respondent. An incidental or consequential relief or order cannot arise from a claim that was not granted. That the learned trial judge ought to have allowed counsel to address him on the issue as to whether libel is actionable *per se* or not before basing his judgment on the said principle. He opined that the issue was raised <u>*suo motu*</u> by the trial judge and therefore required addresses by counsel.

He referred to the cases of *Augustine Udogu & Ors v. Augustine Egwuatu* (1994) 3 NWLR (Pt. 330) 120 at 127. *University of Calabar v. Dr Okon J Essien* (1996) 12 SCNJ 304 at 326.

Appellant submitted further that the learned trial judge by awarding nominal damages in favour of the respondent has imported equitable considerations in granting same which by law he has no power to do. The consideration for the award of the said sum as nominal damages as contained on page 130 of the records is not as a result of any injury caused to the person of the respondent in the alleged libel. He concluded this portion by referring to the case of *Prince Oyesunle Alabi Ogundare & Anor v. Shittu Ladokun Ogunlowo & 3 Ors.* (1997) 50 LRCN 1420 at 1430 to say that the function of a judge is ***'Jus dicere'*** and not ***'Jus dare'***.

Learned counsel for the respondent reacted to issue 4 by saying that two reasons are discernible from the appellant's attack on the award of nominal damages. The first according to him is that the award was a judicial discretion not properly and judicially exercised and, the second is that nominal damages not having been specifically claimed should not have been awarded by the trial court.

On the first, learned counsel for the respondent submitted that the applicable law, is that, an appellate court will not interfere with the exercise of discretion by a lower court unless it can be shown that the lower court acted under a mistake of law or in disregard of principle or under a misapprehension of the facts, or that discretion was wrongly exercised in that due weight was not given to relevant consideration, or that it is capricious, or based on extraneous factors, or did not follow accepted principles.

He referred to the cases of *Offoboche v. Ogoia Local Govt.* (2001) 7 SC (Pt.1) 107 at 121, *Odogwu v. Odogwu* (1992) 2 NWLR (Pt. 225) 539 at 558, *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143, *Vincent Standard Trading Co. Ltd. v. Xtodeus Trading Co. Ltd* (1993) 5 NWLR (Pt. 296) 675 at pages 693 - 694.

He submitted that none of the factors mentioned above was cited by the appellant as vitiating the exercise of discretion by the trial court. That in exercising his discretion to award damages, the learned trial judge specifically referred to the following factors as his bases for his action, the defendant's conduct before and after the Institution of the action, the defendant's conduct in the court during the trial, the nature of the libel, the mode and extent of the publication, the essence of a refraction or apology. That the learned trial judge also adverted to the legal principle that damages are awarded to a plaintiff in defamation to exonerate him and to make for the injury he had suffered to his person or character as a result of the libel.

On the second reason for the appellant's attack on the award of nominal damages mentioned above, learned counsel for the respondent submitted that nominal damages' is not a specie of damages different from general damages awardable in defamation cases in the discretion of the court. The appellant's contention that nominal damages must be specially pleaded before it can be granted is a misconception.

He submitted that in defamation cases, actionable *per se* once liability is founded, damage is presumed and does not have to be pleaded or proved. It is left at large to be quantified by the trial judge.

He referred to *Gatley on Libel and Slander* (Sweet & Maxwell) chapter 22 Para. 998, Mcgregor On Damages (Sweet & Maxwell) 14th Ed. Chap. 10 Paras. 302, 304, 305 and 306.

Learned counsel further submitted that appellant's contention pairing aggravated Damages' together with 'nominal damages' as 'principal claim' and 'incidental relief' respectively is unfounded and unknown to law. That, the respondent's claim of ₦10,000,000.00. in aggravated damages having been disallowed by the lower court, the learned trial judge, finding that liability for libel has been established is justified to award nominal damages in the circumstances.

In deciding issue 4 one must start by appreciating the thin perhaps tedious distinction that the appellant was trying to make in between the appellations of 'nominal damages' and the award of 'general damages' in the instant case.

One must however start with the trite proposition that libel is actionable *per se* in other words damages could be awarded on the establishment of the libel without proof of damages based on the discretion of the learned trial judge.

I would have loved to agree with the appellant that the appellation of an award of 'general damages' rather than 'nominal damages' would have been more appropriate or would have at least shown clarity in the circumstances of the case.

But at the same time, I do not consider it an error to use the terms nominal damages in interchange for general damages. This is because there is actually nothing in the dictionary of law to suggest that the terms 'nominal damages' or 'general damages' could not be used interchangeably except for the fact that nominal damages may indeed express the idea of "a trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. The practical significance of a judgment for nominal damages is that the plaintiff thereby establishes a legal right."

It seems to me that the more important thing in the use of the expression 'nominal damages' or 'general damages' in a claim that is actionable *per se* as in the instant case is that either of the awards is subject to the discretion of the trial judge and not subject of proof.

The 8th edition of the Black's Law Dictionary at page 417 talks of 'general Damages' as:

> **"Damages that the law presumes follow from the type of wrong complained of;.....compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. General damages do not need to be specifically claimed....."**

At page 418, the same dictionary talks of 'nominal damages' in various forms as follows:

> **"Nominal damages. 1. A trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. 2. A small amount fixed as damages for breach of contract without regard to the amount of harm. - Also termed contemptuous damages.**
>
> **"Nominal damages are damages awarded for the infraction of a legal right where the extent of the loss is not shown, or where the right is one of rights of bodily immunity or rights to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated"**
>
> **Charles T. Mccormick Handbook on the Law of Damages 20 at 85 (1935)**
>
> **"Nominal damages are awarded if the plaintiff establishes a breach**

of contract or a tort of the kind that is said to be 'actionable per se' but fails to establish a loss caused by the wrong. In the case of tort not actionable per se, for example, negligence, if the plaintiff fails to establish a loss the action will be dismissed. The practical significance of a judgment for nominal damages is that the plaintiff thereby establishes a legal right....."

From the above literature, it would seem that in claims that are actionable *per se* as in the instant case 'nominal damages' could be used as a specie of 'general damages' to denote the award of a trifling or token sum for the plaintiff in an action. This to my mind is precisely what the learned trial judge did in the instant case. The learned trial judge recognized that the award of damages to a plaintiff in a libel matter is not to be seen as a gold mine. That damages are awarded to a plaintiff to exonerate him and to make for the injury he had suffered to his person or character as a result of the libel. He thus, disallowed the respondent's claim of aggravated damages and instead awarded nominal damages of ₦100,000.00 (One Hundred Thousand Naira only).

In the, circumstance, I do not agree with the appellant that the award of nominal damages to the respondent was improper and unknown to law.

Issue 4 is resolved against the appellant.

On issue 5, the appellant complained of failure of the learned trial judge to properly evaluate evidence. He referred to the statement of the learned trial judge first at page 128 that:

"I am not convinced that the defendant did perceive or witness the plaintiff being given or received any money from any person as bribe on 21/10/99"

Second at page 129 that:

"I have reviewed the evidence of the 6 witnesses who gave evidence for the defendant in this case"

Appellant submitted that these statements show glaringly that the evaluation of evidence made or done by the trial judge in this case before arriving at his judgment was based on the evidence of the appellant's witnesses alone and therefore failed to put the totality of the testimony adduced by both parties on each side of the imaginary scale of justice and see which one weighs higher or more before arriving at his judgment in the suit.

He said the evidence adduced by PW1, PW2, PW3, PW4, PW5, PW6, PW7 and DW1, DW2, DW3, DW4, DW5 and DW6 as contained on pages 32 - 60 of the

records were not evaluated by him before arriving at his judgment.

Appellant referred to the cases of *Otunba Adeniran Ogunsanya & 1 Ors. v. Chief S.A. Dada & 3 Ors.* (1990) 6 NWLR (Pt. 156) 347 at 381 - 382 and *UBA Ltd & 1 Ors. v. Rose Francis Louis* (1994) 4 NWLR (Pt. 336) 110 at 128 and submitted that the findings of the trial judge in this case are perverse and do not bear out the fact that the court really heard and saw the witnesses in court.

He further submitted that the learned trial judge was wrong to have treated the evidence of DW1, DW2, DW3, DW4, DW5 and DW6 as hearsay evidence. He argued that where the finding or non-finding of facts is questioned as in the instant case, the court of Appeal in its primary role in considering a judgment on appeal in a civil case will seek to know the following:

(i) The evidence before the trial court.

(ii) Whether it accepted or rejected any evidence upon the correct perception.

(iii) Whether it correctly approached the value of it.

(iv) Whether it used the imaginary scale of justice to weigh the evidence on either side.

(v) Whether it appreciated upon the preponderance of evidence on which side the scale weighed having regard to the burden of proof.

He referred to the cases of *Falcon Bentil (Nig.) Ltd & 1 Ors. v. Lawrence E. Manulu* (2002) FWLR (Pt. 95) 392 at 403, 404, *Agbonifo v. Aiwereoba* (1988) 1 NWLR (Pt. 70) 325 at 339, *MISR (Nig.) Ltd v. Ibrahim* (1975) 5 SC 55 at 62, *Egonu v. Egon*u (1978) 11 - 12 SC 111 at 129, *Daniel Awudu & 1 Ors. v. Atta Ngodere* (2004) AFWLR (Pt. 225) 10 at 28 - 29, *J.O. Sekoni & 40 Ors v. Olaniyi Ogunmola & 5 Ors* (2004) (Pt. 234) AFWLR 1956 at 1968.

Learned counsel for the respondent in response adopted his earlier submissions on issue 1 where he **"recounted the labours of the learned trial judge" review and evaluation of all the defense evidence".**

He submitted in addition that it is not in dispute that this is a case of defamation (libel) to which the appellant, as defendant, has pleaded justification amongst other defences and, in consequence, bear the burden of proving the truth of the defamatory publication.

The golden rule, he said has been that, the evaluation of evidence and the ascription

of probative value to it is the primary function of the trial court, which saw, heard and assessed the witnesses. And, that unless its findings of fact are perverse, the Court of Appeal would not interfere, or substitute its own views for those of the trial court:

He referred to the cases of *Isaac Gaji & Ors v. Pave* (2003) 5 SCNJ 20 at 32, *Sanusi v. Adebiyi* (1997) 11 NWLR (Pt 530) 565 at 583, *Okino v. Obanebira* (1990) 13 NWLR (Pt. 636) 535 at 558.

In deciding issue 5, it must be recalled that this is a case of libel in which the content of the libelous publication was admitted by the appellant. He however pleaded justification and qualified privilege amongst other common defences to libel. The learned trial judge in evaluating the evidence of the parties was therefore somewhat limited to the proof of any of the defenses raised by the appellant. This, he could not find, either from the evidence of the plaintiff respondent witnesses nor from the witnesses of the defendant appellant.

The submission of the appellant that the learned trial judge wrongly treated the evidence of DW1, DW2, DW3, DW4, DW5 and DW6 as hearsay is not borne out by the records. Indeed in relation to the all important question of whether the respondent actually received a bribe of ₦3,000.00, there was no direct evidence as no witness was able to say he witnessed the receipt of the said sum by the respondent.

I do not have any hesitation to conclude that the learned trial judge properly evaluated the evidence in the case and his conclusions were not perverse.

Issue 5 is resolved against the appellant.

Having resolved the five (5) remaining issues in this appeal against the appellant; the appeal lacks merit and it is accordingly dismissed. I make no other as to costs.

The Cross-Appeal

Learned counsel for the respondent cross-appellant filed a Notice of Cross-Appeal in this Honourable Court on 2/3/2010.

Based on the solitary ground of appeal, the respondent/cross-appellant formulated a sole issue thus:

> **"Whether the finding of fact made by the learned trial judge, after His Lordship's review and evaluation of the evidence of DW3, DW4, DW5 and DW6, being inconsistent with those evidence is perverse and ought to be set aside"**

Elaborating on the sole issue, learned counsel for the cross appellant referred to the definition of 'a finding of fact' as contained in Black's Law Dictionary 6th Edition at page 632 as **"a conclusion by way of reasonable inference from the evidence".**

He submitted that the statement in the sentence complained of to wit. "The evidence that their counsel gave the money to the plaintiff is not in doubt", as a finding of fact, is perverse as it is not supported by the copious evidence adduced before the learned trial judge and now on record.

He referred to the cases of *Gabriel Iwuoha v. Nigerian Postal Services Ltd* (2003) 4 S.C.N.J. 258 at 284 and *Overseas Construction Co. Ltd v. Creek Enterprises (Nig.) Ltd* (1985) 3 NWLR (Pt. 13) 407. That a perverse finding is -

> **".....a finding of fact which is merely speculative and not based on any evidence before the court. A perverse finding is an unreasonable and unacceptable finding because it is wrong and completely outside the evidence before the trial judge".**

He submitted that the particular finding of fact in issue in this cross-appeal is perverse since same is neither borne out nor supported by the evidence of the Defence witnesses on the record as evaluated by the learned trial judge. That none of the Defence witnesses adduced credible and direct evidence of the plaintiff's receipt of the bribe alleged as to warrant the finding of fact under reference. Further, that the perversity of the finding of fact under reference in this cross-appeal becomes obvious when considered in the context of the overall conclusions of the learned trial judge in his evaluation of the Defence evidence.

Learned counsel referred to pages 125 - 126 of the records where the learned trial judge remarked *inter alia* that **"the evidence adduced by DW4, DW5 and DW6 were based on hearsay....."**

And that immediately after, made the finding of fact now complained of in the cross-appeal. But, that thereafter, His Lordship continued his inferential conclusions at pages 125 - 126 of the record as follows:

> **"I am not satisfied that the evidence adduced by DW4, DW5 and DW6 have any evidential value as to whether the plaintiff collected a sum of ₦3,000.00 bribe which is the gist of this action. I therefore refuse to rely on the evidence that the plaintiff collected the sum of ₦3,000.00 bribe in *C.O.P. v. Akereja & Ors.* on 21/10/99"**

He submitted that in the context of the foregoing meticulous conclusions of the learned trial Judge which was based on the record, the solitary perverse finding ascribed to His Lordship at page 125 lines 27 - 30 of the Record **(particularly the**

sentence: "The evidence that their counsel gave the money to the plaintiff is not in doubt") lacks substance and evidential foundation. The foregoing interferential conclusions of the learned trial judge knock bottom out of the finding of fact complained of in this cross-appeal and same ought not be allowed to stand.

To further accentuate the perversity of the finding of fact under reference in this cross-appeal, counsel referred to learned trial Judge's evaluation of the evidence of DW3, the witness referred to as ' their counsel' in the finding, at page 123, lines 10 - 14 of the Record as follow:

> **"I have reviewed the evidence adduced by DW3, above, it is full of hearsay and assumption. He did not give direct evidence that he saw the plaintiff receiving the bribe alleged from either Kunle Gbadamosi or someone else"**

He submitted that it is crystal clear that the finding of fact complained of is an inexplicable deviation from the consistent flow and trend of the trial court's review and evaluation of the evidence of the Defence witnesses, which evaluation was overwhelmingly in favour of the cross-appellant/plaintiff particularly on the crucial issue the proof or otherwise of the bribe alleged.

It thus stands to reason, said counsel that the finding made in the sentence: **"The evidence that their counsel gave the money to the plaintiff is not in doubt"** does not flow from the copious evidence on record as a finding of fact on the issue of the proof of the bribe alleged. Hence, the said finding is perverse. Alternatively, counsel submitted that the inclusion of the word "not" in the above quoted sentence is a Printer's mischief. In either case, said counsel, this Honourable court is urged to invoke its section 15 power and set aside the said finding of fact.

In his cross-respondent's brief of argument, the appellant cross-respondent raised the issue that the sole ground of cross-appeal is at best a ground of mixed law and fact and not a ground of law as claimed by the cross-appellant.

Following, from the above, that the cross-appellant did not seek leave of court before filing a cross-appeal based on mixed law and facts.

In the alternative, the cross-respondent submitted that the finding of fact in issue in the cross-appeal by the trial judge was not perverse but borne out and adequately supported by the cross-respondent's witness as contained on pages 47 - 60 of the records and was properly evaluated by the lower court.

He referred to the cases of *ACME Builders Ltd v. Kaduna State Water Board & 1 Ors.* (1992) 2 SCNJ 25 at 51, *Kaduna Textiles Ltd v. Alhaji Isa Umar* (1994) 1 NWLR (Pt. 319) 143 at 161 and urged that the cross-appeal be either struck out or

dismissed.

The first point raised by the cross-respondent is in the nature of a preliminary objection to the cross-appeal. However, it was not properly so raised. The provision of Order 10 Rules (1) and (3) of the Court of Appeal Rules 2011 is quite clear on the point. It reads.

> **"10 (1) A respondent intending to rely upon a preliminary objection to the hearing of the appeal, shall give the appellant three clear days notice thereof before the hearing setting out the grounds of objection, and shall file such notice together with twenty copies thereof with the Registrar within the same time".**
>
> **(3) If the respondent fails to comply with this Rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the costs of the respondent or may make such other order as it thinks fit".**

In the instant case, the cross-respondent has not complied with the provision of order 10 Rules 1 and 3 of the Court of Appeal Rules 2011 in raising an objection as to the cross-appellant's ground of appeal only in the cross-respondent's brief without filing a Notice of Preliminary Objection. The arguments in paragraph 5.01 at pages 1 and 2 of the cross-respondent's brief are liable to be discountenanced and are accordingly discountenanced.

It is obvious that the finding of fact complained of in the cross-appeal does not in fact flow from the copious evidence on record as a finding of fact on the issue of the proof of the bribe alleged. I do agree with the learned counsel for the cross-appellant that the finding complained of is perverse or perhaps in the minimum a printer's mischief. Either way, it is perfectly in order for this Honourable court to intervene and set aside that finding of fact. This is because, though an appellate court will very rarely, if at all interfere with the findings of facts made by trial court. However, the findings are not sacrosanct. Where the conclusions made from the findings are not supported by the evidence relied upon, or the proper conclusions or inferences are not drawn from the evidence, or where the trial court has failed to evaluate the evidence, the appellate court will in the interest of justice, be free to do so.

The appellate court is entitled to evaluate the evidence and come to the right decision supported by the evidence.

See: *Anthony Ibhafidon v. Sunday Igbinosun* (2001) 4 S.C. (Pt. 1) 96 at 104. *Gabreiel Iwuoha v. Nigerian Postal Services Ltd* (2003) 4 SCNJ 258 at 284 - 285. *Daniel Bassil & Anor v. Chief Lasisi Fajebe & Anor* (2001) 4 S.C. (Pt. II) 119 at

125. *Chief Kalada Nteogwuile v. Chief Isreal Otuo* (2001) 6 S.C. 200 at 211.

In the instant cases, the finding of fact by the learned trial judge at page 125 lines 27 - 30 of the Record (particularly the sentence:

"The evidence that their counsel gave the money to the plaintiff is not in doubt" is perverse or it is a printer's mischief. It cannot stand in view of the other evidence on record.

Consequently, the only issue in the cross-appeal is resolved in favour of the cross-appellant. The cross-appeal is meritorious it is accordingly allowed.

The finding of fact at page 125 lines 27 - 30 of the Record (particularly the sentence: "The evidence that their counsel gave the money to the plaintiff is not in doubt" is accordingly set aside.

I make no order as to costs.

DENTON-WEST, JCA: I have read in advance the judgment just delivered by my learned brother, MOJEED ADEKUNLE OWOADE, JCA, and I agree with the conclusions reached therein.

However, I wish to further adumbrate that for a plea of justification to avail a defendant in an action for defamation, all the defamatory words published must be established to be true. See: *Iloabachie v. Iloabachie* (2005) 5 SC (Pt. 11) 149.

In the instant case, appellant as defendant in the trial court is expected to prove that the bribe of ₦3,000.00 was in truth received by the plaintiff/respondent; by cogent and credible evidence as opposed to hearsay evidence.

Black's Law Dictionary 8th Edition at page 882 defines "justification" thus:

1. "A lawful or sufficient reason for one's acts or omissions; any fact that prevents an act from being wrongful."

2. "A showing in court of a sufficient reason why a defendant did what the prosecution charges the defendant to answer for"

The appellant having failed to establish the truth of the defamatory words published against the respondent, cannot enjoy the protection of the defence of justification.

For this and the more detailed reason ably adduced in the lead judgment, I also dismiss the appeal as lacking in merit.

I make no order as to cost.

JOMBO-OFO, JCA: I have read before now the lead judgment delivered by my brother OWOADE, JCA and I agree with him entirely that Grounds 2, 3, 7 and 9 of the Notice and Grounds of Appeal as well as issue 4 based on an incompetent ground 7 are to be struck out. The position of the law remains that where an issue is formulated for the determination of an appeal but the issue cannot be related to any of the grounds of appeal filed, the court will strike it out and any argument presented in its support will be discountenanced. See *Oniah v. Onyia* (1989) 1 NWLR (Pt. 99) 514; *Ugo v. Obiekwe* (1989) 1 NWLR (Pt. 99) 566; *Aja v. Okoro* (1991) 7 NWLR (Pt. 203) 260. On the other part any ground upon which no issue is distilled, the said ground is regarded as abandoned and ought to be struck out. See *Ngilari v. Mothercat Ltd*. (1999) 13 NWLR (Pt. 636) 626; *Western Steel Works v. Iron & Steel Workers Union* (No. 2)(1987) 1 NWLR (Pt.49) 284, 304; *Iyaji v. Eyigebe* (1987) 3 NWLR (Pt. 61) 523.

It is obvious that fresh issues were imported into Ground 7 of the appellant's grounds of appeal without the leave of court and this is not proper in law. To raise a fresh issue on appeal which issue did not arise from at least one of the grounds of appeal will definitely necessitate seeking and obtaining the leave of court for same to be argued on appeal.

From the respondent's Notice of Preliminary Objection which I too uphold, it seems to me and I so hold that Grounds 2, 3, 7 and 9 of the Notice and Grounds of Appeal together with issue 4 which is based on an incompetent ground 7 ought to be struck out and they are so struck out.

My learned brother adequately dealt with the issues pertaining to the main appeal as well as the cross-appeal and I could not agree more with the conclusions reached therein. The appeal indeed lacks merit and is accordingly dismissed. The cross-appeal on the other part succeeds and is accordingly allowed.

I make no order as to costs.

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History:

HIGH COURT
High Court of Ondo State
Adejumo, J

COURT OF APPEAL (Akure Division)
Sotonye Denton-West, JCA *(Presided)*
Mojeed Adekunle Owoade, JCA (*Read the lead Judgment)*

Cordelia Ifeoma Jombo-Ofo, JCA

Counsel:
Chief O. J. Jejelola appeared in person for the appellant/respondent.
T. A. Oyelola with Ife Faloye for the respondent/cross-appellant.