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SUPREME COURT OF NIGERIA

SC. 720/2017
FRIDAY 15TH JANUARY, 2021

(RHODES-VIVOUR; KEKERE-EKUN; NWEZE; AUGIE; ABBA-AJI, JJ.SC)

APPEAL – Ground of appeal – a ground of appeal must find its anchor in the ratio decidendi of the decision appealed against.

JUDGMENT – Delivering of judgment – obiter dictum and ratio decidendi – differentiated.

ACTION – Institution of an action – locus standi – Locus standi is the legal capacity to institute an action in a court of law, and it is a threshold issue that affects the jurisdiction of the court to look into the complaint.

COMPANY LAW – Memorandum and Articles of Association – when registered, the Memorandum and Articles of Association shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves – Section 41 (now section 46) CAMA.

COMPANY LAW – Action for wrong done on a company – the company or association is the proper plaintiff in all actions in respect of injuries done to it – exception thereof.

COMPANY LAW – Protection of minority – the court on the application of any member, may by injunction or declaration, restrain the company from any act or omission affecting the applicant's individual rights as a member – Section 300 (c) (now section 343 (c)) CAMA.

COMPANY LAW – Notice of meetings – failure to give notice of meetings to shareholders is a breach of the constitutional provision of fair hearing.

ACTION – Institution of an action – locus standi – where a party lack lacks locus standi his case must be struck out as being incompetent.

Facts:

The 1st Appellant is a limited liability company with a share capital of 2 million

ordinary shares. While the 1st - 4th respondents owned 95% of the share capital, the 2nd Appellant owned the balance of 5%. The 1st, 2nd, 4th Respondents and the 2nd Appellant were the original directors of the company. By an ordinary resolution passed on 1/4/2002, the share capital was increased to 10 million. It was the allegation that on the 9th and 10th March 2006, the company held board meetings whereby the 1st Respondent was removed as chairman and his official residence and vehicle withdrawn and no due process was followed to remove him. In another board meeting that held on 4/4/2006, it was alleged that despite the absence of the 1st - 4th Respondents because they were not given notice of meeting and hence there was no quorum, some crucial resolutions were taken. Furthermore, in a meeting held on 6/10/2006, the names of the 1st - 4th Respondents were removed as signatories to the company's account, their houses were put up for sale, they were suspended and their salaries were stopped. Thus, the 1st - 4th Respondents were deprived of their rights as shareholders, directors and management staff of the company without notice to them and opportunity of being heard.

They consequently sued at the Federal High Court, Abuja, seeking declaratory and injunctive reliefs in order to restore them to their original positions in the company and their rights and entitlements. The suit was challenged by the appellants after being served, that the trial court did not have the jurisdiction to entertain the suit. The trial court granted the application of the appellants.

Aggrieved, the 1st – 4th Respondents appealed the decision of the trial court, to the Court of Appeal (lower court), and the trial court's decision was set aside.

Also aggrieved by the decision of the lower court, the appellants appealed to the Supreme Court.

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

[1] ***Appeal – Ground of appeal – a ground of appeal must find its anchor in the ratio decidendi of the decision appealed against.***

…A ground of appeal must find its anchor in the ratio decidendi of the decision appealed against. It is also settled law that an issue for determination can only be distilled from a competent ground or competent grounds of appeal. As observed earlier, in a situation where an issue for determination is derived from both competent and incompetent grounds, the issue is liable to be struck out for incompetence. See *Jev v. Iyortom* (2014) 14 NWLR (Pt. 575). **(P. 12 lines 24 - 30)**

[2] ***Judgment – Delivering of judgment – obiter dictum and ratio decidendi – differentiated.***

An obiter dictum is an expression of opinion made by a Judge in passing

in the course of delivering judgment, but which does not decide the live issues in the matter. The ratio decidendi on the other hand, is the principle of law upon which a particular case is decided. It has the binding force of precedent. All lower courts are bound by the ratio decidendi of the decision of a higher court. The ratio decidendi has also been defined as "the reason for deciding." See: *Amobi v. Nzegwu* (2013) 12 SC (Pt. 1) 142; *UTC (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt. 103) 244; *Oshodi v. Eyifunmi* (2000) 7 SC (Pt. II) 145; *Babarinde v. The State* (2014) 3 NWLR (Pt. 1395) 568; *N.D.P. v. INEC* (2013) 6 NWLR (Pt. 1350). **(P. 12 lines 32 - 43)**

[3] ***Action – Institution of an action – locus standi – Locus standi is the legal capacity to institute an action in a court of law, and it is a threshold issue that affects the jurisdiction of the court to look into the complaint.***

Locus standi connotes the legal capacity to institute an action in a court of law. It is a threshold issue that affects the jurisdiction of the court to look into the complaint. Where the claimant lacks the legal capacity to institute the action, the court, in turn, will lack the capacity to adjudicate… In order to have locus standi, the claimant must have sufficient interest in the suit. For instance, it must be evident that the claimant would suffer some injury or hardship or would gain some personal benefit from the litigation. See *Inakoju v. Adeleke* (2007) 4 NWLR (Pt. 427 @ 601 - 602 H - B); *B.B. Apugo & Sons Ltd. v. O.H.M.B.* (2016) 13 NWLR (Pt. 1529) 206; *Daniel v. INEC* (2015) 9 NWLR (Pt. 1463) 113; *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669; *Opobiyi & Anor. v. Muniru* (2011) 18 NWLR (Pt. 1278) 387 @ 403 D - F; *Nyesom v. Peterside* (2016) 1 NWLR (Pt. 1492) 71. **(P. 17 lines 41 - 45; 18 lines 1 - 8)**

[4] ***Company Law – Memorandum and Articles of Association – when registered, the Memorandum and Articles of Association shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves – Section 41 (now section 46) CAMA.***

It is necessary at this stage to consider section 41 of CAMA, which provides for the effect of the Memorandum and Articles of Association of a company as follows:

"41(1) Subject to the provisions of this Act, the Memorandum and Articles of Association, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered

from time to time in so far as they relate to the company, members or officers as such." **(P. 21 lines 6 - 15)**

[5] ***Company Law – Action for wrong done on a company – the company or association is the proper plaintiff in all actions in respect of injuries done to it – exception thereof.***

The rule in Foss v. Harbottle, as I understand it, comes to no more than this. Firstly, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and or all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the company or association is in favour of what has been done, then cadit quaestio. Thus, the company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be ratified by a simple majority of its members. Hence the rule does not apply where the act complained of was ultra vires the company or illegal or constituted a fraud on the minority and the wrongdoers are in the majority and in control of the company ... And finally, where a resolution has been passed by a simple majority. See *Yalaju-Amaye v. A.R.E.C. Ltd & Ors* (1990) 4 NWLR (Pt. 145) 422 @ 446; *Edwards v. Halliwell* (1950) 2 All ER 1064 @ 1066. **(P. 21 lines 27 - 45)**

[6] ***Company Law – Protection of minority – the court on the application of any member, may by injunction or declaration, restrain the company from any act or omission affecting the applicant's individual rights as a member – Section 300 (c) (now section 343 (c)) CAMA.***

Section 300 (C) of CAMA provides:

> "Without prejudice to the rights of members under sections 303 to 308 and sections 310 to 312 of this Act or any other provisions of this Act, the court on the application of any member, may by injunction or declaration, restrain the company from the following:
>
> (c) any act or omission affecting the applicant's individual rights as a member."

The provisions are clear and unambiguous. Learned counsel for the appellants misconstrued the provision when he argued that it is only applicable to restrain a company from taking steps which are illegal or

ultra vires and will not apply to completed acts. With respect to learned counsel, the provisions relate not only to injunctive reliefs but also to declaratory reliefs relating to any act or omission affecting the applicant's individual rights. **(P. 22 lines 37 - 45; P. 23 lines 1 - 6)**

[7] ***Company Law – Notice of meetings – failure to give notice of meetings to shareholders is a breach of the constitutional provision of fair hearing.***

Learned counsel for the appellants has also argued that the fair hearing provisions under section 36(1) of the 1999 Constitution, as amended, do not apply to a company's proceedings. The short answer is that in so far as the company's Memorandum and Articles of Association make provision for the giving of notice for meetings to shareholders, it follows that those entitled to be given notice of such meetings are entitled to participate in and contribute at such meetings and to be part of whatever resolution might be reached thereat. See also sections 262(2) and 266(1) of CAMA. It is settled law that even the proceedings of a non-judicial or administrative body must be conducted in accordance with the principles of natural justice. See *Adeniyi v. Governing Council of Yabatech* (1993) 6 NWLR (Pt. 300) 426; *Denloye v. Medical & Dental Practitioner Disciplinary Committee* (1968) 1 All NWR 306. **(P. 23 lines 11 - 22)**

[8] ***Action – Institution of an action – locus standi – where a party lack lacks locus standi his case must be struck out as being incompetent.***

ABBA-AJI, JSC:

'Locus standi' (or standing) denotes the legal capacity to institute proceedings in a court of law. Standing to sue is not dependent on the success or merits of a case; it is a condition precedent to a determination on the merits. It follows, therefore, that if the plaintiff has no locus standi or standing to sue, it is not necessary to consider whether there is a genuine case on the merits; his case must be struck out as being incompetent. See *Josiah Kayode Owodunni v. Registered Trustees of Celestial Church of Christ & Ors.* (2000) 10 NWLR (Pt. 675) 315. **(P. 35 lines 16 - 23)**

KEKERE-EKUN, JSC (Delivering the lead Judgment): This appeal is against the judgment of the Court of Appeal, Abuja Division delivered on 7th July 2017, wherein the court allowed the appeal filed by the present 1st - 4th respondents and set aside the decision of the trial Federal High Court, Abuja Division.

The facts are relatively simple and straightforward. The 1st Appellant, CITEC International Estates Ltd. was duly incorporated on 16th February 2001 as a limited

liability company under the provisions of the Companies and Allied Matters Act (CAMA), with a share capital of 2 million ordinary shares. The 1st - 4th respondents owned 95% of the share capital while the 2nd Appellant, Bello Saka Oludare, owned the balance of 5%. The 1st, 2nd and 4th Respondents as well as the 2nd Appellant were the original directors of the company. By an ordinary resolution passed on 1st April 2002, the share capital of the company was increased to 10 million.

It was alleged that the company held board meetings on the 9th and 10th of March 2006 whereby the 1st respondent was removed as chairman and his official residence and vehicle withdrawn. It was contended that due process was not followed in his removal. Another board meeting took place on 4th April 2006. It was alleged that notwithstanding the fact that the 1st – 4th respondents were not given notice of the meeting and the members present were unable to form a quorum, the following decision were taken by the 2nd appellant:

(i) The allotment of the 8 million unallotted shares to members and non-members of the 1st appellant without regard to the 1st - 4th respondents' right of first refusal;

(ii) A call for payment on shares allotted to the 1st - 4th respondents to be paid within 28 days; and

(iii) A resolution to the effect that the 2nd appellant (Bello Saka Oludare) and the 5th respondent (his wife) had paid ₦2 million out of their called up capital on the basis that the 2nd appellant incurred ₦2 million as pre-incorporation expenses, whereas it was contended that it was the 1st respondent who bore all the pre-incorporation expenses.

At another board meeting held on 6th October 2006, the names of the 1st - 4th respondents were removed as signatories to the company's accounts. The houses allocated to the 1st and 4th respondents were put up for sale. The 1st - 4th respondents were suspended, and their salaries were stopped. It was alleged that the 1st - 4th respondents, have by all the actions complained of been deprived of their rights as shareholders, directors and management staff of the company without notice to them and without being given the opportunity of being heard.

As a result, they instituted an action before the Federal High Court, Abuja, seeking the declaratory and injunctive reliefs reproduced below, aimed at restoring them to their original positions within the company and restoring their rights and entitlements.

The plaintiffs' claim against the defendants is for:

i. A declaration that once the 1st defendant has fully allotted its

authorised shares, the shareholders to whom the same were allotted can only transfer the same to another person through a proper instrument of transfer and not by a resolution of the company.

ii. *A declaration that the plaintiffs and the 2nd defendant are the only members of the 1st defendant.*

iii. *A declaration that the plaintiffs own 95% of the total shares of the 1st defendant.*

iv. *A declaration that the 3rd, 4th, 5th, 6th and 7th defendants are not shareholders of the 1st defendant.*

v. *A declaration that the 4th, 5th, 6th and 7th defendants have no locus to vote on resolutions allotting shares of the 1st defendant to themselves or to any other person whosoever.*

vi. *A declaration that the 2nd defendant cannot single-handedly pass resolution to allot the shares of the 1st defendant.*

vii. *A declaration that the allotment of the 8,000,000 unallotted ordinary shares of the 1st defendant by the 2nd to the 7th defendant on the 4th of April 2006 is wrongful, illegal, unlawful and accordingly null and void.*

viii. *A declaration that neither the provisions of CAMA nor the Articles of Association of the 1st defendant empower the Board of Directors of the 1st defendant to remove the 1st plaintiff.*

ix. *A declaration that the suspension of the 4th plaintiff who is a shareholder and a director is unknown to either CAMA or the Articles of Association of the 1st defendant.*

x. *A declaration that a minority shareholder cannot retrieve, withdraw, sell or alienate properties allocated to the majority shareholders of the 1st defendant in their official capacities and/or remove them from their positions.*

xi. *A declaration that the resolution changing the signatories to the accounts of the 1st defendant is wrongful, unlawful and void.*

xii. *An order reversing to the former positions in respect of signatories to the account of the 1st defendant before the resolution of 6th of October 2005.*

xiii. An order nullifying the resolution dated 24th day of April, 2001, wherein the shares of the plaintiffs were redistributed/re-allotted.

xiv. An order nullifying and/or avoiding all the decisions contained in the resolution dated 4th day of April, 2006, and likewise, all further resolutions passed from the 4/4/06 by the 1st to the 7th defendants and registered with the 8th defendant be reversed and vacated forthwith.

xv. An order nullifying and/or voiding the resolution dated the 10th day of March, 2006, wherein the 1st plaintiff was removed as the Chairman of the 1st defendant and reinstating him forthwith.

xvi. An order nullifying and/or voiding the decision contained in the letter of the 1st defendant dated 3rd of April, 2006, wherein the 4th plaintiff was suspended as Director of the 1st defendant and reinstating him forthwith.

xvii. An order mandating the 1st defendant to pay all outstanding salaries, allowances and emoluments due to the plaintiffs forthwith.

xviii. An order of perpetual injunction restraining the 1st to the 7th defendants, their agents, privies and representatives from selling and/or alienating the official quarters of the 1st and 4th plaintiffs and/or dealing with the properties of the 1st defendant allocated to the 1st and 4th plaintiffs in their official capacities.

xix. An order of mandatory injunction directing the 8th defendant to remove or cancel from the 1st defendant company's file held at the Corporate Affairs Commission in Abuja all documents reflecting the purported redistribution and re-allotment of the plaintiffs' shares by resolution dated 24th of April, 2001.

xx. An order of mandatory injunction directing the 8th defendant to remove or cancel from the 1st defendant company's file held at the Corporate Affairs Commission in Abuja all documents reflecting the purported allotment of the 1st defendant's unallotted 8,000,000 ordinary shares by resolution dated 4th of April 2006.

xxi. An order that a proper and regular meeting of the bona fide members of the 1st defendant be summoned within twenty-one days (21 days) of final judgment in this matter wherein all issues relating to the management and administration of the 1st defendant will be settled.

The appellants upon being served with the writ of summons filed a motion on notice challenging the jurisdiction of the court to entertain the suit. The grounds for the application were as follows:

1. The plaintiffs lack the locus standi to initiate, maintain and sustain the action as constituted.

2. The action is incompetent by reason of non-compliance with mandatory statutory provisions of the Companies and Allied Matters Act, Cap. C20, LFN, 2004, as well as the Companies Proceedings Rules S. I. of 1992.

3. The suit is a derivative one and no leave of court was sought or obtained from this honourable court before the action was commenced.

4. Mandatory conditions precedent necessary to be fulfilled before instituting the suit were not fulfilled or complied with.

5. The writ of summons and statement of claim are void as the statutorily mandatory procedure for commencing the action was not fulfilled.

6. The suit does not disclose any cause of action (or) a reasonable cause, and the suit as constituted is an abuse of the process of this honourable court.

7. All the reliefs sought in the statement of claim are derivative in nature for the benefit of the 1st defendant only.

The 1st - 4th respondents filed a counter affidavit to the motion, to which the appellants filed a reply. Written addresses were filed, exchanged and adopted in open court. In his judgment delivered on 1st December 2006, His Lordship A.I. Chikere, granted the application and held, inter alia:

a) The complaint in the suit relates to the affairs of the company allegedly being conducted in an illegal or oppressive manner. That under the Companies Proceedings Rules, 1992, the suit ought to have been commenced by way of petition, not by way of a writ of summons.

b) On the issue of locus standi - that part of the claim relates to the allotment of shares. He held that since the shares belong to the company, it is only the company that can be aggrieved by the improper exercise of power by the 1st appellant. His Lordship

held that a complaint could only be brought in the company's name therefore, the plaintiffs had no locus standi.

c) *That the suit is a derivative action for which leave ought to have been sought and obtained. That in the absence of leave, the suit was incompetent. It was accordingly dismissed.*

On appeal to the lower court, the decision of Chikere, I. was set aside. The court held that the plaintiffs/appellants had the locus standi to sue the defendants/respondents for the infringement of their legal rights. The court also rejected the finding that the suit was a derivative action requiring prior leave. The court held that the essence of the suit was to protect the plaintiffs' individual interests.

The respondents in that appeal are now the appellants before us. They were not surprisingly aggrieved by the judgment. By their notice of appeal filed on 2/8/2017, they raised six grounds of appeal. At the hearing of the appeal on 19/10/2020, A.M. Kayode Esq. adopted and relied on the appellants' brief filed on 9/11/18 and deemed filed on 4/2/18. Appellants' reply brief to 1st - 4th respondents' brief deemed filed on 19/10/20 and the appellants' reply brief to 6th respondent's brief also deemed filed on 19/10/20 in urging the court to allow the appeal. Kehinde Ogunwumiju, SAN adopted and relied on the 1st - 4th respondents' brief filed on 24/2/20, while O.O. Olowolafe Esq. adopted the 6th respondent's brief filed on 3/3/20 respectively, in urging the court to dismiss the appeal. Olayinka Adedeji Esq. for the 5th respondent, had nothing to urge, as he did not file any process on his client's behalf.

Also, at the hearing of the appeal, learned senior counsel for 1st - 4th respondents moved a motion filed on 24/2/20 challenging ground 6 of the notice of appeal. In support of the application, he filed a written address. A further affidavit was deposed to on 16/10/20. He adopted and relied on all the processes in urging the court to grant the application. In opposing the application, learned counsel for the appellants relied on their counter affidavit deemed filed on 19/10/20 and their written address filed therewith in urging the court to dismiss the application. Learned counsel for the 5th and 6th respondents did not oppose the application.

In respect of the appeal, the appellants distilled 2 issues from the notice and grounds of appeal as follows:

(i) Was the court below right in holding that the 1st - 5th respondents have the required locus to initiate the suit?

(ii) Was the court below right in its decision that the respondents' action was based on alleged breach of their rights and obligations under section 300 of CAMA and as such, the requirement prior to leave of court to institute the suit or the use of originating

summons or petition to commence the suit was inapplicable to the suit. (Grounds 2, 4 and 5).

For the 1st - 4th respondents, two similar issues were formulated thus:

(i) Whether or not the lower court was right when it held that the 1st - 4th respondents possess the locus standi to institute this action?

(ii) Whether or not the court below was right when it held that it was not necessary for the 1st - 4th respondents to seek and obtain leave of court to institute the action, as same was not a derivative action? (Grounds 2, 4 and 5).

The issues formulated by the 6th respondent are substantially similar to the issues formulated by the appellants and 1st - 4th respondents respectively. There is no need to reproduce them here. I find the issues formulated by the 1st - 4th respondents to be clear and concise. I shall adopt them in the resolution of this appeal.

As the 1st - 4th respondents have challenged ground 6 of the notice of appeal, which, along with grounds 1 and 3 form the basis of issue 1, it is necessary to deal with the application first. This is because, in the event that ground 6 is incompetent, the effect would be that issue 1 is incompetent because it is not the duty of the court to sift the arguments in respect of the competent grounds from those in respect of the incompetent grounds. See: *Jev v. Iyortom* (2014) 14 NWLR (Pt. 575); *Ogundipe v. Adenuga* (2006) All FWLR (Pt. 330) 206.

The grounds for the application are that ground 6 of the notice of appeal is an appeal against an obiter dictum of the lower court and not the ratio decidendi of the decision. It is contended that the said ground and issue 1 formulated there from are consequently incompetent and should be struck out. Relying on the authority of *K.R.K. Holdings (Nig.) Ltd. v. F.B.N. (Nig.) Ltd.* (2017) 3 NWLR (Pt. 1552) 326 D- E, *Omisore v. Aregbesola* (2015) 15 NWLR (Pt.1482) 205, 263 - 264 G - B and *Ohakim v. Agbaso* (2010) 6 - 7 SC 86 @ 168 line 20, learned senior counsel for the applicants submitted that the law is settled that a ground of appeal must arise from the ratio of the decision appealed against. He submitted that the ratio of the court's decision was not based on section 36 of the Constitution, which a remark was made in passing but rather that the appellants were entitled to notice of meetings which was not given to them. He argued that ground 6 is a misrepresentation of the court's decision.

In opposition, learned counsel for the appellants, in his written address referred to some inconsistencies in the averments in the affidavit in support in relation to the date the deponent received the information he deposed to. It was observed that the affidavit was deposed to on 24th February 2020, while in paragraph 5,

it was averred that the information was received on 24th of March, 2020. I must observe here that in the further affidavit filed by the appellants, it is averred that there was a typographical error, and the correct date is 24th February 2020. That takes care of the complaint.

On the substance of the application, it is conceded that grounds of appeal must be derived from the ratio of the decision complained of. Learned counsel submitted that a decision can have more than one ratio. See *Adetoun Oladeji (Nig.). Ltd. v. N.B. Plc* (2007) 5 NWLR (Pt. 1027) 415 @ 436 H - B. He submitted further that the court below found the issue of fair hearing to be a fundamental issue in the appeal. He referred to pages 874 - 875 of the record, where the lower court held thus:

> *"The meetings held without the mandatory notice to the appellants and the resolutions taken against them without given (sic) them a fair hearing is their complaint in this case. Issue of denial of fair hearing is fundamental, as it goes to the jurisdiction of the court"*

Referring to paragraphs 4.16 and 4.16.04 of the appellants' claim on pages 323 - 325 of the record, he asserted that ground 6 properly arises from the ratio of the decision and not from an obiter dictum. He submitted that the said ground and issue 1 are therefore competent.

Both learned counsel are correct in their submission that a ground of appeal must find its anchor in the *ratio decidendi* of the decision appealed against. It is also settled law that an issue for determination can only be distilled from a competent ground or competent grounds of appeal. As observed earlier, in a situation where an issue for determination is derived from both competent and incompetent grounds, the issue is liable to be struck out for incompetence. See: *Jev v. Iyortom (supra)*.

An *obiter dictum* is an expression of opinion made by a Judge in passing in the course of delivering judgment, but which does not decide the live issues in the matter. See: *Oshodi v. Eyifunmi* (2000)7 SC (Pt. II) 145, (2000) 13 NWLR (Pt. 684) 298; *Babarinde v. The State* (2014) 3 NWLR (Pt. 1395) 568; *N.D.P. v. INEC* (2013) 6 NWLR (Pt. 1350)

The *ratio decidendi* on the other hand, is the principle of law upon which a particular case is decided. It has the binding force of precedent. All lower courts are bound by the *ratio decidendi* of the decision of a higher court. The *ratio decidendi* has also been defined as "the reason for deciding." See: *Amobi v. Nzegwu* (2013) 12 SC (Pt. 1) 142, (2014) 2 NWLR (Pt. 1392) 510; *UTC (Nig.) Ltd v. Pamotei* (1989) 2 NWLR (Pt. 103) 244.

One of the issues argued before the lower court was whether the appellants

possess the locus standi to institute the suit. The 1st - 4th respondents argued before that court that the trial court was wrong when it held that they lacked locus standi. They argued that they had the necessary locus because their claims and the reliefs sought were to enforce their rights or assuage injuries done to them personally and not to the company. The appellants, on the other hand, contended that the substance of the complaints was the alleged violation of the Memorandum and Articles of Association of the company and oppressive and discriminatory management of the 1st appellant's affairs by the 2nd - 5th appellants. The finding of the lower court was:

> *"The appellants are free to protect their rights and obligations which were being infringed. The meeting shield without the mandatory notice to the appellants and the resolutions taken against them without giving them a fair hearing is their complaint in this case. Issue of denial of fair hearing is fundamental as it goes to the jurisdiction of the court. A party's right to fair hearing is provided under section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) is inviolable and as such cannot be denied on the grounds of technicalities."*

The appellants specifically challenged this finding in ground 6 of the notice of appeal. I do not entertain any doubt whatsoever that this finding constitutes part of the *ratio decidendi* of the judgment appealed against. It is not an obiter dictum.

I, therefore, hold that ground 6 of the notice of appeal and Issue 1 formulated partly from this issue are competent. The 1st - 4th respondents' motion on notice filed on 24/2/2020 is without merit. It is hereby dismissed.

The ruling just delivered paves the way for the determination of the appeal.

Issue 1

Learned counsel for the appellants reiterated the settled position of the law regarding *locus standi*. He submitted that a claimant would only have locus standi where the reliefs sought would confer some benefit on him. That it is the statement of claim that determines whether he has the locus to institute the action. He also submitted that the locus standi of a claimant is fundamental and touches on the court's competence to adjudicate. See: *Bakare v. Ajose-Adeogun* (2014) 6 NWLR (Pt. 1403) 320 @ 350 - 351 H - B; *Pam v. Mohammed* (2008) 16 NWLR (Pt. 1112) 1 @ 66 F. He referred to paragraphs 16, 17, 18, 19, 20 and 34 of the statement of claim and contended that the 1st - 4th respondents' cause of action centres on irregularity in the allocation of unallotted shares of the 1st appellant, the change of signatories to the 1st appellant's bank account and illegal conduct of the 1st appellant's affairs by the 2nd - 5th appellants. He asserted that the complaints in the above-mentioned paragraphs reflect the wrong done to the 1st appellant by the 2nd - 5th appellants. He contended that the wrongs do not reflect a violation

of 1st - 4th respondents' personal rights. He described them as corporate rather than individual wrongs. He submitted that the complaints relate to the internal management of the company and that it is not the practice of the court to interfere with the internal management of companies.

In support of the contention that the proper plaintiff is the company itself, he referred to *A.G. Lagos State v. Eko Hotels Ltd.* (2006) 18 NWLR (Pt. 1011) 378 @ 455 - 456 H - B; Section 299 of CAMA. He submitted further that the fair hearing provisions of section 36(1) of the 1999 Constitution, as amended, do not apply to the Board Meetings and Annual General Meetings of the 1st appellant, which is a company limited by shares. He argued that the said provisions are restricted to the proceedings before courts and tribunals established for the determination of the civil rights and obligations of litigants.

Learned counsel submitted that there are neither express nor implied provisions in the 1st appellant's Memorandum and Articles of Association, which guarantee fair hearing in the allotment/redistribution of shares, removal and appointment of directors or changes in the signatories to the 1st appellant's accounts. He posited that even if there were such provisions, they would only qualify as civil rights or a Director's right, which is outside the scope of section 36 of the 1999 Constitution as amended.

Learned counsel submitted that the holding by the court below, on page 885 of the record, that the failure of the appellants to respond to the allegation that they failed to notify the 1st - 4th respondents board meetings amounted to an admission, violates the principle that courts must not delve into substantive issues at the interlocutory stage, particularly as the 1st - 4th respondents' reliefs are declaratory reliefs, which cannot be granted on admission. He referred to *Helzger v. Dept. of Health & Social Welfare* (1977) 3 All ER 444 @ 451; *A.G., Cross Rivers State v. A.G. Federation* (2012) 16 NWLR (Pt. 1327) 425 @ 479 B-C; *Dumez Nig. Ltd. v. Nwakhoba* (2008) 18 NWLR (Pt. 1119) 361 @ 386 B-C.

Countering the above submissions, learned senior counsel for the 1st - 4th respondents submitted that there are three provisions which govern locus standi, to wit:

(a) Section 6(6)(b) of the 1999 Constitution, as amended.

(b) The Rule in *Foss v. Harbottle* (1842) 2 KB 461, as codified in section 299 of CAMA; and

(c) The exceptions to the rule in *Foss v. Harbottle* as codified in section 300 of CAMA.

With regard to section 6(6)(b) of the Constitution, he submitted that the settled position of the law is that the jurisdiction of a court can only be invoked where the

suit relates to the determination of any question as to the rights and obligations of the plaintiff, whether that plaintiff be a human being or an artificial person.

He argued that while the general rule laid down in *Foss v. Harbottle (supra)*, as codified in section 299 of CAMA, is that where there is an irregularity, which occurs in the course of a company's affairs, only the company is competent to sue, there are exceptions to the rule, which have evolved through case law and eventually codified in section 300 of CAMA, which protect the rights of members of a company who are personally aggrieved by the conduct of its affairs. He referred to: *Pender v. Lushington* (1877) 6 Ch. D. 70; *Northwest Transportation Co. v. Beatty* (1887) 12 A.C. 589; *Edward v. Halliwell* (1950) 2 All ER 1064. He submitted that in any of the circumstances set out in subparagraphs (a)-(f) of section 300, an individual member of the company has the locus to approach the court.

He submitted that the originating processes of the 1st - 4th respondents disclose the necessary locus standi: He argued further that an incorporated company is a separate entity from its shareholders and therefore the rights and interests of the company are different from the personal rights and interests of its shareholders. He referred to: *Elufioye v. Halilu* (1993) 6 NWLR (Pt. 301) 570 @ 599 E. He submitted that the Memorandum and Articles of Association of a company represent the contract between the individual shareholders and the company, and it is that document that spells out the rights and interests of the individual shareholders. He referred to *Yalaju-Amaye v. A.R.E.C. Ltd. (supra)* @ 445 A-D. He referred to the pleadings in paragraphs 1-3, 23, 25, 26, 31, 35, 36 and 38 of the statement of claim. He also referred to page 34 of the record, which details the shareholding of the 1st - 4th respondents as contained in the Memorandum & Articles of Association of the company and clause 4 thereof relating to pre-emptive rights of shareholders at page 35. He argued further that reliefs (ii), (iii), (viii), (ix), (x), (xii), (xiii), (xv), (xvi), (xvii) and (xviii) were sought to enforce their personal shareholders' rights.

Learned senior counsel referred to *C.B.N. v. Kotoye* (1994) 3 NWLR (Pt. 330) 66 @ 75-76 H - B and 77D, where it was held that the rule in *Foss v. Harbottle* which was derived from decisions of the courts over the years, cannot override clear statutory provisions to the contrary or affect the rights and obligations conferred by the Constitution. Furthermore, that it will not apply to an action instituted to protect the invasion of personal rights of an individual member qua member of a company, as in such cases the wrong ceases to be a wrong to the company and goes beyond the authority of the company, union or association or its majority members to rectify or seek redress in court. He referred to *Yalaju-Amaye v. A.R.E.C. (supra)* @ 459 A-B.

It was further argued that the contention of the appellants that several of the complaints in the suit relate to the shares of the company and therefore only the company was competent to sue in relation thereto, had been raised in a previous

case, *A.G, Lagos State v. Eko Hotels Ltd.* (2006) 18 NWLR (Pt. 1011) 378, and rejected by this court. He referred to pages 419 D-G and 445 A-H of the report. He submitted that in that case it was held that the company to whom the shares belong as well as the shareholders, who are beneficial holders of the shares, can initiate an action in respect of the company's shares.

Learned senior counsel submitted that contrary to the appellants' contention that the cause of action centers on the alleged violation of the corporate rights of the company, the suit falls not only within section 300(c) of CAMA, it also falls under section 300 and (d) which relate to ultra vires/illegal and fraudulent acts. He referred to paragraphs 16, 23, 25, 26 and 38 of the statement of claim. He also referred to reliefs (i), (v), (vii), and (xiii). He noted that the reliefs in paragraphs to were sought to facilitate the enforcement of the declarations sought in paragraphs (i) to (xi).

Relying on *Yalaju Amaye v. A.R.E.C. (supra)* @ 446 C, he submitted that the acts complained of are not mere irregularities but illegalities, which cannot be ratified by the company under section 299 of CAMA and therefore the rule in *Foss v. Harbottle (supra)* is inapplicable. He proceeded to advance arguments on why the decision of the trial court should not be restored, basing his submission on the fact that the trial court misconstrued and wrongly applied the decision of this court in *Edokpolor v. Sem-Edo Wire Ltd.* (1984) NSCC Vol. 15

It is pertinent to remind learned senior counsel that the judgment of the trial court is not on appeal before us.

On the complaint that the lower court delved into substantive issues at the interlocutory stage, he noted that the appellants, at the time they raised their preliminary objection, had not filed their defenses. He submitted that in the circumstances, and for the purpose of determining the preliminary objection, they are deemed to have admitted all the averments in the statement of claim. See: *C.B.N. v. Interstella Communications Ltd.* (2017) 12 SC (Pt. iv) 97 @ 183 lines 30-5, (2018) 7 NWLR (Pt. 1618) 294; *Omnia (Nig.) Ltd. v. Dyktrade Ltd.* (2007) 15 NWLR (Pt. 1058) 576 at 628 E-F, *Sehindemi v. Gov. Lagos State* (2006) 10 NWLR (Pt. 987) 1 @ 29 G-H. He urged us to discountenance the appellants' submissions on this issue.

On the contention that the fair hearing provisions of section 36 of the 1999 Constitution, as amended, are not applicable to company's proceedings, he submitted that fair hearing at administrative proceedings, such as company meetings, is also guaranteed under the rules of natural justice. See *Adeniyi v. Governing Council of Yabatech* (1993) LPELR - 128 (SC) @ 30 B - F, (1993) 6 NWLR (Pt. 300) 426, *Oyeyemi v. Comm. for Local Govt. Kwara State* (1992) 2 NWLR (Pt.226) 661 @ 681-682 H-A. He submitted that the right to fair hearing at company meetings is expressly guaranteed by CAMA as well as the Company's Articles of Association.

He referred to sections 262 and 266(1) of CAMA; *Longe v. F.B.N. Plc* (2010) 6 NWLR (Pt. 1189) 1 @ 30 F-G, 46-47 G-B; *Re: GlaxoSmithline Consumer Nig. Plc* (2019) LPELR-47498 (CA) @ 55-57 C-B.

Relying on the authority of *Witt & Busch Ltd. v. Dale Power Systems Plc* (2007) 17 NWLR (Pt. 1062) 1 @ 26 G - H and *Adonike v. The State* (2015) 7 NWLR (Pt. 1458) 237 @ 258 E - F, he submitted that assuming without conceding that the appellants are correct in stating that section 36 of the 1999 Constitution, as amended, is not applicable to the conduct of company meetings, the provisions of CAMA and the relevant clauses in the Articles of Association relating to notices of meetings, guarantee the 1st - 4th respondents' right to fair hearing and the decision of the lower court should not be set aside on this ground. Finally, he submitted that the alleged errors of the lower court have not occasioned a miscarriage of justice.

The submissions of learned counsel for the 6th respondent are in alignment with those made on behalf of the 1st - 4th respondents. I shall only make reference to those submissions not covered by the learned senior counsel for the 1st - 4th respondents. Learned counsel submitted that in order to ascertain the actual nature of the plaintiffs' claim, the entire statement of claim must be considered as a whole and not selectively as done by the appellants. He submitted that a holistic appraisal of the statement of claim reveals that the cause of action was the protection of the 1st - 4th respondents' personal rights. He submitted that the pleadings are replete with instances of denial of fair hearing.

In the appellants' reply to 1st - 4th respondents' brief, it was submitted that section 300 of CAMA is restricted to suits designed to restrain a company from taking steps which are illegal or ultra vires. Learned counsel submitted that the provision is inapplicable to completed acts. He urged the court to give the words in the statute their natural and ordinary meaning. He contended that most of the reliefs the 1st - 4th respondents are seeking are aimed at reversing completed acts. He submitted that the authority of *A.G. Lagos State v. Eko Hotels Ltd (supra)* is inapplicable to the facts of this case because the plaintiffs, in that case, instituted the action vide an originating summons and not by writ of summons, as in this case. He maintained that the complaints of the 1st - 4th respondents relate to irregularities and not illegalities. I have discountenanced those submissions which are a rehash of the arguments in the main brief.

RESOLUTION OF ISSUE 1

Locus standi connotes the legal capacity to institute an action in a court of law. It is a threshold issue that affects the jurisdiction of the court to look into the complaint. Where the claimant lacks the legal capacity to institute the action, the court in turn will lack the capacity to adjudicate. See: *Daniel v. INEC* (2015) LPELR -24566 (SC) @ 47 A - D, (2015) 9 NWLR (Pt. 1463) 113; *Thomas v. Olufosoye* (1986) 1

NWLR (Pt. 18) 669; *Opobiyi & Anor. v. Muniru* (2011) 18 NWLR (Pt. 1278) 387 @ 403 D - F; *Nyesom v. Peterside* (2016) LPELR - 40036 (SC) @ 39 - 40 C-A, (2016) 1 NWLR (Pt. 1492) 71. In order to have locus standi, the claimant must have sufficient interest in the suit. For instance, it must be evident that the claimant would suffer some injury or hardship or would gain some personal benefit from the litigation. See: *Inakoju v. Adeleke* (2007) 4 NWLR (Pt. 427 @ 601 - 602 H - B; *Thomas v. Olufosoye (supra)*; *B.B. Apugo & Sons Ltd. v. O.H.M.B.* (2016) 13 NWLR (Pt. 1529) 206.

In determining whether the claimant has the necessary locus standi to institute the action, it is his pleadings that would be considered by the court. Standing to sue does not depend on the merit of the claim but on the interest of the claimant in the subject matter of the suit. See: *Basinco Motors Ltd. v. Woermann-Lines & Anor.* (2009) 13 NWLR (Pt. 1157) 149; *Fawehinmi v. Akilu* (1987) 12 SC 36, (1987) 4 NWLR (Pt. 67) 797; *Musical Copyright Society of Nig. Ltd./Gte v. Compact Disc Technology Ltd & Ors.* (2018) LPELR - 46353 (SC) @ 27 - 28 F - F, (2019) 4 NWLR (Pt.1661)

The following paragraphs of the statement of claim give a glimpse into the complaints of the 1st - 4th respondents, which gave rise to their suit at the trial court.

> *"1. The 1st plaintiff is the Chairman, Chief Executive Officer, majority shareholder, the alter ego and the directing mind and will of the 1st defendant holding70% of the shares.*
>
> *2. The 2nd and 3rd plaintiffs are shareholders and directors of the 1st defendant; they are also wife and child respectively of the 1st plaintiff they hold 10% of the shares each in the 1st defendant.*
>
> *3. The 4th plaintiff is a shareholder and the Director of Administration of the 1st defendant; he holds 5% of the share.*
>
> *17. The plaintiffs aver that in the course of their business, the shareholders of the 1st defendant/company decided to increase the share capital of the 1st defendant from 2,000,000 ordinary shares to 10,000,000 ordinary shares. Consequently, on the 1st day of April, 2002, the 1st defendant/company with an ordinary resolution increased its share capital by an additional 8,000,000 ordinary shares which shares were unallotted. The certificate of increase in shares capital dated 9th April 2002, is pleaded and annexed as "Afe 5".*
>
> *18. During the general meeting of the 1st defendant held on the 4th of April, 2006, the 2nd defendant unilaterally and without the concurrence of the other 4 shareholders of the 1st defendant*

claimed that the 4th, 5th, 6th and 7th defendants (who were neither shareholders of the 1st defendant nor possess the right to attend or vote at the general meeting of the 1st defendant) voted that the aforesaid 800,000,000 (sic: 8000,000.00) unalloted ordinary shares of the 1st defendant be allotted consequent upon which an ordinary resolution was passed to distribute the unallotted shares in the following ways:

i.	*Josiah Oluwole Francis*	*-*	*3,400,000*	*Ord. Shares*
ii.	*Josiah Olusola Biodun (Mrs)*	*-*	*400,000*	*" "*
iii.	*Josiah Michael*	*-*	*200,000*	*" "*
iv.	*Bello Saka Oludare*	*-*	*2,880,000*	*" "*
v.	*Fasubaa Albert Ademola*	*-*	*400,000*	*" "*
vi.	*Bello Aderonke (Mrs).*	*-*	*400,000*	*" "*
vii.	*Akin Fayinminu*	*-*	*80,000*	*" "*
viii.	*Nurudeen Jinadu*	*-*	*80,000*	*" "*
ix.	*Goke Odunlami*	*-*	*80,000*	*" "*
x.	*Biodun Daniels*	*-*	*80,000*	*" "*

The Form C02 and the ordinary resolution dated the 4th of April 2006 and filed at the 8th defendant are hereby pleaded and annexed as "Afe 6 and (b)".

23. The Plaintiffs aver that the allotments of 4th April, 2006, unilaterally done by the 2nd defendant are fraudulent, unlawful and illegal.

25. The plaintiffs aver that the 2nd defendant in his usual characteristics of acting contrary to the provisions of CAMA and the Article of Association of the 1st defendant/company on the 6th day of October 2005, held a Board Meeting where signatories to the account of the 1st defendant were changed without complying with the rules.

26. On another occasion, the 2nd to the 7th defendants sheduled another unlawful and illegal board meeting on the 9th and 10th March 2006, where they purportedly removed the 1st plaintiff as

the Chairman of the 1st defendant's Board of Directors contrary to the Articles of Association of the 1st defendant, the Companies and Allied Matters Act, common law and equity. The notice and the minutes of the said meeting of the 9th and 10th March 2006, and the resolution of 10th March 2006, removing the 1st plaintiff as the Chairman of the 1st defendant are hereby pleaded and annexed as "Afe11, 12 and 13".

31. The plaintiffs aver that the 2nd to the 7th defendants have completely taken over the management, control and administration of the 1st defendant and have thus excluded the plaintiffs despite their colossal investment in the 1st defendant.

35. As part of the 1st defendant's welfare policy for its director and shareholders, the 1st defendant allocated the following houses to the 1st and 4th plaintiffs as follows:

(i) The 1st plaintiff - Duplex at 27, Oka Akoko Close, Garki II, Abuja.

(ii) The 4th plaintiff - House No. 3, 17 Road, Citec Villas, Gwarimpa, Team 5, Abuja, FCT.

36. The 2nd to the 7th defendants are making desperate bids to sell the official quarters of the 1st and 4th plaintiffs described in paragraph 32 above and have in fact placed notice of sale in front of the said houses.

38. On the 3rd April, 2006, the 2nd to 7th defendants becoming more and more daring purported to have illegally suspended the 4th plaintiff as a Director of the 1st defendant and ordered that his salary which has hitherto been withheld since September 2005 remains withheld. The letter of suspension is hereby pleaded and annexed as 'Afe 19'.

39. The 2nd to the 7th defendants have ganged up against the plaintiffs and their family members to cheat the amount of their lives investments and are even threatening the lives of the plaintiffs as a result.

It is evident that the pleadings along with the reliefs sought are to the effect that the plaintiffs have suffered personal injury arising from the interference by the appellants with their rights as shareholders, directors and management staff of the 1st appellant, without recourse to them. Learned counsel for the appellants rejects this assertion and contends that the complaints relate simply to the internal

management of the 1st appellant, for which only the 1st appellant has the capacity to sue. The 1st - 4th respondents contend that the Memorandum and Articles of Association of the 1st appellant have been breached in so far as the actions and inactions complained of affect their personal rights.

It is necessary at this stage to consider section 41 of CAMA, which provides for the effect of the Memorandum and Articles of Association of a company as follows:

> "41(1) Subject to the provisions of this Act, the Memorandum and Articles of Association, when registered, shall have the effect of a contract under seal between the company and its members and officers and between the members and officers themselves whereby they agree to observe and perform the provisions of the memorandum and articles, as altered from time to time in so far as they relate to the company, members or officers as such."

If this provision is juxtaposed with the paragraphs of the statement of claim reproduced above, it is clear that the suit is complaining about a breach of the obligations owed to the plaintiffs under the Memorandum and Articles of Association as individual members and officers of the company.

This brings me to the rule in Foss v. Harbottle. In the case of Yalaju-Amaye v. A.R.E.C. Ltd & Ors (1990) 4 NWLR (Pt. 145) 422 @ 446 A-, His Lordship Karibi Whyte, JSC reiterated the dictum of Jenkins, LJ. in *Edwards v. Halliwell* (1950) 2 All ER 1064 @ 1066,where His Lordship held *inter alia*:

> *"The rule in Foss v. Harbottle, as I understand it, comes to no more than this. Firstly, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and or all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the company or association is in favour of what has been done, then cadit quaestio.*
>
> *Thus, the company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be ratified by a simple majority of its members. Hence <u>the rule does not apply where the act complained of was ultra vires the company or illegal or constituted a fraud on the minority and the wrongdoers are in the majority and in control of the company</u> ... And finally where a resolution has been passed by a simple majority. See Edwards v. Halliwell (supra). These last mentioned*

circumstances are the generally recognized exceptions to the rule in Foss v. Harbottle (supra)."

His Lordship Nnaemeka-Agu, JSC in the same case of *Yalaju-Amaye v. A.R.E.C. Ltd. (supra)* @ 465 D - H, held, *inter alia*, that, notwithstanding the rule in *Foss v. Harbottle*, it is permissible for a shareholder to maintain an action when it is clear that to deny him relief would be tantamount to allowing the rule to be converted into an engine of fraud or oppression. His Lordship stated further:

"...Apart from actions enforcing personal rights of an oppressed plaintiff shareholder, the courts have always allowed actions, in spite of the rule, where the act in question is ultra vires the company or such that it cannot be sanctioned by a simple majority but by special resolution or is based on fraud."

At page 466 B - C (supra), His Lordship further held:

"Although it is recognized that the word "fraud" is a term of so wide an import that it is idle to attempt to define it, it at least appears clear that any act which may amount to an infraction of fair dealing, or abuse of confidence, or unconscionable conduct or abuse of power as between a trustee and his shareholders in the management of a company is fraud, which may take the case out of the rule in Foss v. Harbottle (supra)".

I agree with learned senior counsel for the 1st - 4th respondents that the rule in *Foss v. Harbottle (supra)* is inapplicable in the present circumstances. The complaints are not complaints of wrongs done to the company. Their grievance is that they have been denied their rights to notice of meetings where decisions affecting their individual rights were taken. They also contend that the allotment of 8 million unallotted ordinary shares of the 1st appellant by the 2nd appellant to members and non-members of the 1st appellant without regard to their right of first refusal is ultra vires, illegal, unlawful and accordingly null and void. Another complaint is in relation to the intended sale of their official quarters, their suspension and the stoppage of their salaries. See *A.G. Lagos State v. Eko Hotels Ltd.* (2006) 18 NWLR (Pt. 1011) 378 @ 419 D - G.

Section 300 (C) of CAMA provides:

"Without prejudice to the rights of members under sections 303 to 308 and sections 310 to 312 of this Act or any other provisions of this Act, the court on the application of any member, may by injunction or declaration, restrain the company from the following:

(c) any act or omission affecting the applicant's individual rights as a member."

The provisions are clear and unambiguous. Learned counsel for the appellants misconstrued the provision when he argued that it is only applicable to restrain a company from taking steps which are illegal or ultra vires and will not apply to completed acts. With respect to learned counsel, the provisions relate not only to injunctive reliefs but also to declaratory reliefs relating to any act or omission affecting the applicant's individual rights. I am of the considered view that the 1st - 4th respondents' suit falls squarely within section 300 of CAMA as well as the exceptions to the rule in *Foss v. Harbottle* to confer them with the necessary locus to institute their action.

Learned counsel for the appellants has also argued that the fair hearing provisions under section 36(1) of the 1999 Constitution, as amended, do not apply to a company's proceedings. The short answer is that in so far as the company's Memorandum and Articles of Association make provision for the giving of notice for meetings to shareholders, it follows that those entitled to be given notice of such meetings are entitled to participate in and contribute at such meetings and to be part of whatever resolution might be reached thereat. See also sections 262(2) and 266(1) of CAMA. It is settled law that even the proceedings of a non-judicial or administrative body must be conducted in accordance with the principles of natural justice. See: *Adeniyi v. Governing Council of Yabatech* (1993) 6 NWLR (Pt. 300) 426; *Denloye v. Medical & Dental Practitioner Disciplinary Committee* (1968) 1 All NWR 306.

With regards to the contention that the lower court delved into substantive issues at the interlocutory stage, I find myself unable to agree with that assertion. What the court did was merely to observe that in circumstances where a defendant raises a preliminary objection without having filed his statement of defence, he is taken, for the purposes of the objection only, to have admitted the averments in the statement of claim. This is because, in order to determine the objection, the court can only consider the averments in the statement of claim. I am not persuaded that any miscarriage of justice has occurred thereby.

In conclusion on this issue, I hold that the lower court was right when it held that the 1st - 4th respondents had the requisite locus standi to institute the action. The issue is accordingly resolved against the appellants.

Issue 2

Learned counsel for the appellants contended that the 1st - 4th respondents' suit is a derivative action for which the prior leave of the court ought to have been obtained before it was instituted. He argued that going by the various reliefs sought, they are not for the protection of the individual rights of the plaintiffs but are reliefs which are beneficial to the 1st appellant and seek to redress wrongs committed against the 1st appellant. He referred to *Agip Nig. Ltd v. Agip Petrol Int'l* (2010) 5 NWLR (Pt. 1187) 348 @ 393 G - H. He submitted that the action

ought to have been commenced by originating summons and not by a writ of summons and statement of claim.

He submitted that where, by a rule of court, the doing of an act or taking a procedural step is a condition precedent to the hearing of a case, the rule must be strictly complied with. He submitted that non-compliance is not a mere irregularity but a fundamental issue that goes to the root of the court's jurisdiction. He referred to *Amaechi v. INEC* (2008) 5 NWLR (Pt. 1080) 227 @ 437 H-A; *Aladejobi v. N.B.A.* (2013) 15 NWLR (Pt. 1376) 66 @ 84B; *Mainstreet Bank Capital Ltd. v. Nigeria Reinsurance Corporation Plc* (2018) 14 NWLR (Pt. 1640) 423 @ 455 B. He also referred to section 303 of CAMA. He submitted that on this issue, the trial court was right in holding that the suit was a derivative action and failure to commence the suit by originating summons rendered it incompetent. He urged the court to set aside the decision of the lower court, which held a contrary view, and to strike out the suit for incompetence.

In response, learned senior counsel for the 1st - 4th respondents submitted that a derivative action is an action brought to protect the interest of a company and that the reliefs in a derivative action are sought for the benefit of the company. He submitted that the resolution of issue 1 against the appellants would lead to the inevitable conclusion that the suit is not a derivative action. He submitted that not only is the suit, not a derivative action requiring prior leave, even if the suit was brought pursuant to a wrong mode of commencement, it was not sufficient to defeat the action. Learned counsel for the 6th respondent is of similar persuasion. In view of my finding and resolution of issue 1 against the appellants, I do not deem it necessary to reproduce the remaining submissions of learned counsel on this issue.

RESOLUTION OF ISSUE 2

Section 303 of CAMA provides:

> "303(1) Subject to the provisions of subsection of this section, an applicant may apply to the court for leave to bring an action in the name or on behalf of a company, or to intervene in an action to which the company is a party; for the purpose of prosecuting or defending or discontinuing the action on behalf of the company.
>
> (2) No action may be brought, and no intervention may be made under subsection of this section unless the court is satisfied that -
>
> (a) the wrongdoers are the directors who are in control and will not take necessary action;
>
> (b) the applicant has given reasonable notice to the direc-

tors of the company of his intention to apply to the court under subsection of this section if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;

(c) it appears to be in the interest of the company that the action be brought, prosecuted, defended or discontinued."

In *Unipetrol (Nig.) Plc v. Agip (Nig.) Plc* (2002) 14 NWLR (Pt. 787) 312 @ G - N, the Court of Appeal per Aderemi, JCA (as he then was), in interpreting the above provisions held, *inter alia*:

> *"It has now become accepted as settled in law that a derivative action is an action brought by a shareholder in the name of himself and all other shareholders to enforce the company's rights. The company must be joined as a defendant to the action so that it becomes a party to the action and judgment can be given in its favour so that it will be bound by the court's judgment."*

This position was affirmed by this court in *Agip (Nig.) Ltd. v. Agip Petrol International* (2010) All FWLR (Pt. 520) 1198 @ 1230 - 1231 D - F; (2010) 5 NWLR (Pt. 1187)

In the course of resolving issue 1, I held that the suit of the 1st - 4th respondents does not seek to redress any wrong done to the 1st appellant but to protect and enforce their individual rights. The suit cannot, by any stretch of the imagination, be considered to be a derivative action. It follows therefore that they did not require prior leave for their suit to be properly instituted. I also held that the said suit was properly commenced by writ of summons and statement of claim and was therefore competent.

This issue is accordingly resolved against the appellants.

On the whole, I find no merit in this appeal. I am not persuaded to interfere with the sound reasoning of the court below. The appeal is hereby dismissed. The judgment of the Court of Appeal, Abuja Division delivered on 7th July, 2017 is affirmed. Costs of ₦2 million are awarded in favour of the 1st - 4th respondents against the appellants.

Appeal dismissed.

RHODES-VIVOUR, JSC: I have had the privilege of reading in draft the leading judgment of my learned brother, Kekere-Ekun, J.S.C., and for the reasons given, I too find no merit in this appeal. The appeal is dismissed with costs as proposed in the leading judgment.

NWEZE, JSC: I had the advantage of reading before now, the draft of the leading judgment which my Lord, Kekere-Ekun, JSC, just delivered. I agree with His Lordship that, being unmeritorious, this appeal should be dismissed.

Learned counsel for the appellant dwelt on the question of locus standi in dealing with issue one. My Lords, I had the opportunity of addressing this issue at length in *Centre For Oil Pollution Watch v. NNPC* (2018) LPELR-50830(SC), (2019) 5 NWLR (Pt.1666) 518. I shall adopt my views in that case as part of my reasoning in this contribution. For their bearing on the question in this appeal, I shall set out my views in *extenso*. On the position of the law on this question, I stated thus:

> "...the expression 'locus standi', Latin expression used, interchangeably, for 'a place to stand', or standing to sue 'is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born,' per Bhagawati, J. in *Gupta v. President of India and Ors* (1982) 2 SCR 365 (italics supplied for emphasis).

Like most of English law of the time, the rules as to standing could not be found in any statute for they were made by Judges of the Realm, per Lord Diplock in *Rev v. I.R.C., Exp. Fed. of Self-Employed* (1982) A. C. (H. L. (E.)) 617, 641. Indeed, the said locus standi rules would appear to have been more, popularly enunciated in *Ex parte* Side Botham (1880) 14 Ch. D 458.

According to James, L.J. a 'person aggrieved' must be a man 'who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something,' Ex parte Side Botham (supra).

This definition was approvingly adopted in In *Re: Reed Bowen and Co.* (1887) 19 QBD 174. The learned Master of the Rolls, Lord Esher, emphasized that 'when James, L. J. said that a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him of something, he obviously meant that the person aggrieved must be a man who has been refused something which he had a right to demand, per *Bhagawati, J. in Gupta v. President of India and Ors, (supra)*.

In simple terms, therefore, this narrow and rigid conception of locus standi means that it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. In effect, 'this rule with regard to *locus standi* thus postulates a right-duty pattern which is common to be found in private law litigation. *Gupta v. President of India and Ors. (supra)*. Subsequent English decisions clung to this 'right-duty pattern:' a common feature of private law.

Nigeria's inheritance of the common law determinant of *locus standi.*

Nigerian courts, as legatees of the English common law heritage, embraced this concept of locus standi. In doing so, however, they would appear to have merged the narrow and restrictive concept of private law (cause of action test) with the requirements of public law. Thus, although *Olawoyin v. A.G. Federation* (1961) 1 SCNLR 2, which would appear to be the first Nigerian case on the point, was 'a case in the realm of public law. (*Owodunni v. Registered Trustees, CCC (supra)* 340), yet the court invoked the 'interest' and 'injury' test.

Subsequent decisions towed that line. *Gamioba and Ors v Esezi* (1971) ANLR 608, 613; *Attorney General Eastern Nigeria v. Attorney General of the Federation* (1964) ANLR 224; *Odeneye v. Efunnuga* (1990) 7 NWLR (Pt. 164) 618; *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669; *Amusa Momoh v. Jimoh Olotu* (1970) 1 All NLR 117; (1970) ANLR 121; *Maradesa v. The Military Governor of Oyo State and Ors*. (1986) 3 NWLR (Pt. 125; *Olawoyin v. Attorney-General of Northern Nigeria* (1961) 2; SCNLR 5; (1961) 2 NSCC 165; *Senator Adesanya v. President of the Fed. Republic of Nigeria and Anor* (1981) 12 NSCC 146; (1981) ANLR 1; (1981) SC 112, 2 NCLR 358 and so on.

Did *Adesanya v. President FRN (supra)* extend *locus standi*?

In *Owodunni v. Registered Trustees. C.C.C.* (2000) 10 NWLR (Pt. 675) 315, 331, Ogundare, JSC, introduced the leading judgment as follows this:

> *"... appeal raises once again the vexed question of locus standi which, in spite of a plethora of decided cases on it, still remains a Gordian Knot. A number of judicial pronouncements have been made and academic papers written. Rather than the problem being solved, it has become more intractable as the case now on hand demonstrates".*

His Lordship continued in *Oloriode v. Oyebi* (1984) 1 SCNLR 390, 400, Irikefe JSC (as he then was) declared that:

> *"party prosecuting an action would have locus standi where the reliefs claimed would confer some benefit on such a party".*

According to His Lordship:

This is clearly the position in private law... The position appears to be that in private law, the question of locus standi is merged in the issue of cause of action, for instance, a plaintiff who has no privity of contract with the defendant will fail to establish a cause of action for breach of the contract as he will simply not have a locus standi to sue the defendant on the contract. Our laws reports are replete with authorities that show that in chieftaincy cases, all a plaintiff is required to do is to show in his statement of claim his interest and his entitlement to the chieftaincy title. I may add that the same principle applies to similar cases such

as the one presently on hand.

The erudite jurist maintained that '*Thomas v. Olufosoye (supra)* falls into this category as well. *Olawoyin v. Attorney-General of Nigeria (supra)* is a case in the realm of public law...The court applied the 'interest' 'injury' test in denying (Olawoyin) of locus standi in the case. The same test was applied by the court in *Gamioba and Ors. v. Esezi II and Ors.* (1961) ANLR 608, 613.

Almost all counsel, including the amicus curiae, would seem to entertain the view that the decision in *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt. 67) 797 expanded the scope of locus standi. With respect, this cannot be correct. See T. E. Ogowewo, Wrecking the Law: How Article 111 of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria, 26 Brook. J. Int'l L. (2017) 528, where the erudite scholar debunked such views. [Per Nweze, JSC, in *Centre for Oil Pollution Watch v. NNPC (supra)* 39 - 44; C - C.]

On the question of whether section 6(6)(b) of the 1999 Constitution is the provenance of locus standi. I continued thus:

In *Owodunni v. Registered Trustees, C.C.C. (supra)*, Ogundare, JSC, answered this question thus:

> "It appears that the general belief is that this court laid it down in that case (that is, *Adesanya v. President, FRN*) that the law on locus standi is now derived from section 6(6)(b) of the Constitution of the Federal Republic of Nigeria,1979 (re-enacted in section 6(6)(b) of the 1999 Constitution) which provided:
>
> *6(6) the judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and 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".*

I am not sure that this general belief represents the correct position. Of the seven Justices that sat on that case (that is, *Adesanya v. President, FRN*) only 2 (Bello and Nnamani, JJSC) expressed views to that effect. Bello JSC, (as he then was), put the law on locus standi or standing in the realm of public law in these words.

Finally, I would like to make the following observations: A careful perusal of the problem would reveal that there is no jurisdiction within the common law countries where a general licence or a blank cheque - if I may use that expression without any string or restriction, is given to a private individual to question the validity of legislative or executive action in a court of law. It is common ground in all the juris-

dictions of the common law countries that the claimant must have some justiciable interest which may be affected by the action or that he will suffer injury or damage as a result of the action. In most cases, the area of dispute, and sometimes, of conflicting decisions have been whether or not on particular facts and situations the claimant has sufficient interest or injury to accord him a hearing. In the final analysis, whether a claimant has a sufficient justiciable interest or sufferance of injury or damage depends on the facts and circumstances of each case, *Bengal Immunity Co. v. State of Bihar* (1955) 2 S.C.R.602; *Forthingham v. Mellon* (1925) 262 U.S. 447; for India and America, respectively. Even in the Canadian case of *Torson v. Attorney-General of Canada* (1974) 1 N.R. 2254, and the Australian case of *Mckinlay v. Commonwealth* (1975) 135 C.L.R ... in which liberal views on standing were expressed, the issue of sufficiency of interest was the foundation upon which the decisions in both cases were reached.

I think this passage correctly sums up the law and is in accord with *Olawoyin v. Attorney-General of Northern Nigeria (supra)*. Bello, JSC did not, however, stop there. He went on to consider the provision of our Constitution and after quoting section 6(6)(b) of the Constitution (1979 Constitution) went on to observe:

> It may be observed that this sub-section expressed the scope and content of the judicial powers vested by the Constitution in the courts within the purview of the subsection. Although the powers appear to be wide, they are limited in scope and content to only matters, actions and proceedings for the determination of any question as to the civil rights and obligations of that person. It seems to me that upon the construction of the sub-section, it is only when the civil rights and obligations of the person, who invokes the jurisdiction of the court, are in issue for determination that the judicial powers of the courts may be invoked. In other words, standing will only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of.

Idigbe, JSC, also quoted section 6(6)(b) of the Constitution and went on to say:

> The expression 'judicial power' in the above quotation is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision (see Justice Miller: The Constitution (p. 314). Judicial power is therefore invested in the court for the purpose of determining cases and controversies before it; the cases or controversies, however, must be 'justiciable'. That being so, it is necessary to know in what circumstances a court can, in the exercise of its judicial power pronounce on the constitutional validity of an 'Act' (i.e. legislation)of the Legislature or, an 'act' (i.e. action) of the National Assembly. In attempting to answer this question, I would gratefully adopt the views of Marshall C.J. in *Marbury v. Madison* (1803) 1

> Cranch 137, which, in summary, are that the right of the court to declare unconstitutional an act of Congress can only be exercised by it when a proper case between opposing parties has been submitted to it for judicial determination.

On what is a "proper case" that would justify the invocation of the judicial power of the court, the learned Justice of the Supreme Court observed:

> The type of case or controversy which will justify the exercise by the court of its judicial power must be justiciable and based on bona-fide assertion of right by the litigants (or one of them) before it. I take the view that the circumstances in which the judicial power under section 6(6)(b) of the 1979 Constitution can be exercised by the court for the purpose of pronouncing on the constitutional validity of an act for the National Assembly or, more particularly, any legislation must be limited to those occasions in which it has become necessary for it (i.e. the court) in the determination of a justiciable controversy or case based on bona fide assertion of rights by the adverse litigants (or anyone of them) before it to make such a pronouncement. The court does not, in my view possess a general veto power over legislation by, or acts of, the National Assembly; its powers properly construed, are supervisory, and the supervisory power, in circumstances to which I have referred above.

According to Ogundare, JSC:

> It will be observed that Idigbe JSC did not say that it was section 6(6) that gave locus standi but rather that it was this sub-section that prescribed the judicial power of the court in the separation of powers scheme of the Constitution. Obaseki JSC was emphatic in his rejection of the notion that section 6(6) is concerned with locus standi. The learned Justice of the Supreme Court after quoting the sub-section, said:

> This provision by itself, in my opinion and respectful view, does not create the need to disclose the locus standi or standing of the plaintiff in any action before the court and imposes no restriction on access to the courts. It is the cause of action that one has to examine to ascertain whether there is disclosed locus standi or standing to sue.

Nnamani, JSC, appeared to share Bello, JSC's a view when he said:

> Section 6(6) (b), to my mind, encompasses the full extent of the judicial powers vested in the courts by the Constitution. Under it, the courts have power to adjudicate on a justiciable issue touching on the rights and obligations of the person who brings the complaint to court. The litigant must show that the act of which he complains affects rights and obligations peculiar or personal to him. He must show that his private rights have been

> infringed or injured or that there is a threat of such infringement or injury. It seems to me that the Court must operate within the parameter of the judicial power vested in them by section 6(6)(b) of the Constitution and that they can only take cognisance of justiciable actions properly brought before them in which there is dispute, controversy, and above all, in which the parties have sufficient interest. The courts cannot widen the extent of this power which has been so expressly defined by the Constitution.

Uwais, JSC also agreed with Bello, JSC but only to some extent. For he said:

> It is for the foregoing reasons and those given by my learned brother, Bello, JSC (which I had the privilege of reading in draft) that I feel that the interpretation to be given to section 6 subsection (6)(b) of the Constitution will depend on the facts or special circumstance of each case. So that no hard and fast rule can really be set-up. But the watchword should always be the 'civil rights' and obligations' of the plaintiff concerned.

I have highlighted above the views expressed by five of their Lordships that determined the Senator Adesanya's case. I am only left with two. Sowemimo, JSC, (as he then was), declined to express a view on section 6 subsection (6)(b) of the Constitution. He said:

> *"On interpretation placed on section 6(6)(b) I prefer to reserve my comments until a direct issue really arises for a determination."*

Fatayi-Williams, CJN, who expressed his preference for what the Romans called *actio popularis* when he said:

> To my mind, it should be possible for any person who is convinced that there is an infraction of the provisions of sections 1 and 4 of the Constitution which I have enumerated above to be able to go to court and ask for the appropriate declaration and consequential relief if relief is required. In my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an obligation to see to it that he is governed by a law which is consistent with the provisions of the Nigeria Constitution. Indeed, it is his civil right to see that this is so. This is because any law that is inconsistent with the provisions of that Constitution is, to the extent of that inconsistency, null and void by virtue of the provisions of sections 1 and 4 to which I have referred earlier.

Still found against the Senator on the ground that the latter:

> By coming to court to ask for a declaration, the plaintiff/appellant, in these circumstances, has completely misconceived his role as a Senator. In

> short, Senator Adesanya has no locus standi in this particular case. He participated in the debate leading to the confirmation of the appointment of the second defendant/respondent and lost. For him, that should have been the end of the matter. The position would probably have been otherwise if he was not a Senator.

From the extracts for their lordships' judgments I have quoted above, one can clearly see that there was not majority of the court in favour of Bello, JSC's interpretation of section 6 subsection of the Constitution. It will, therefore, not be correct to say that this court decided in the Adesanya case that the subsection prescribes the locus standi of a person wanting to invoke the judicial powers of the court. They all seem to agree, however, that the sub-section prescribes the extent of the judicial powers of the courts.

In my respective view, I think Ayoola, JCA, (as he then was), correctly set out the scope of section 6 subsection of the Constitution when in *N.N.P.C. v. Fawehinmi and Ors.* (1998) 7 NWLR (Pt. 559) 598, 612 he said:

> In most written constitutions, there is a delimitation of the power of the three independent organs of government, namely the executive, the legislature and the judiciary, section 6 of the Constitution which vests judicial powers of the Federation and the States in the courts and defines the nature and extent of such judicial powers does not directly deal with the right of access of the individual to the court. The main objective of section 6 is to leave no doubt as to the definition and delimitation of the boundaries of the separation of powers between the judiciary on the one hand and the other organs of government on the other, in order to obviate any claim of the other organs of government, or even attempt by them, to share judicial powers with the courts. Section 6 of the Constitution is primarily and basically designed to describe the nature and extent of judicial powers vested in the courts. It is not intended to be a catch-all, all-purpose provision to be pressed into service for determination of questions ranging from locus standi to the most uncontroversial questions of jurisdiction.
>
> (pages 338 et seq; italics supplied for emphasis)

My Lords, I have, deliberately, embarked on this tour of the horizon to demonstrate how this court, in *Owodunni v. Registered Trustees, C.C.C. (supra)*, gallantly, endeavoured to state the correct position that *"... it is obvious that the Supreme Court in Adesanya did not decide that section 6 contains a requirement of standing..."* (T. I. Ogowewo, Wrecking the Law: How Article 111 of the Constitution of the United States Led to the Discovery of a Law of Standing to Sue in Nigeria, 26 Brook. J. Int'l L. (2017) 528,559 (per Nweze, JSC in *Centre for Oil Pollution Watch v. NNPC (supra)* 44- 555; C - D.

On how English courts expanded the frontiers of locus standi, the court in *Centre for Oil Pollution Watch v. NNPC (supra)* noted that:

> ... learned counsel for the respondent, Victor Ogude, contended that, as the law stands, there is no room for the adoption of the modern views on locus standi in England and Australia.

With respect, this submission overlooks the approach which this court had always adopted in circumstances such as the present one. Only one or two instances will be cited here to debunk the submissions of counsel. Indeed, on this question of locus standi, this court had occasion to refer to such jurisdictions like India; USA; Canada and Australia. Thus, in Adesanya (supra), Bello, JSC, opined thus:

> "In the final analysis, whether a claimant has sufficient justiciable interest or sufferance of injury or damage depends on the facts and circumstances of each case, *Bengal Immunity Co. v. State of Bihar* (1955) 2 S.C.R. 602; *Forthingham v. Mellon* (1925) 262 U.S. 447; for India and America, respectively. Even in the Canadian case of *Torson v. Attorney-General of Canada* (1974) 1 N.R. 2254, and the Australian case of *Mckinlay v. Commonwealth* (1975) 135 C.L.R ... in which liberal views on standing were expressed, the issue of sufficiency of interest was the foundation upon which the decisions in both cases were reached".

The truth of the matter, as Diplock, LJ, held in *Rev v. I.R.C. Exp. Fed. of Self-Employed* (1982) A.C. (H. L. (E.)) 640 -641 is that the rules as to standing could not be found in any statute for they were made by Judges of the Realm:

> "...by Judges, they can be changed; and so they have been over the years to meet the need to preserve the integrity of the rule of law... Any judicial statements on matters of public law if made before 1950 are likely to be misleading guide to what the law is today..."

True to that Diplockian prediction, English courts have extended the meaning of locus standi and the aforementioned determinant principle in appropriate cases, *Reg. v. Inland Revenue Commissioners/Ex-Parte National Federation of Self-Employed and Small Business Ltd* (1982) AC 617, 639; paragraph H; *Reg. v. Foreign Secretary of State for Foreign and Common Wealth Affairs/Ex Parte World Development Movement Ltd.* (1995) 1 WLR 386; *R. v. Inspectorate of Pollution and Anor, Ex Parte Greenpeace Ltd.(No. 2)* (1994) All ER 329; *R. v. Sommer set County Counsel ARC Southern Ltd, Ex Parte Dixon* (1998) Environment LR 111; *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd* (1995) 1 All E.L.R. 611, 620 where an NGO was held to have *locus standi*.

The English courts are not alone on this development. Other common law jurisdic-

tions have followed that pattern. In India, the Supreme Court, without any statutory enactment, but rather for the overall need to do justice, generally, liberalized the traditional rule on locus standi with respect to environmental degradation, since, in the court's view, maintaining a clean environment is the responsibility of all persons in the country, *Maharaj Signh v. State* U.P. AIR 1976 SC 2607; *Raflam Municipal Council v. Vardhchard*, AIR 1980 SC 1622; *S.P. Gupta v. Union of India, AIR* (1982) SC149, 189. Per Nweze, JSC in *Centre for Oil Pollution Watch v. NNPC (supra)* 55 - 65; C - B.

As indicated above, I adopt the above views of mine as part of my reasoning in this contribution. It is for these, and the more detailed reasons in the leading judgment that I hereby enter an order dismissing this appeal. I abide by the consequential orders in the leading judgment. Appeal dismissed.

AUGIE, JSC: My learned brother, Kekere-Ekun, JSC, dealt extensively with the issues raised by the parties in the lead Judgment just delivered by him, and I agree with his reasoning and conclusion, which represents my views. In the circumstances, I dismiss this appeal and abide by the order as to cost in the lead judgment.

ABBA-AJI, JSC: I have read in advance the draft judgment of my learned brother, Kekere-Ekun, JSC, just delivered, and I agree that the appeal be dismissed.

The 1st appellant is a limited liability company with a share capital of 2 million ordinary shares. While the 1st - 4th respondents owned 95% of the share capital, the 2nd appellant owned the balance of 5%. The 1st, 2nd, 4th respondents and the 2nd appellant were the original directors of the company. By an ordinary resolution passed on 1/4/2002, the share capital was increased to 10 million.

It was the allegation that on 9th and 10th March 2006, the company held board meetings whereby the 1st respondent was removed as chairman and his official residence and vehicle withdrawn and no due process was followed to remove him. In another board meeting that held on 4/4/2006, it was alleged that despite the absence of the 1st to 4th respondents because they were not given notice of meeting and hence there was no *quorum*, some crucial resolutions were taken. Furthermore, in a meeting held on 6/10/2006, the names of the 1st to 4th respondents were removed as signatories to the company's account, their houses were put up for sale, they were suspended and their salaries were stopped. Thus, the 1st to 4th respondents were deprived of their rights as shareholders, directors and management staff of the company without notice to them and opportunity of being heard.

They consequently sued at the Federal High Court, Abuja, seeking declaratory and injunctive reliefs in order to restore them to their original positions in the company and their rights and entitlements. The suit was challenged by the appellants after

being served, that the trial court did not have the jurisdiction to entertain the suit. The trial court granted the application and on appeal to the lower court, it was set aside, hence the appeal to this court by the appellants. The appellants' issues for determination are as follows:

1. Was the court below right in holding that the 1st - 5th respondents have the required locus to initiate the suit?

2. Was the court below right in its decision that the respondents' action was based on alleged breach of their rights and obligations under section 300 of CAMA and as such, the requirement prior to leave of court to institute the suit or the use of originating summons or petition to commence the suit was inapplicable to the suit?

'Locus standi' (or standing) denotes the legal capacity to institute proceedings in a court of law. Standing to sue is not dependent on the success or merits of a case; it is a condition precedent to a determination on the merits. It follows, therefore, that if the plaintiff has no *locus standi* or standing to sue, it is not necessary to consider whether there is a genuine case on the merits; his case must be struck out as being incompetent. See Per Michael Ekundayo Ogundare, JSC in *Josiah Kayode Owodunni v. Registered Trustees of Celestial Church of Christ & Ors.* (2000) LPELR-2852(SC) (P. 18, paras. C-E), (2000) 10 NWLR (Pt. 675) 315.

It cannot be disputed that the question whether or not a plaintiff has a *locus standi* in a suit is determinable from a totality of all the averments in his statement of claim. In dealing with the locus standi of a plaintiff, it is his statement of claim alone that has to be carefully scrutinized with a view to ascertaining whether or not it has disclosed his interest and how such interest has arisen in the subject matter of the action. Where the averments in a plaintiffs statement of claim disclose the rights or interests of the plaintiff which have been or are in danger of being violated, invaded or adversely affected by the act of the defendant complained of, such a plaintiff would be deemed to have shown sufficient interest to give him the *locus standi* to litigate over the subject-matter in issue. See Per Anthony Ikechukwu Iguh, JSC in *Josiah Kayode Owodunni v. Registered Trustees of Celestial Church of Christ & Ors (supra)* (P.53, paras. B-F).

By the statement of claim of the 1st to 4th respondents at the trial court, it sufficiently shows their interests been or in danger of being violated, invaded or adversely affected by the act of the appellants. Thus, the respondents have a locus standi to institute the action as they did.

On the 2nd issue, my tent is pitched with that of my learned brother that the suit of the 1st to 4th respondents was meant principally to protect and enforce their individual rights. There is therefore no connotation of any derivative action as

envisaged by section 300 of CAMA.

On the whole, this appeal is dismissed. I abide with the terms as to costs awarded by my learned brother.

Appeal dismissed.

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C.B.N. v. Interstella Communications Ltd. (2017) 12 SC (Pt. iv) 97 @ 183 lines 30-5, (2018) 7 NWLR (Pt. 1618) 294
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R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte World Development Movement Ltd (1995) 1 All E.L.R. 611
R. v. Sommer Set County Counsel ARC Southern Ltd, Ex Parte Dixon (1998) Environment LR 111
Raflam Municipal Council v. Vardhchard, AIR (1980) SC 1622
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Reg. v. Foreign Secretary of State for Foreign and Common Wealth Affairs/Ex Parte World Development Movement Ltd. (1995) 1 WLR 386
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Torson v. Attorney-General of Canada (1974) 1 N.R. 2254

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Sections 1 and 4 of the Constitution
Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 (re-enacted in Section 6(6)(b) of the 1999 Constitution)
Section 41 of CAMA
Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
Sections 262(2) and 266(1) of CAMA
Section 299 of CAMA
Section 300 of CAMA
Sections 303 to 308 and sections 310 to 312 of this Act

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History:

HIGH COURT
Federal High Court, (Abuja Division)

COURT OF APPEAL (Abuja Division)
7th July, 2017

SUPREME COURT OF NIGERIA
Olabode Rhodes-Vivour, JSC ***(Presided)***

Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC ***(Read the leading Judgment)***
Chima Centus Nweze, JSC
Amina Adamu Augie, JSC
Uwani Musa Abba Aji, JSC

APPEARANCES:
A. M. Kayode, Esq., with C.I.A. Ofoegbunam, Esq., and A. F. Obiwumma, Esq., for the Appellants
Kehinde Ogunwumiju, SAN., with Olumide Adekunle Esq., Saadu Lukman, Esq., and Funmilayo Longe Esq., for the 1st - 4th Respondents
Olayinka Adedeji, Esq., for the 5th Respondent
O. O. Olowolafe, Esq., with O. O. Owonla, Esq., for the 6th Respondent

UNITED BANK FOR AFRICA PLC v. JOHN MICHAEL COMPANY & NIGERIA LIMITED

SUPREME COURT OF NIGERIA

SC. 544/2015
FRIDAY 8TH APRIL, 2022

(KEKERE-EKUN; OKORO; ABOKI; SAULAWA; ABUBAKAR, JJ.SC)

APPEAL – Grounds of appeal – where of mixed law and facts – leave to appeal must be sought from the appellate court.

APPEAL – Grounds of appeal – how determined.

APPEAL – Grounds of appeal – where leave is required – failure to seek leave goes to root of the appeal and robs the court of jurisdiction.

Facts:

The Appellant as defendant filed a statement of defence on 27th July, 2000. In 2004, when the Lagos State High Court (Civil Procedure) Rules came into force, the parties were required to follow the new rules. The Respondent Therefore, refiled its claims and complied with the new rules. Thereafter, the front-loaded processes were served on the Appellant, as defendant. The Appellant did not file its accompanying documents in relation to the processes filed and served on it. At the pre-trial conference, the High Court (trial court) was informed that the defendant/applicant was served and was absent in Court. The trial Court was satisfied that the defendant/Appellant had been duly served, judgment was accordingly entered in favour of the Claimant/Respondent. The Claimant/Respondent thereafter levied execution of the default judgment. The Appellant then filed a motion on notice and prayed, for a stay of further execution of the default judgment, an order setting aside the default judgment and an order for the release of the Appellant's vehicles held in execution of the Judgment. When the motion was argued, the learned trial judge delivered ruling dismissing the application of the Appellant.

Aggrieved, the Appellant lodged an appeal at the Court of Appeal, Lagos Division lower court). The lower Court in its judgement dismissed the Appellant's appeal and affirmed the decision of the trial court.

Further aggrieved by the decision of the lower court, the Appellant appealed to the Supreme Court.

Held *(Unanimously dismissing the appeal):*

[1] ***Appeal – Grounds of appeal – where of mixed law and facts – leave to appeal must be sought from the appellate court.***

Where leave first sought and obtained is the sine qua non, under section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria, as amended for a valid or competent appeal, unless the leave was first sought and granted to the appellant to appeal, any appeal lodged or filed in defiance of the said mandatory provisions will be void and nullity ab initio… It is therefore clear that the court has no jurisdiction to entertain an appeal on a ground of fact or mixed law and facts, unless of course, leave has been obtained. See *Maigoro v. Garba* (1999) 7 S.C. (Pt. 3); *AL Majir v. Jalbait Ventures Nig. Ltd & Anor. (2021) 1 - 2 S.C (Pt. 2); Oluwole v. Lagos Development (1983) 5 S.C. 1 and J.B. Ogbechie & Ors. v. Gabriel Onochie & Ors (No 1.)* (1986) 3 S.C. (Reprint 32). **(P. 48 lines 3 - 8; 15 - 17)**

[2] ***Appeal – Grounds of appeal – how determined.***

There is no doubt that it is always difficult to distinguish of ground of law from a ground of fact, but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law to the facts already proved or admitted in which case, it would be question of law or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact... See *Ogbechie v. Onochie* (1986) 2 NWLLR (Pt. 23) 484. **(P. 49 lines 29 - 36)**

[3] ***Appeal – Grounds of appeal – where leave is required – failure to seek leave goes to root of the appeal and robs the court of jurisdiction.***

It is a settled matter of law that an Appellant seeking to appeal against a decision of the Court of Appeal does so as of right only where the ground of appeal involves questions of law alone and when it involves a question of facts or mixed law and facts, the need for leave of Court is of the essence… See *Fasuyi & Ors. v. PDP & Ors.* (2017) LPELR 43462 (SC).

The consequence for not seeking leave where a ground of appeal is of mixed law and fact is fatal to the ground. Thus, an appeal to this Court cannot be entertained once the grounds are of facts or mixed law and fact and leave has not been asked for or obtained. See also Section 233(2) and (3) of the CFRN 1999, as amended. **(P. 50 lines 20 - 29)**

ABUBAKAR, JSC (Read the lead Judgment): This appeal is against the Judgment of the Court of Appeal Lagos Division, delivered on the 23rd day of October, 2014, wherein the Appellant's appeal against the Judgment of the trial Court was unanimously dismissed by the lower Court.

The Claim of the Respondent in this appeal as Plaintiff at the trial Court as per the writ of summons taken out on the 26th day of April 2000 reads as follows:

1. ***A declaration that the negligent payment by the defendant of money due to the plaintiff (in the sum of ₦7,339,217.25) into a private account instead of the plaintiff's account is wrongful and unlawful.***

2. ***An order for the payment of the defendant to the plaintiff of the sum of ₦1,738,171.28 representing interest at the rate of 21% on the said sum of ₦7,339,217.25 per annum from 12/5/98 to 28/6/99 being the period during which the defendant wrongly deprived the plaintiff of its money.***

3. ***Further interest on the said sum of ₦1,738,171.28 at the rate of 21% per annum from 29/6/99 until the sum is fully liquidated.***

The facts grounding this appeal are that the Appellant as defendant filed a statement of defence on 27th July, 2000. In 2004, when the Lagos State High Court (Civil Procedure) Rules came into force, the parties were required to follow the new rules. The Respondent Therefore, refiled its claims and complied with the new rules. Thereafter, the front-loaded processes were served on the Appellant, as defendant, in February, 2005. The Appellant did not file its accompanying documents in relation to the processes filed and served on it.

At the pre-trial conference on the 13th day of April, 2006, the Court was informed that the defendant/applicant was served and was absent in Court. The trial Court was satisfied that the defendant/Appellant had been duly served, judgment was accordingly entered in favour of the Claimant/Respondent.

The Claimant/Respondent thereafter levied execution of the default judgment on the 26th day of July, 2006. The Appellant on the 31st day of July, 2006 filed a motion on notice and prayed, for a stay of further execution of the default judgment, an order setting aside the default judgment and an order for the release of the Appellant's vehicles held in execution of the Judgment. This application was supported by an affidavit and written address, further affidavit was also filed on the 8th day of August, 2010.

The Respondent filed counter affidavit and written address in response. When

the motion was argued, the learned trial judge delivered ruling dismissing the application of the Appellant.

The Appellant became aggrieved and lodged an appeal at the lower Court, the Court of Appeal Lagos Division. The lower Court in its judgement delivered on the 23rd day of October, 2014, dismissed the Appellant's appeal and affirmed the decision of the trial court. The decision of the lower Court therefore nettled the Appellant who further appealed to this Court on the 24th day of February, 2015 via notice of appeal containing two grounds of appeal.

Appellants brief of argument was filed on the 19th day of October, 2015 by learned Counsel Johnson Odionu Esq. In the Appellant's brief of argument, learned Counsel nominated and argued two issues for determination, the issues are reproduced as follows:

a) *"Whether the appellant was served with the necessary pre-trial conference forms 17 and 18 together with the hearing notice for pre-trial conference before the grant of the default judgment upheld by the court of appeal. This relates to ground one of the Notice of Appeal.*

b) *Whether the court of appeal was right to have held that exhibit A with attached processes speaks for itself and does not necessitate the calling of oral evidence to resolve conflicting affidavits of the patties".*

The Respondent through learned Counsel A.M. Makinde Esq. filed the Respondents brief of argument on the 15th day of February, 2015, learned Counsel also filed notice of preliminary objection on the 15th day of February 2021 and argument in support of the said preliminary objection on the 17th day of March 2021.

In the Respondents brief of argument, learned Counsel crafted two issues for determination, they are also reproduced as follows:

1. *"Whether the appellant has made out a case of exceptional circumstances to warrant or justify the review of the concurrent findings of fact made by the courts below on the question of service of processes on the appellant by this court.*

2. *Whether the court below was right when it held that the documentary evidence available to the court has obviated calling oral evidence to resolve any conflict in the affidavit in support of the motion dated 31/7/2006 and the counter affidavit and further affidavit of the appellant."*

As I stated earlier, the learned Counsel for the Respondent filed Notice of preliminary objection, I must state that the Appellant's Counsel filed no response to the preliminary objection. In line with the settled position of the law, the Court has a duty to hear and determine the Preliminary Objection first before proceeding to consider and determine the substantive appeal if so doing turns out to be necessary. I will therefore in obedience to the dictates of the law, proceed to consider and determine the Respondent's preliminary objection first.

THE PRELIMINARY OBJECTION

The Notice of preliminary objection was brought pursuant to order 2 Rule 9 of the Supreme Court Rules, 1999 and section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), and the inherent jurisdiction of this Court. Learned Counsel for the Respondent said the appeal is incompetent, and this Court lacks jurisdiction to hear and determine the appeal since leave of Court was not sought for and obtained before commencing the appeal. The Respondents grounds of objection as set out on the face of the Notice of preliminary objection are:

1. *The grounds of appeal are grounds of mixed law and facts.*

2. *Non-compliance of the Appellant with section 233(2) and (3) of the 1999 Constitution of the Federal Republic of Nigeria as amended to obtain leave of Court.*

3. *Appeal is incompetent.*

4. *The Court lacks jurisdiction to entertain the appeal.*

Arguing the objection, learned Counsel for the Respondent said the sale issue to resolve in the determination of the objection is *"whether, the Appellant's two grounds of appeal are grounds of mixed law and facts for which the Appellant ought to have sought for and obtain an order for leave to appeal, the grounds of appeal in the notice of appeal not being grounds of law in compliance with section 233 (2) and (3) 1999 Constitution of the Federal Republic of Nigeria as amended".*

Learned Counsel referred to the Appellants Notice of appeal deemed as properly filed and served on the 15th day of September, 2021 and submitted that the grounds of appeal are of mixed law and facts and cannot therefore be determined without the Appellant seeking for and obtaining leave of court to appeal against the Judgment. Counsel contended that the inability of the Appellant to seek for and obtain leave to appeal offends the provisions of section 233 (2) and (3) of the 1999 constitution of the Federal Republic of Nigeria (as amended).

Learned counsel relied on the decision in *Chrome Air v. Fidelity Bank* (2017)

LPELR 43470 SC. to argue that where the grounds of appeal question the evaluation of evidence before the application of the law, it is a ground of mixed law and facts, counsel relied on the *decisions* in *Min. Pet. Resources v. Ekpo Shopping Line* (2012) LPELR 3189 SC, *Ojemen v. Momodu* (1983) S.C 173 and *Yaro v. Arewa Const.* (2007) 6 SC (Pt. 2) pg. 149 to submit that it is trite that labelling a ground of appeal an error in law is insufficient to cloak it as such. The grounds and particulars according to learned counsel must be construed together to determine whether it is a ground of law or a ground of mixed law and facts relying on *State v. Omoyele* (2016) NWLR (Pt. 1059) pg. 99.

Learned counsel said ground of appeal number one at pages 147-148 of the records of appeal questions the evaluation of the affidavit of service of the hearing on the Appellant, that being a ground of mixed law and facts, the Appellant requires leave of Court to have valid and competent appeal, Counsel relied on the decisions in *Fasuyi v. PDP* (2017) LPELR-43416 (SC), *Dairo v. UBN* (2007) 16 NWLR (Pt. 1059) Pg 99.

Learned Counsel also referred to ground of appeal number two at page 149 of the records of appeal to contend that the complaint of the Appellant also relates to evaluation of facts relating to service, Counsel said the ground is of mixed law and facts and Appellant requires leave of Court before the appeal becomes competent. Learned Counsel said where an appellant fails to obtain leave of Court to file an appeal on grounds of mixed law and facts, the appeal will be incompetent and therefore liable to be struck out, he relied on the decision in *Abraham v. Olorunfunmi* (1991) 1 NWLR (Pt. 165) Pg. 53. Counsel further submitted that even though a party has the right to challenge any decision of Court by way of appeal, the same party must comply with all necessary conditions precedent to activating the jurisdiction of the Court, he cited, *Ukpong v. Comm for Finance* (2006) LPELR-3349 SC, *Ifeajuna v. Ifeajuna* (1999) 1 NWLR (Pt. 587) Pg. 492.

Learned counsel finally submitted that the Appellant having failed to seek for and obtain leave of Court in this appeal in compliance with the provisions of the constitution cannot invoke the powers of this court to adjudicate in the appeal. Counsel urged that the preliminary objection be sustained.

RESOLUTION

Before I proceed to discuss the preliminary objection, let me first reproduce the Appellants grounds of appeal and the particulars as filed by the Appellant, so doing will show whether the grounds are grounds of law or of mixed law and facts. Appellant's two grounds of appeal and their respective particulars as set out in pages 147 to 149 of the records of appeal read as follows:

> *"**Ground One***

The learned Justices of the Court of Appeal erred in law in refusing to set aside the default judgment entered against the appellant on 13th April, 2006 by Lagos High Court for failure to participate in pretrial conference when they came to the conclusion that all the necessary forms 17 & 18 together with the pre-trial, conference hearing Notice were properly served and acknowledged by the appellant's counsel.

Particulars of Error

a. *The necessary form 17 or hearing notice for the pre-trial conference was not served on the appellant's then counsel. Oyagbola chambers as there is no where in the copy of the acknowledged of service marked as exhibit-J1 attached to affidavit of service by the respondent where the appellant's then counsel acknowledged the receipt of the necessary form 17 or hearing notice.*

b. *The acknowledgement of service marked exhibit J1 attached to affidavit of service by the respondent is the acknowledgment of receipt of document or letter dated 28/02/2006 which the respondent addressed to the Chief Registrar simpliciter.*

c. *The endorsement thus "original copies received by me" contained in the acknowledgment of service marked exhibit J1 attached to the affidavit of service by the respondent did not indicate the specific or particular document received and this ought to have created some doubts in the mind of the trial lower court.*

d) *There is no endorsement on forms 17 and 18 to indicate that the appellant actually received the documents as it is the case under a normal circumstance.*

Ground Two

The learned justices of the Court of Appeal erred in law in holding that the document exhibit A which is proof of service by the respondent with all the attachment speaks for itself and as such the issue of calling oral evidence to resolve the conflict in the affidavits filed by the parties is uncalled for.

Particulars of Error

a) *The respondent exhibited before the lower court exhibit A which is an affidavit of service to the effect that the appellant former counsel the law firm of Oyagbolu Chamber received the said processes.*

b) The appellant by a further affidavit exhibited a letter from the said law firm Oyagbola Chambers that they were never served with any such notice or otherwise notified of a pre-trial conference date.

c) The affidavit exhibit A filed by the respondent and the further affidavit filed by the appellant are in conflict with each other which can only be resolved by oral testimony."

Issue of mixed law and facts, facts and law alone is very delicate, mystifying and intricate, it entails complex mixture in most cases making it difficult to navigate through the muddle and untie. The Court examines the grounds upon which the Appeal is erected in order to find basis of concreting its decision on where the grounds of appeal stand, that is whether they are grounds of law, law and facts, or law and law alone. The Court must do a community reading of the grounds of appeal and their particulars of error, so doing will unveil the status of the ground of appeal. Some Appellants craft their grounds of appeal and assign to them inappropriate nomenclature "grounds of law" just to circumvent the requirements of section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria 1999 as amended on the mandatory requirement for leave to appeal where the grounds of appeal are of mixed law and facts.

This Court in *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) at pg. 484 and several other endless decisions of this Court set out the principles to apply in identifying where a particular ground of appeal resides. I carefully read the grounds and particulars of error in grounds 1 and 2 contained in the Notice of Appeal, they deal with issues of law and facts, ground one relates to the service of hearing notice for pre-trial conference. Ground two relates to proof of service. It is clear from reading grounds 1 and 2 and their respective particulars of error that they are grounds of mixed law and facts. A ground of appeal on facts could be cleverly crafted as a ground of law, so doing by the Appellant does not necessarily make it a ground of law while a ground of law could be designed as a ground of facts, so doing by the Appellant does not also make it a ground of facts. Upon conducting surgical and meticulous analysis of the two grounds, it is apparent that the two grounds are of mixed law and facts the Appellant cannot therefore engage in gymnastics and manoeuvres to conceal the identity of the two grounds to evade the requirement for leave to appeal, the grounds as they are remain deficient, incompetent and therefore invalid and remain incapable of activating the jurisdiction of this Court. The Appellant cannot make his way to this Court and file an appeal on grounds of mixed law and facts without obtaining prior leave of Court as required by section 233 (3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The grounds of appeal as filed are out and out deficient and incompetent and therefore liable to be struck out. Let me finally have recourse to the settled position of the law by citing our decision in *AL Majir v. Jalbait Ventures Nig. Ltd & Anor.* (2021) 1 - 2 S.C (Pt. 2) where this

Court held as follows and I quote:

> *"Where leave first sought and obtained is the sine qua non, under section 233 (2) and (3) of the Constitution of the Federal Republic of Nigeria, as amended for a valid or competent appeal, unless the leave was first sought and granted to the appellant to appeal, any appeal lodged or filed in defiance of the said mandatory provisions will be void and a nullity ab initio..."*

Again in *Maigoro v. Garba* (1999) 7 S.C. (Pt. 3) this Court per my law lord and brother EJIWUNMI, JSC emphasized on the consequence of default in obtaining prior leave of Court when he emphatically and in clear and unambiguous words said as follows:

> *"It is therefore clear that the court has no jurisdiction to entertain an appeal on a ground of fact or mixed law and facts, unless of course, leave has been obtained. This point has been emphasized in a number of recent decisions. It is enough to refer only to the following; Oluwole v. Lagos Development (1983) 5 S.C. 1 and J.B. Ogbechie & Ors. v. Gabriel Onochie & Ors (No 1.) (1986) 3 S.C. (Reprint 32)"*

Having said this much therefore I am bound to hold that, Respondents preliminary objection is richly meritorious and deserves to be and is hereby sustained.

Appellant's grounds of appeal are patently deficient and incompetent, they are accordingly struck out. The appeal is therefore struck out.

Parties shall bear their respective costs.

KEKERE-EKUN, JSC: The law is by now, quite well settled that failure to seek and obtain leave to file an appeal where leave is required renders the appeal incompetent and liable to be struck out. By Section 233(2) of the 1999 Constitution, as amended, an appeal to this court may only be filed as of right from decisions of the Court of Appeal, where the grounds are of law alone (sub-paragraph) 2(a) or in any of the circumstances set out in Sub-Section (2) (b) – (f). Any ground of appeal that does not fall within those parameters, requires the prior leave of this court or the court below. This is the requirement of Section 233(3).

My learned brother, Tijjani Abubakar, JSC has carefully scrutinized the grounds of appeal and their particulars in the lead Judgment. I agree with him that the two grounds in the Notice of Appeal filed on 24/2/2015 at pages 147-148 of the record together with their particulars are grounds of mixed law and fact, filed without leave.

The said notice of appeal is therefore incompetent and incapable of sustaining

the appeal before this court.

The appeal is accordingly struck out.

I abide by the order as to costs.

OKORO, JSC: My learned brother, Tijjani Abubakar, JSC accorded me the privilege of reading in draft the Lead Judgment just delivered and I totally agree with his reasons and conclusion that the appeal is incompetent.

The law is well settled that where leave is a precondition before an appellant can raise grounds containing mixed law and fact in his notice of appeal, such precondition must be satisfied otherwise that ground of appeal will be incompetent and liable to being-struck out. See: *Abubakar v. Dankwambo* (2015) 18 NWLR (Pt 1491) P. 213.

Indeed, this court has in a plethora of decided cases emphasized that grounds of law alone are appealable without leave. However, if the notice of appeal contains grounds of fact or mixed law and fact, the appellant must obtain leave of court. See *Obatoyinbo v. Oshatoba* (1996) 55 SCNJ 1 at 16; (1996) 5 NWLR (Pt. 450) 531; *Senator Hosea Etinlanwo v. Chief Olusola Oke* (2008) 16 NWLR (Pt. 1113) 357.

This court has also in several authorities laid down guiding principles for determining grounds of law, mixed law and facts and grounds of facts alone. In the case of *Ogbechie v. Onochie* (1986) 2 NWLLR (Pt. 23) 484, his Lordship Esho, JSC (of blessed memory) gave an insight on how to determine grounds of mixed law and fact as follows:

> ***"There is no doubt that it is always difficult to distinguish of ground of law from a ground of fact, but what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law to the facts already proved or admitted in which case, it would be question of law or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact..."***

In the instant case, a calm reading of the Appellant's grounds 1 and 2 already reproduced in the leading judgment would show clearly that they are grounds of mixed law and fact for which leave of court is a requisite pre-condition before they could be competently raised. Having failed to obtain leave before raising those grounds, the grounds are incompetent and accordingly struck out.

To this end, I also find merit in the preliminary objection raised by the Respondent challenging the competence of the appeal. It is hereby sustained. The two grounds

in the notice of appeal having been struck out there is nothing more to sustain the appeal. It is hereby struck out. I also make no order as to cost.

Appeal struck out.

ABOKI, JSC: I had the privilege of reading in draft, the judgment written by my Learned Brother Tijjani Abubakar, JSC and I agree with the reasoning contained therein and the conclusion arrived thereat.

The appeal, as shown in the Lead Judgment, is one the law requires the Appellant to seek leave of either the Court below or this Court before filing. The Record of Appeal clearly shows that Appellant did not obtain the required leave before its appeal. This failure goes to the root of the appeal and robs this Court of the jurisdiction to hear and determine the appeal.

See: Section 233(2) and (3) of the CFRN 1999, as amended.

In *Fasuyi & Ors. v. PDP & Ors.* (2017) LPELR 43462 (SC), this Court stated thus:

> *"It is a settled matter of law that an Appellant seeking to appeal against a decision of the Court of Appeal does so as of right only where the ground of appeal involves questions of law alone and when it involves a question of facts or mixed law and facts, the need for leave of Court is of the essence…"*

The consequence for not seeking leave where a ground of appeal is of mixed law and fact is fatal to the ground. Thus, an appeal to this Court cannot be entertained once the grounds are of facts or mixed law and fact and leave has not been asked for or obtained.

It is on account of this and the fuller reasons of in the Lead Judgment prepared by my learned brother, Tijjani Abubakar, JSC, that I also find this appeal to be incompetent and it is hereby struck out.

I abide by the Order as to cost.

SAULAWA, JSC: I concur with the reasoning postulated in the judgment just delivered by my learned brother, the Hon. Justice Tijjani Abubakar, JSC, to the conclusive that the instant appeal is incompetent.

Hence, having adopted the said reasoning and conclusion as mine I too here by dismiss the appeal for lack in competence.

Cases cited in the Judgment

Abraham v. Olorunfunmi (1991) 1 NWLR (Pt. 165) 53

Abubakar v. Dankwambo (2015) 18 NWLR (Pt 1491) 213
AL Majir v. Jalbait Ventures Nig. Ltd & Anor. (2021) 1 - 2 S.C (Pt. 2)
Chrome Air v. Fidelity Bank (2017) LPELR 43470 SC
Dairo v. UBN (2007) 16 NWLR (Pt. 1059) 99
Fasuyi & Ors. v. PDP & Ors. (2017) LPELR 43462 (SC)
Ifeajuna v. Ifeajuna (1999) 1 NWLR (Pt. 587) 492
J.B. Ogbechie & Ors. v. Gabriel Onochie & Ors (No 1.) (1986) 3 S.C. (Reprint 32)
Maigoro v. Garba (1999) 7 S.C. (Pt. 3)
Min. Pet. Resources v. Ekpo Shopping Line (2012) LPELR 3189 SC
Obatoyinbo v. Oshatoba (1996) 55 SCNJ 1 at 16; (1996) 5 NWLR (Pt. 450) 531
Ogbechie v. Onochie (1986) 2 NWLLR (Pt. 23) 484
Ojemen v. Momodu (1983) S.C 173
Oluwole v. Lagos Development (1983) 5 S.C. 1
Senator Hosea Etinlanwo v. Chief Olusola Oke (2008) 16 NWLR (Pt. 1113) 357
State v. Omoyele (2016) NWLR (Pt. 1059) 99
Ukpong v. Comm for Finance (2006) LPELR-3349 SC
Yaro v. Arewa Const. (2007) 6 SC (Pt. 2) 149

Statutes cited in the Judgment
Section 233 (2) and (3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)
Rules of Court referred to in the Judgment
Order 2 Rule 9 of the Supreme Court Rules, 1999

History:

HIGH COURT
High Court of Lagos State

COURT OF APPEAL (Lagos Division)
Thursday 23rd October, 2014

SUPREME COURT OF NIGERIA
Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC ***(Presided)***
John Inyang Okoro, JSC ***(Read the lead Judgment)***
Abdu Aboki, JSC
Ibrahim Mohammed Musa Saulawa, JSC
Tijjanni Abubakar, JSC

APPEARANCES:
Johnson Odianu, Esq., for the Appellant
A.M. Makinde SAN and O.S. Ishola for the Respondent

DIRECTOR GENERAL INDUSTRIAL TRAINING FUND v. NIGERDOCK NIGERIA PLC FZE; NIGERIA EXPORT PROCESSING ZONE AUTHORITY

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/176/2017
FRIDAY 17TH MARCH, 2023

(BADA; UMAR; SIRAJO, JJ.CA)

COMPANY LAW – Incorporation – the corporate identity of a Company is rooted in the name and the Registration number assigned to it upon incorporation.

COMPANY LAW – Corporate identity – the corporate identity of an existing company is not altered by merely upgrading from a private company to a public company or by altering the objects of existing company.

COMPANY LAW – Change of name and dissolution of a company – change ofname does not terminate the existence of a company – differentiated.

INTERNATIONAL TRADE – Free trade zones – organisations operating within the free trade zones are liable to make contributions for industrial training fund so long that the organisation requires approval for expatriate quota or utilizes customs services.

APPEAL – Grounds of appeal – procedure to objecting a ground of appeal – the objector to come by way of motion on notice to strike out.

APPEAL – Preliminary objection – when should be raised in an appeal – a preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal – basis of.

APPEAL – Cross-appeal – a respondent who wants a reversal of a decision of the lower court, or any conclusion of fact in the decision, shall appeal by way of a cross-appeal.

CIVIL PROCEDURE – Standard of proof in civil case – the standard of proof in a civil case is on the balance of convenience or balance of probability.

Facts:

The Appellant (Plaintiff) who is a federal government agency charged with the responsibility to provide, promote and encourage the acquisition of skills in the industry and commerce and to provide training for skills in management for

technical and entrepreneurial development, stated in their averment that the 1st Respondent (1st defendant), is a limited liability company registered with the Appellant as a contributor paying its contribution to the Appellant from 1989 up to 2006. On January 4, 2010, the Appellant wrote the 1st Respondent requesting payment of its contribution for the 2007-2009 periods. Again, on the 31st January 2012, the Appellant through its counsel wrote and explained the need for the 1st Respondent to pay its annual contribution. The 1st Respondent via a reply letter acknowledged its liability to pay its statutory contribution to the Appellant from the year 2011. The Appellant further wrote the 1st Respondent to request a meeting with the 1st Respondent to resolve grey areas to which the 1st Respondent replied that the managers of the SIMCO free zones company had advised it that it is not liable to pay the contribution being demanded from it by the Appellant. The Appellant stated that it then took up the issue with the 2nd Respondent by its requesting the 2nd Respondent (2nd Defendant) to instruct the 1st Respondent to pay its contribution, and the Minister for Industry, Trade and Investment clarified the position that the companies operating in the free trade zones are not liable to make contribution to the Appellant. The 1st Respondent stated that its operation does not require approval for expatriate quota and that as an enterprise that operates within the free zone it enjoys exemption from Federal, State and Local Governments' taxes, levies and rates. It stated that contrary to the Appellant's claim it is not a registered contributor with the Appellant.

The suit was heard on the merits and the learned trial judge of the Federal High Court (trial court), after construing the provisions of sections 6(1)-(3) of the Industrial Training Fund Act along with the provisions of sections 8 and 18(1) of the Nigeria Export Processing Zone Act LPN (2004) held that those liable to make contribution to industrial training fund are organizations public or private including companies situate in the Free trade zones which require approval for expatriate quota and/or utilizing customs services in matters of export and import. The trial court consequent upon its finding aforesaid dismissed the Appellant's claim.

Aggrieved by the decision of the trial court, the Appellant appealed to the Court of Appeal.

Held ***(Unanimously allowing the appeal):***

[1] ***Company Law – Incorporation – the corporate identity of a Company is rooted in the name and the Registration number assigned to it upon incorporation.***

It is trite that a company is brought into existence by incorporation pursuant to the relevant provisions of the Companies and Allied Maters Act and the corporate identity of the Company is rooted in the name and the Registration number assigned to it upon incorporation. The name with which the company is registered is peculiar to it and the law protects the

name such that registration of another company with a similar or identical name is prohibited. See Sections 30 and 41 of the Companies and Allied Matters Act, (CAMA) 2020; *Mustapha v. CAC* (2008) LPELR-3603(CA) (PP. 18-20 PARAS. C). **(P. 66 lines 13 - 20)**

[2] ***Company Law – Corporate identity – the corporate identity of an existing company is not altered by merely upgrading from a private company to a public company or by altering the objects of existing company.***

The corporate identity of an existing company is not altered by merely upgrading from a private company to a public company or by altering the objects of existing company unless the company changes its name, merges with another company or it is wound up or dissolved. And even where a company's name is changed the rights, obligations, and liabilities of the company are preserved and remain intact. See *SDV (Nig.) Ltd v. Ojo & Anor* (2016) LPELR-40323(CA) (PP. 8-9 PARAS. C). **(P. 67 lines 8 - 13)**

[3] ***Company Law – Change of name and dissolution of a company – change of name does not terminate the existence of a company – differentiated.***

A change of name is not synonymous with dissolution or winding up of the company which in effect means the total disintegration on termination of the existence of the company. In a change of name, only the identifiable description of the company changes while other basic elements of the company remain intact i.e., the life of the company is preserved. Rights and liabilities remain the same. CAMA acknowledged that for business purposes, a company may decide to change its name but in doing so it maintains everything about its existence' except the way it is called or identified. If a change of name can have the effect of total annihilation of a company, then it must have corresponding legal implications to that of a dead person. However, the law preserved the existence of a company when it changes its name. See *Spring Bank Plc v. ACB Int'l Bank Plc & Anor* (2016) LPELR 53014 CA (PP. 11-12 PARAS. E); *Sambawa Farms Ltd & Another v. Bank of Agriculture Ltd.* (2015) LPELR 25939 CA, *Nagarta Integrated Farms Ltd v. Nagoda & Ors* (2016) LPELR-40266(CA) (PP. 11 PARAS. A). **(P. 67 lines 24 - 37)**

[4] ***International Trade – Free trade zones – organisations operating within the free trade zones are liable to make contributions for industrial training fund so long that the organisation requires approval for expatriate quota or utilizes customs services.***

Organisations operating within the free trade zones are also liable to make contribution for industrial training fund provided it is shown that the organisation requires approval for expatriate quota or utilizes customs services in matters of import and export. Similarly, I had held in the earlier part of this judgment that section 6 (3) of the Industrial Training Fund (Amendment Act) 2011 creates an exception to the general provisions of sections 8 and 18(4) of the Nigeria Export Processing Zone Act, 2004, thereby rendering organisations operating within the free trade zones liable to make contribution for industrial training fund provided any of the two alternative conditions exists. **(P. 72 lines 35 - 43)**

[5] ***Appeal – Grounds of appeal – procedure to objecting a ground of appeal – the objector to come by way of motion on notice to strike out.***

…Where the aim of a Respondent to an appeal is to attack one or more of the grounds of appeal or issues in the appellant brief such that even if the attack is successful, the appeal will still proceed to hearing on the basis of grounds of appeal or issues not affected by the attack, a preliminary objection in such a situation is a non-starter as it is incompetent the appropriate procedure in such a situation is for the objector to come by way of motion on notice praying the court to strike out the grounds or issues considered to be afflicted with the defect complained of. See *Ajuwon & Ors v. Governor of Oyo State & Ors* (2021) LPELR 55339 SC. **(P. 62 lines 27 - 34)**

[6] ***Appeal – Preliminary objection – when should be raised in an appeal – a preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal – basis of.***

A preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal. The purport of preliminary objection is the termination or truncation of the appeal in limine. A Preliminary Objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal when there are other grounds to sustaining the appeal; which Purported Preliminary Objection is, therefore, not capable of truncating the hearing of the appeal. In such a situation, a preliminary objection is not the appropriate procedure to deploy against defective grounds of appeal when there are other grounds, not defective, which can sustain the hearing of the appeal. See *Ajuwon & Ors v. Governor of Oyo State & Ors* (2021) LPELR 55339 SC (PP. 4-5 PARAS. D); *Adejumo & Ors v. Oludayo Olawaiye* (2014) 12 NWLR (Pt. 1421).
(P. 74 lines 5 - 12)

[7] ***Appeal – Cross-appeal – a respondent who wants a reversal of a***

decision of the lower court, or any conclusion of fact in the decision, shall appeal by way of a cross-appeal.

Where a respondent wants a reversal of a decision, a part thereof, or any conclusion of fact in the decision, his proper procedure is by way of a cross-appeal. A cross-appeal does not strictly depend upon an appeal having been filed; any person who has had a judgment in his favour but seeks to reverse the judgment or part of it or any important finding' therein can file a cross-appeal without waiting to be served with a notice of appeal by the unsuccessful party. See *Arogundade v. Skye Bank* (2020) LPELR 52304 CA (PP. 23-25 PARAS. B); *Ageyaye v. Ogbogboyibo & Ors* (2014) LPELR 22610 CA, *Udotong v. Uno* (2019) LPELR 48166 CA; *Owoyele v. Mobil Producing, Nig.* (2020) LPELR 50352 CA. **(P. 72 lines 21 - 27)**

[8] ***Civil Procedure – Standard of proof in civil case – the standard of proof in a civil case is on the balance of convenience or balance of probability.***

…The standard of proof in a civil case is on the balance of convenience or balance of probability and except where a particular fact in issue borders on an allegation of crime or fraud, the burden of proof is discharged on the preponderance of evidence. The age-long judicial approach is to place the respective case of the parties on an imaginary scale to decide to which side does the scale of justice tilts. See *Owie v. Ighiwi* (2005) LPELR-2846(SC) (PP. 30 PARAS. B). **(P. 68 lines 16 - 21)**

UMAR, JCA (Delivering the lead Judgment): This is an appeal against the judgment of the Federal High Court, sitting in Lagos delivered by C.M.A. OLATO-REGUN, J. on the 7th October, 2014 wherein the trial court found that the Appellant failed to prove its entitlement to the reliefs sought against the Respondents and therefore dismissed the suit.

BRIEF STATEMENT OF FACTS

The Appellant commenced this suit by originating summons dated 19th December, 2014 wherein it prayed for the following reliefs:

a. A declaration that the 1st Defendant as an employer is liable to register and pay 1% of its annual payroll as statutory training contribution to the Plaintiff in accordance with Industrial Training Fund (Amendment) Act 2011.

b. A declaration that the 1st Defendant is liable to pay 5% penalty every month on any amount not paid on the prescribed date in accordance with Industrial Training Fund (Amendment) Act 2011.

c. A declaration that the 2nd Defendant as the authority of the Free Trade Zone is bound to direct the 1st Defendant to register and pay 1% of (sick) his annual payroll as training contribution to the Plaintiff.

d. An order that the 1st Defendant pay his statutory contribution to the Plaintiff from 2011-2013 in accordance with Industrial Training Fund (Amendment) Act 2011.

e. An order that the 1st Defendant pay 5% penalty every month from 2011-2013 on the amount due and payable for failure to pay his statutory training contribution on the prescribed date in accordance with Industrial Training Fund (Amendment) Act 2011.

f. An order directing the 2nd Defendant to ensure that the 1st Defendant registers and pays his 1% annual payroll as statutory contribution to the plaintiff and 5% penalty on the amount every month from 2011-2013.

The Appellant's case is that it is a federal government parastatal established under Decree 47 of 1971 as amended and charged with the responsibility to provide, promote and encourage the acquisition of skills in the industry and commerce and to provide training for skills in management for technical and entrepreneurial development with a view to generating a pool of indigenous trained manpower sufficient to meet the need of the private and public sectors of the economy. The Plaintiff stated that any employer with five employees and above or with annual turnover of ₦50 Million is mandated to register with it (plaintiff) and pay 1% of his annual payroll as training contribution to it (plaintiff) and that where an employer fails to register and make payment as and when due, such an employer is liable to pay 5% penalty every month on the amount due and unpaid. The Appellant stated that the 1st Respondent, as a limited liability company registered with the Appellant as a contributor paying its contribution to the Appellant from 1989 up to 2006.

On January 4, 2010, the Appellant wrote the 1st Respondent requesting for payment of its contribution for the 2007-2009 periods. Prior to the demand letter of 4th January, 2010, the Appellant had on the 10th April, 2007, paid the 1st Respondent the sum of ₦542,810 as training reimbursement for the year 2005. Again on the 31st January 2012, the Appellant through its counsel wrote and explained the need for the 1st Respondent to pay its annual contribution. The 1st Respondent via exhibit 'E', a reply to the Appellant's solicitor's letter admitted its liability to pay its statutory contribution to the Appellant from the year 2011. The Appellant further wrote the 1st Respondent to request for a meeting with the 1st Respondent to resolve grey areas to which the 1st Respondent vide exhibit 'G' replied that the managers of the STMCO free zones company had advised it that it is not liable

to pay the contribution being demanded from it by the Appellant.

The 1st Respondent attached correspondences by the SIMCO free zones company with the 2nd Respondent, being the regulatory agency in charge of free trade zones on the issue. SIMCO free zones company claimed that the 2nd Respondent had advised that companies operating in the free trade zones are not liable to pay any contribution to the Appellant. The Appellant stated that it then took up the issue with the 2nd Respondent by its solicitors' letter exhibit 'H' requesting the 2nd Respondent to instruct the 1st Respondent to pay its contribution.

The Appellant attached to exhibit 'H' a copy of a correspondence from the Minister for Industry, Trade and Investment by which the minister clarified the position that the companies operating in the free trade zones are not liable to make contribution to the Appellant.

Learned Counsel for the Appellant relied on the combined provision of sections 6 (1) and 6 (3) of the Industrial Training Fund (Amendment) Act, 2011 to submit and urge the Lower Court to hold that the 1st Respondent is liable to make contribution being demanded from it.

The case of the 1st Respondent as borne out of its counter-affidavit and is that the 1st Respondent is not a public liability company as alleged by the Appellant but rather it is a free zone enterprise dealing in oil and gas, construction and marine services including offshore and pressure vessel fabrication, ship building and repair and was registered by the 2nd Respondent on the Tel July, 2005.

The 1st Respondent stated that its operation does not require approval for expatriate quota and that as an enterprise that operates within the free zone it enjoys exemption from Federal, State and Local Governments' taxes, levies and rates. It stated that contrary to the Appellant's claim it is not a registered contributor with the Appellant. That exhibit 'A' relied on by the Appellant as an evidence of registration with the Appellant is in the name of Nigerdock Nigeria Limited and ditto for exhibit 'B' and 'C' which are evidence of reimbursement of contribution in the name of Nigerdock Nigeria Plc and that the 1st Respondent is different from both Nigerdock Nigeria Limited and Nigerdock Nigeria Plc. That the first demand for contribution made from it by the Appellant was the correspondence it received from the Appellant's solicitors which is exhibit 'D' a letter dated the 31st January, 2012 and that it responded by acknowledging the Appellant's solicitors letter via its letter of 7th February, 2012. The 1st Respondent said that *it* later sought clarifications from the SIMCO, the managers, of Snake Island integrated Free Zone under which it operates on the propriety of making the contribution requested by the Appellant and that it communicated the response of the SIMCO to the Appellant.

Learned Counsel for the 1st Respondent, in addition to the technical objection to the competence of the originating summons and certain paragraphs of the

affidavit in support of same, contended that the suit does not disclose any reasonable cause of action against the 1st Respondent and that the 1st Respondent as an enterprise that operates in the free trade zones is exempted, pursuant to sections 8 and 18(1) of the Nigeria Export Processing Zone Act LFN (2004) from making contribution 'to'ii1dustrial training fund or from paying any tax, levy or duty to any government agency.

On its part, the 2nd Respondent opposed the reliefs sought *by* the Appellant in that the 1st Respondent is operating within the free trade zone and that companies or businesses that operate within the free trade zones enjoy certain incentives pursuant to sections 8 and 18(1) of the Nigeria Export Processing Zone Act LPN (2004), certain provisions of the Snake Island Integrated Free Zone Regulations 2012 and Nigeria Export Processing Zones Authority Investment Procedure and Operational Guidelines for Free Zones, 2004. The 2nd Respondent further contended that the 1st Respondent is not bound by the provisions of section 6(1) & (3) of the Industrial Training Fund Act which the Appellant relies on in demanding the payment of contribution from the 1st Respondent.

In his judgment, the learned trial judge, after construing the provisions of sections 6(1)-(3) of the Industrial Training Fund Act along with the provisions of sections 8 and 18(1) of the Nigeria Export Processing Zone Act LPN (2004) held that those liable to make contribution to industrial training fund are organizations public or private including companies situate in the Free trade zones which require approval for expatriate quota and/or utilizing customs services in matters of export and import. The trial court consequent upon its finding aforesaid dismissed the plaintiff's claim.

Aggrieved by this decision, the Appellant invoked the appellate jurisdiction of this court vide a Notice of Appeal dated and filed on 26th December, 2016. The said Notice of Appeal containing four grounds can be gleaned at pages 247 to 253 of the record of appeal.

In line with the rules and practice of this court, parties filed and exchanged their respective briefs. The Appellant's brief is dated and filed on the 27th of March 2017. The Appellant's Reply Brief is also dated and filed on the 7th of November, 2017. For the determination of the instant appeal, the Appellant's counsel formulated four issues as follows:

1. "Whether an averment in an affidavit which was not denied needs any further proof?

2. Whether the change of name or status of the 1st Respondent from private limited liability company to public limited liability company and subsequently to free zone enterprise exonerates the 1st Respondent from any liabilities incurred by 1st Respondent

before or after the change of name or status.

3. Whether the learned trial judge was right in not considering the admission of liability made by the 1st (sic) Appellant as per their letter of February, 2012 (exhibit 'E').

4. Whether it is mandatory that the issue for determination has to be stated first before the relief sought in an originating summons.

The 1st Respondent's brief of argument is dated and filed on the 26th of October 2017 wherein learned counsel raised a preliminary objection to the competence of ground 1 in the Appellant's notice of Appeal and the issue formulated therefrom, before distilling a sole issue for determination of the appeal thus,

"Whether the 1st Respondent as a Free Zone Enterprise, is obliged to pay training contribution pursuant to the Industrial Training Fund (Amendment Act) 2011, Nigeria Export Processing Zone Act, 2004 and Snake Island Integrated Free Zone 2012 Regulations?

COUNSELS' ARGUMENTS AND SUBMISSIONS

Arguing issue no.1, learned counsel for the Appellant noted that the averments in paragraph 6 of the affidavit in support of the appellant's originating summons to the effect that *'the 1st Appellant engages in import and export in carrying out its activities'* was not specifically denied in the counter-affidavit of the 1st Respondent. Counsel also 'noted that while the 1st Respondent denied in paragraph 5 of its counter-affidavit that it required expatriate quota which is the first condition under section 6 (3) of the Industrial, Training Fund (Amendment Act) 2011, the 1st Respondent did not specifically deny that it utilizes custom services for export and import. That despite the lack of specific denial by the 1st Appellant, the lower court, still held that the Appellant did not show any evidence that the 1st Respondent utilizes custom services in matters of export and import so as to bring it within the category of free trade zone companies liable to pay industrial training contribution pursuant to section 6 (3) of the Industrial Training Fund (Amendment Act) 2011. Counsel contends that the 1st Respondent cannot engage in import and export without utilizing custom services. Counsel submits that the failure of the 1st Respondent to specifically deny that it utilizes custom services is deemed to be an admission and that fact admitted needs no further proof. Reliance was placed on *Yaradua & 9 Ors v. Yandoma & Ors* (2014) 12 S.C. (Pt. 111) 64 and *Efet v. INEC* (2011) 1-2 SC (Pt. 111) 61 @85. Counsel urged this court to hold that the 1st Respondent is liable to register and pay its industrial training fund to the Appellant as the 1st Respondent utilizes custom services in import and export.

On issue 2, counsel submits that the 1st Respondent has registered with the Appellant as Nigerdock *Nig.* Ltd via exhibit 'A' and the fact of subsequent re-reg-

istration of the 1st respondent as a Public Limited Liability Company under the name Nigerdock Nig. Plc or as a Free Zone Enterprise, under the name Nigerdock Nig., Plc FZE does not relief the 1st Respondent of liability incurred either before or after the change of name or status. Counsel posits that all three names Nigerdock Nig. Ltd, Nigerdock Nig. Plc. and Nigerdock Nig. Plc FZE belongs to the same company which is the 1st Respondent. Relying on sections 31 and 50 of the Companies And Allied Matters Act, counsel submits that exhibits 'A', 'B' and 'C' all refer to the 1st Respondent contrary to the finding of the lower court that those exhibits do not support the case of the appellant as those companies are different from the 1st Respondent which by 3rd July 2005 changed its corporate entity by registering under the Snake Island Integrated Free Zone, Apapa, Lagos.

Counsel urged this court to hold that exhibits 'A', 'B' and 'C' were for the 1st Respondent and that the 1st Respondent is liable to pay 1% of her annual payroll as training contribution to the Appellant and 5% as penalty for failure to pay as and when due pursuant to section 9 of the Industrial Training Fund (Amendment Act) 2011.

Counsel submits on issue no. 3 that the 1st Respondent by exhibit 'E' its letter dated 7th February 2012 admitted liability to pay industrial training contribution because the 1st Respondent is aware that it engages in import and export and utilizes custom services as provided in section 6 (3) of the Industrial Training Fund (Amendment Act) 2011. That the 1st Respondent is estopped from denying the admission of liability in exhibit 'E', Relying on sections 20, 21 (1) and 23 of the Evidence Act, 2011, counsel submits that the learned trial judge erred in not giving judgment to the Appellant against the 1st Respondent based *on* the letter's admission.

On issue no. 4 bordering on the learned trial judge's commentary on the defect in the originating summons by which the Appellant commenced the suit, counsel submits that contrary to the position of the trial judge, it is not mandatory for question for determination to be placed before the court and the reliefs though must flow from the issues raised but need not come after the issues. That the format used by the appellant in preparing the originating summons is in line with FORM 3 pursuant to Order 3 Rule 9 of the applicable rules of the lower court, therefore the originating summons is not defective.

1ST RESPONDENT'S PRELIMINARY OBJECTION

Before delving into the analysis of the sole issue distilled by counsel for the Respondent, *it is* imperative to state that the Respondent raised a preliminary objection challenging the competence of ground one of the Appellant' Notice of Appeal, issue no.1 distilled from the said ground as well as issue no. 3 of the Appellant's Brief of Argument.
The substance of the objection is that the said ground one did not arise from

the judgment of the lower court and therefore both ground one and issue No. 1 formulated from it are incompetent and liable to be struck out. On issue no. 3 of the Appellant's brief, counsel submits that the said issue cannot be tied to any ground of appeal of the Appellant and is therefore equally incompetent and ought to be struck out counsel referred the court to the cases of *Okafor v. Abumofuani* (2016) All FWLR (Pt. 855) 1 at 19; *Cooperative And Commercial Bank Plc v. Ekperi* (2007) All FWLR (Pt. 355) 412, *Bolanle v. Access Bank* (2016) All FWLR (Pt. 831) 1405 at 1416 among others.

In response to the preliminary objection, learned counsel to the Appellant in his Reply brief contends that the 1st Respondent's counsel's submission in his preliminary objection that ground one of the Notice of Appeal did not arise from the judgment of the trial court is wrong as the lower court in his judgment at page 227 of the Record of Appeal made a finding that he has no evidence before him to establish that the 1st Respondent required and sought approval for expatriate quota and utilized custom services in matters of import, and export. As regards issue no.3 in the Appellant's brief of argument, Appellant's counsel submits that the said issue no.3 was distilled from ground 4 of the Appellant's' Notice of Appeal, counsel therefore urged this court to dismiss the preliminary objection.

RESOLUTION OF PRELIMINARY OBJECTION

It is elementary that preliminary objection in an appeal must first be disposed of before the substantive appeal. It is logically so because the intent of a preliminary objector is to terminate an appeal in *limine.* Therefore, the success of a preliminary objection obviates the need to consider the substantive appeal at all. However, where the aim of a Respondent to an appeal is to attack one or more of the grounds of appeal or issues in the appellant brief such that even if the attack is successful, the appeal will still proceed to hearing on the basis of grounds of appeal or issues not affected by the attack, a preliminary objection in such a situation is a non-starter as It is incompetent the appropriate procedure in such a situation is for the objector to come by way of motion on notice praying the court to strike out the grounds or issues considered to be afflicted with the defect complained of EKO, J.S.C (rtd.) in *Ajuwon & Ors v. Governor of Oyo State & Ors* (2021) LPELR 55339 SC (PP. 4-5 PARAS. D) Stated the law thus:

> **"A preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal. The purport of preliminary objection is the termination or truncation of the appeal in limine. A Preliminary Objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal when there are other grounds to sustaining the appeal; which Purported Preliminary Objection is, therefore, not capable of truncating the hearing of the appeal. In such a situation, a preliminary objection is not the appropriate procedure to deploy against defective grounds**

of appeal when there are other grounds, not defective, which can sustain the hearing of the appeal: *Adejumo & Ors v. Oludayo Olawaiye* (2014) 12 NWLR (Pt. 1421) 252 (SC); (2014) LPELR-22997 (SC)."

In his contribution to the lead judgment of Eko JSC, SAULAWA, JSC (Pp. 54-55, paras. F-E) said:

"The law is well settled beyond per adventure, that the essence of preliminary objection is to challenge the competence of an appeal in its entirety. Thus, once a preliminary objection is upheld, the appeal is liable, to be truncated and struck out in limine.

Contrariwise, however, once there are other grounds that can conveniently sustain the appeal, a preliminary objection ought not be filed. Instead, a notice of motion seeking to strike out the apparently defective grounds need to be filed. See *SPDC v. Amadi* (2011) 6 SCN 183 @ per Rhodes Vivour, JSC @ 196. In *Dada v. Dosunmu* (2006) 19 NWLR (Pt. 1010) 134; (2006) LPELR 909 (SC), this Court aptly reiterated the trite fundamental doctrine: Failure to file a motion on notice as required by the rules of Court affects the competence of the objection' as raised in the respondent's brief and as such, counsel to the appellant had no obligation to file a reply thereto the said objection being incompetent. Rules of Court are meant to be obeyed so as to ensure that justice is done to the parties and the Court is saddled with the responsibility of administering same. Per Onnoghen, JSC (as he then was) @ 17 paragraphs E-F."

Similarly, this court in *Omatek Computer Ltd v. FBN Ltd* (2021) LPELR 56812 CA (Pp. 7-9 paras. E-E) Per LAMIDO, J.C.A held:

"The Appellant's two other grounds i.e. 1 and 3 are not attacked in the Preliminary Objection. Learned Counsel for the Appellant argued that in this type of situation, filling a Preliminary Objection is not the appropriate procedure since the aim of a Preliminary Objection is to terminate the appeal in limine and in this appeal, Grounds 1 and 3 are not attacked by the Respondent. In *General Electric Co. v. Akande* (2011) NSCQR 611, the Supreme Court held that:

"If I may add to the above; whereas in this appeal the Preliminary Objection was filed against some grounds of appeal that can sustain the appeal, a Preliminary Objection was inappropriate. The Respondent ought to have filed a motion on notice since the Preliminary Objection if successful would not have terminated the hearing of the appeal as there were other grounds of appeal to sustain the appeal. Preliminary Objections are only tiled against the hearing of an appeal and not against one or more grounds of appeal which

cannot stop the Court from hearing the appeal".

Also in *Adejumo v. Olawaiye* (2014) 12 NWLR (Pt. 1421) 252 AT 265; Rhodes-Vivour, JSC held that: **"A Preliminary Objection should only be filed against the hearing of an appeal and not against the one or more grounds of appeal which are not capable of disturbing the hearing of the appeal. The purpose of a Preliminary Objection is to convince the Court that the hearing of the appeal comes to an end if found to be correct. If sustained, a Preliminary Objection terminates the hearing of an appeal. Where a Preliminary Objection would not be the appropriate process to object or show to the Court defects in processes before it, a motion on notice filed complaining about a few grounds or defects would suffice". See also *Akeredolu & Anor. v. Mimiko & Ors (Supra)* and *Ezeofor v. Honey King Media Ltd.* (2018) LPELR 44558.**

Now, in the light of the authorities cited above, the Preliminary Objection filed by the Respondent, same having not been raised against the hearing of the appeal, but solely against the competence of Ground 2 on the notice of appeal out of several others, is inappropriate for the simple reasoning that upholding same cannot terminate the appeal in limine in view of the existence of two other grounds not under any challenge. What, the Respondent ought to do in the circumstances is to file a motion on notice to challenge the competence of Ground 2. Having not done that, he cannot validly challenge Ground 2 on a Preliminary Objection. The said objection is incompetent and it is accordingly dismissed." See also *SPDC v. Amadi* (2011) LPELR 3204 SC; *Zenith Bank Plc v. John & Ors.* (2015) LPELR 24315 SC; *NJC v. Agumagu* (2015) LPELR 24503 CA; *Nwosu v. PDP* (2018) LPELR 44386 SC; *Fecond Network Ltd. v. Okolo & Ors.* (2018) LPELR 4685 CA.

Now, the grouse of the 1st Respondent vide its preliminary objection in this appeal is in respect of ground one only out of the four grounds contained in the Appellant's Notice of Appeal and issue not distilled from the said ground as well as issue no. 3 distilled in the Appellant's brief of Argument, thereby leaving grounds 2, 3, and 4 of the Appellant's Notice of Appeal as well as issues nos. 2 and 4 distilled in the Appellant's brief intact. Standing on the pedestal of afore-stated plethora of authorities, I find the 1st Respondent's Preliminary Objection in this context incompetent, and it is accordingly struck out.

The 1st Respondent's counsel proceeded to argue the sale issue which he formulated as follows:

> **"Whether the 1st Respondent as a Free Zone Entity is obliged to pay training contribution pursuant to the provisions of the Industrial Training Fund (Amendment) Act 2011, the Nigeria Export Processing Zone Act; 2004 and the Snake Island Integrated Free Zone Regulations 2012?**

In arguing the sole issue, learned counsel dwelled on the objective of the free zone and referred the court to the provisions of sections 8 and 18 (1) of the Nigeria Export Processing Zone Act 2004 (NEPZA Act) which exempt enterprises operating within Free Zone from all Federal, State and local Government taxes, levies and rates. Counsel submits that literal rule of interpretation ought to be applied to the afore-stated provisions and by so doing, the effect of the provisions is that all enterprises operating within the free trade zone shall not be obliged under any legislative enactment to pay taxes, levies or duties. Counsel posits that for any entity within the free trade zone to be obligated to pay taxes, levies, rates or duties, there must be a direct abolition of the provisions of sections 8 and 18(4) of the Nigeria Export Processing Zone Act, 2004, The court was referred to the case of *A.T. Limited v. A.D.H. Limited* (2007) 15 NWLR (Pt. 1056) 118.

It was further submitted that for a company operating within the free trade zone to pay industrial training contribution pursuant to sections 6 (1) & (3) of the Industrial Training Fund (Amendment) Act, such a company must require approval for expatriate quota and since the 1st Respondent does not require expatriate quota, the 1st Respondent *is* not under any obligation to pay training contribution being demanded by the Appellant from the 1st Respondent.

In response to the Appellant's submission on Issue no. 1 of the Appellant's brief that the 1st Respondent is deemed in law to have admitted that it utilizes customs in matter of export and import by failure of the 1st Respondent to specifically deny the averment in paragraph 6 of the affidavit in support of the Appellant's originating summons, learned counsel for the Respondent contends that there is nowhere in paragraph 6, the Appellant states that the 1st Respondent utilizes custom services and therefore the for Respondent has no basis to have countered that fact in its counter-affidavit.

On the issue of alleged admission of liability to pay training fund by the 1st Respondent via exhibit 'E', counsel contends that exhibit 'E' was not an admission but was written before the 1st Respondent sought clarification from IMCO and that upon the clarification by SIMCO that the 1st Respondent is not liable to pay training fund, the 1st Respondent wrote Exhibit 'G' in which the 1st Respondent categorically denied liability to pay any training contribution to the Appellant. Counsel submits, in the alternative, that even if exhibit 'E' amounts to an admission, the 1st Respondent is not bound by such an admission in view of the clear provision of the extant law as the law is settled that parties cannot enter into an agreement outside the provision of the statute. Reliance was placed on *Raji v. Unilorin* (2007) 15 NWLR (Pt. 1057) PG. 259; *Olly v. Tunji & Ors* (2012) LPELR 791 CA.

RESOLUTION OF THE SUBSTANTIVE APPEAL

Upon a perusal of the briefs of the parties and. the record of appeal transmitted to this court, I am of the view that this appeal can be disposed of by resolution

of the following issues:

i. Whether the change of name or status from Nigerdock Nig. Ltd to Nigerdock Nig. Plc and subsequently to Nigerdock Nig. Plc FZE alters the corporate identity of the 1st Respondent and relieves it of liabilities incurred before or after the change of name or status?

ii. Whether having regards to the totality of the evidence before the court, the court below was right to have held that the Appellant did not prove its case and thereby dismissing the suit?

It is trite that a company is brought into existence by incorporation pursuant to the relevant provisions of the Companies And Allied Maters Act and the corporate identity of the Company is rooted in the name and the Registration number assigned to it upon incorporation. The name with which the company is registered is peculiar to it and the law protects the name such that registration of another company with a similar or identical name is prohibited. See sections 30 and 41 of the Companies And Allied Matters Act, (CAMA) 2020, PETER-ODILI, J.C.A as he then was in *Mustapha v. CAC* (2008) LPELR-3603(CA) (PP. 18-20 PARAS. C) remarked thus:

> "It is therefore necessary to recast the relevant part of the Companies and Allied Matters Act LFN 1990 and that Section is 30(1) of CAMA. "Section 30(1): No company shall be registered under this Act by a name which: (a) Is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive, except where the company in existence is in the cause of being dissolved and signifies its consent in such manner as the Commission requires; or……
>
> Bearing the above provision of Section 30(1) of the Companies and Allied Matters Act and specifically Section 30(1) (a) in mind, it is clearly less than the truth to say that the proposed names viz: Ayida Investment (Nigeria) Limited, A.A. Concerns Limited and Blue Sea Resources Limited do not closely resemble the following names of companies already in existence which are Ayida Ventures Nigeria Limited, A.A. Associates Limited, Blue Sea Resources Limited registered properly on their specific dates. From the visual effect or the hearing of the sound of the names would clearly lead to confusion as to the relationship between the proposed respective names of companies and that already in existence. It is this confusion, misleading situation and possible mischief that the lawmakers had through Section 30(1) (a) of CAMA set out to prevent. From what is on ground nothing has been provided to debunk the fear of the Respondent which any onlooker or hearer would see or discern and so the Respondent was

> in the right and this Court sees nothing to change the sound reasoning and decision of the Respondent, affirmed by the Court below. I refer to *Niger Chemists Limited v. Nigeria Chemists & Anor* (1961) All NLR page 180; *Amasike v. Registrar Federal Corporate Affairs Commission* (2006) 3 NWLR (Pt. 968) 462." See also *Maersk (Nig.) Ltd & Anor v. Maersk (Nig.) Ltd & Anor* (2017) LPELR-43578(CA).

The corporate identity of an existing company is not altered by merely upgrading from a private company to a public company or by altering the objects of existing company unless the company changes its name, merges with another company or it is wound up or dissolved. And even where a company's name is changed the rights, obligations, and liabilities of the company are preserved and remain intact. In *SDV (Nig.) Ltd v. Ojo & Anor* (2016) LPELR-40323(CA) (PP. 8-9 PARAS. C), PER NIMPAR, J.C.A held thus:

> **"Section 31(6) of the Companies and Allied Matters Act (CAMA) provides thus: "The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced against it or by it in its former name may be continued or commenced against it in its new name."**

The quotation above preserves the rights and obligations of a company that has changed its name. A change of name is not synonymous with dissolution or winding up of the company which in effect means the total disintegration on termination of the existence of the company. In a change of name, only the identifiable description of the company changes while other basic elements of the company remain intact i.e. the life of the company is preserved. Rights and liabilities remain the same. CAMA acknowledged that for business purposes, a company may decide to change its name but in doing so it maintains everything about its existence' except the way it is called or identified. If a change of name can have the effect of total annihilation of a company, then it must have corresponding legal implications to that of a dead person. However, the law preserved the existence of a company when it changes its name. "See also *Spring Bank Plc v. ACB Int'l Bank Plc & Anor* (2016) LPELR 53014 CA (PP. 11-12 PARAS. E); *Sambawa Farms Ltd & Another v. Bank of Agriculture Ltd.* (2015) LPELR 25939 CA, *Nagarta Integrated Farms Ltd v. Nagoda & Ors* (2016) LPELR-40266(CA) (PP. 11 PARAS. A).

In the light of the foregoing, it is crystal clear that the change of name by the 1st Respondent from Nigerdock Nig. Ltd to Nigerdock Nig. Plc and subsequently to Nigerdock Nig. Plc FZE does not in any way alter the corporate identity of the 1st Respondent as all the names refer to the 1st Respondent neither does it relieve the 1st Respondent of any obligation or liability incurred before or after the change of name. It is instructive to note that exhibit C, a letter dated the 10th April 2007 addressed to Niger Dock (Nig.) Plc was replied vide exhibit C1 which was signed

by one Olayode Ojengbede, Manager, Legal on behalf of Nigerdock Nigeria Plc FZE. Invariably, the 1st Respondent had treated 'Niger Dock (Nig.) Plc as the same entity with 'Nigerdock Nigeria Plc-FZE' in the course of its interaction with the Appellant.

Against this background, contrary to the finding of the learned trial judge in his judgment at page 227 of the Record of Appeal, mere registration under the Free Zone does not change the corporate entity of the 1st Respondent. I hold that exhibits A, B and C support the case of the Appellant; the said exhibits do not refer to any other company but the 1st Respondent. I, therefore, resolve this issue in favour of the Appellant and against the Respondents.

Having held that exhibits A, B and C support the case of the Appellant, I will now proceed to the second issue which is whether in the light of the evidence before the court the lower court was right to have dismissed the Appellant's case on the ground that the Appellant did not prove same... It is settled law that the standard of proof in a civil case is on the balance of convenience or balance of probability and except where a particular fact in issue borders on an allegation of crime or fraud, the burden of proof is discharged on the preponderance of evidence. The age-long judicial approach is to place the respective case of the parties on an imaginary scale to decide to which side does the scale of justice tilts. NIKI TOBI, JSC shed light on this procedure in *Owie v. Ighiwi* (2005) LPELR-2846(SC) (PP. 30 PARAS. B). Thus

> **"In determining either balance of probability or preponderance of evidence, the trial judge is involved in some weighing by resorting to the imaginary scale of justice adumbrated in *Mogaji v. Odofin* (1978) 4 SC 91. In arriving at the balance of probability or the preponderance of evidence, the trial Judge needs not search for an exact mathematical figure in the weighing machine because there is in fact no such machine and therefore, no figure; talk less of mathematical exactness: On the contrary, the trial Judge relies on his judicial and judicious mind to arrive at when the imaginary scale preponderates and that is the standard, though oscillatory and at times nervous."**

In the instant appeal, the Appellant's case before the Lower Court is simply that the 1st Respondent is liable to pay training contribution to the Appellant pursuant to the combined provisions of section 6 (1) & (3) of the Industrial Training Fund (Amendment Act) 2011. While the Respondents contended that the 1st Respondent being a company operating within the free trade zone, is exempted from paying the training contribution to the Appellant by virtue of the combined provisions of sections 8 and 18(4) of the Nigeria Export Processing Zone Act, 2004. Issues were therefore joined basically on whether all companies operating within the free trade zone including the 1st Respondent are exempted from paying training contributions or some of the companies are not exempted and are therefore liable

within the context of the amendment in section 6 (3) of the Industrial Training Fund (Amendment Act) 2011. While the trial court's finding that any company operating within the free trade zones is also liable to pay training contributions if the company requires approval for expatriate quota or the company utilizes customs services in matters of import and export cannot be faulted, the same thing cannot be said of the court's finding that the Appellant failed to prove either of the two conditions for liability in respect of the 1st Respondent.

This conclusion flows from a critical assessment of the affidavit evidence and exhibits attached on both sides. First, the Appellant deposed in paragraph 6 of the affidavit in support of the originating summons that the 1st Respondent engages in import and export In carrying out its activities. Other than saying paragraph 6 is not true, there is no categorical denial of the averments contained in the said paragraph 6 of the Appellant's affidavit that the 1st Respondent engages in import and export in carrying out its activities in any paragraph of the 1st Respondent's Counter-Affidavit.

Learned counsel for the 1st Respondent had argued that there was no need for a counter-deposition to paragraph 6 because the Appellant did not depose to the fact that the 1st Respondent utilizes custom services in matters of import and export. It will however be observed that in paragraph 5(d) of its Counter-Affidavit, the 1st Respondent deposed categorically that it does not require approval for expatriate quota when there is even no paragraph of the affidavit in support that says the 1st Respondent requires approval for expatriate quota.

In my view, I consider the averment contained in paragraph 6 of the Appellant's affidavit, that the 1st Respondent engages in import and export in carrying out its activities as unchallenged. The law is settled that denial whether in pleading or affidavit must be categorical. Evasive denial is tantamount to no denial at all.

This court in *Polaris Bank Ltd v. Ohms Sources & Systems Ltd* (2021) LPELR-54782(CA) (Pp. 20-21 paras. C) MUSTAPHA, J.C.A. espoused the position thus:

> "The position of the law is that, when a party denies an allegation he must not do so evasively, but must answer the substance of the allegation and not the terms in which it is made. It is trite law that when as a result of exchange of pleadings by parties to a case, a material fact is affirmed by one of the parties but denied by the other, the question thus raised between the parties is an issue of fact, and to raise such issue of fact there must be a proper traverse see: *Akintola v. Solano* (1986) 2 NWLR (Pt. 24) PG. 598. A proper traverse must be a specific denial or a specific non-admission; see *Odiba v. Muemue* (1999) 6 SCNJ 245 AT 253;

The corollary of the foregoing is that the 1st Respondent is deemed to have admitted that it engages in import and export in carrying out its activities and if

that is so then it is established that the 1st Respondent utilises customs services in matters of import and export which is one of the two conditions that renders a company operating within the free trade zones liable to pay industrial training contribution. There is no Import and export activities that can be done without the involvement of customs.

Secondly, the Appellant also attached exhibit 'C' by which the Appellant sought to prove that the 1st Respondent benefited from training contribution reimbursement in the year 2007. In an attempt to debunk this allegation, the 1st Respondent in paragraph 5(m) of its counter-affidavit deposed that the ₦542,810 was paid to Nigerdock Nigeria Plc a separate entity from the 1st Respondent.

As I have pointed out above in any treatment of issue No.1, exhibit C1 exposes the lie in this averment as the acknowledgement of the payment of the reimbursement was signed in the name of Nigerdock Nigeria Plc. FZE, the 1st Respondent. How can the 1st Respondent deny that Nigerdock Nigeria Plc. is a different entity from Nigerdock Nigeria Plc. FZE when the latter had responded to a letter addressed to the former as shown in exhibit C1? The 1st Respondent at this stage is estopped from denying that Nigerdock Nigeria Plc. FZE is not the same as Nigerdock Nigeria Plc. In the light of the foregoing, I hold that the 1st Respondent's contention that. it has become a free trade zone enterprise in the year 2005 and therefore not liable to pay training contribution is untenable in the face of exhibit C1 which proved that it received the sum of ₦542,810 as training contribution reimbursement in the year, 2007. It is only a company or an organisation that makes a contribution to the fund that is entitled to reimbursement. It is my considered view that the proof that the 1st Respondent received training contribution reimbursement in the year 2007 alone is sufficient to hold the 1st Respondent liable to make contribution to industrial training fund.

Thirdly, by exhibit 'E' a response to exhibit 'D' demand letter from the Appellant's solicitors, the 1st Respondent admitted liability to contribute to training fund by virtue of the 2011 amendment. A calm reading of exhibit 'E' will show that the 1st Respondent was convinced that from the 2011 amendment, it has become liable to make contribution and the 1st Respondent was in fact willing to cooperate with the Appellant. To put it beyond doubt that the 1st Respondent was aware of its liability to make contribution, the 1st Respondent pointed out in the last paragraph of exhibit 'E' that it became liable only from the end of the year 2011.

This is because it was the amendment to the Industrial Training Fund - Act in 2011 particularly section 6(3) thereof that expressly includes organization operating within free trade zones among the organisations that are liable provided either of the two conditions i.e. requiring approval for expatriate quota or utilizing custom services in matters of export and import, exists. If exhibit 'E' is not an admission as misguidedly submitted by the 1st Respondent's counsel what else would amount to an admission? In the same vein, I find the 1st Respondent's counsel's

alternative submission that the 1st Respondent is not bound by that admission as it is contrary to the provisions of sections 8 and 18 (4) of the Nigeria Export Processing Zone Act, 2004 misconceived. Section 6(3) of the Industrial Training Fund (Amendment Act) 2011 creates an exception to the general provisions of sections 8 and 18(4) of the Nigeria Export Processing Zone Act, 2004. I, therefore, hold that the 1st Respondent is bound by its admission of liability in exhibit 'E'.

It is unfortunate that the 2nd Respondent, a government agency which is also saddled with the responsibility of facilitating the collection of the training fund under the Act turned out to be the obstacle by emboldening or discouraging the 1st Respondent from cooperating with the Appellant a sister government agency in the discharge of its statutory duty.

From the above analysis, I hold that the Appellant, on the preponderance of evidence, has proved its case. I answer the above question in the negative, I resolve issue no. 2 against the Respondents.

RESPONDENT'S NOTICE

The 1st Respondent filed a Respondent's Notice dated the 26th October 2017. In his brief counsel also proffered argument in support of Respondent's Notice. Counsel submits that besides the finding of the trial court that the 1st Respondent is not liable to pay training contribution to the Appellant on the ground that the Appellant failed to show that the 1st Respondent requires approval for expatriate quota or utilizes custom in matters of export and import, the 1st Respondent is also exempted from such contribution by virtue of the provisions of sections 8 and 18 (1) of the Nigeria Export Processing Zone Act.

Learned counsel urged this court to dismiss this appeal, in addition to the finding of the lower court, on the ground that the 1st Respondent is not liable to make contribution to the Appellant pursuant to the provision of sections 8 and 18 (1) of the Nigeria Export Processing Zone Act.

Having critically examined the Respondent's Notice in the context of the lower court's judgment, I observe that the Respondent's Notice is premised on the provision of sections 8 and 18 (1) of the Nigeria Export Processing Zone Act. In other words, the 1st Respondent is contending that based on the aforesaid provisions, the 1st Respondent is not liable to make any training contribution to the Appellant. However, it is worthy of note that the Respondents' case before the lower court rested on the same provisions.

The argument canvased before the lower court by the Respondents that the 1st Respondent is not liable to pay any training contribution to the Appellant is not in any way different from the argument in the Respondent's notice. The lower court had considered the same provision of sections 8 and 18 (1) of the Nigeria

Export Processing Zone Act *vis a vis* the provisions of sections 6 (1) & (3) of the Industrial Training Fund (Amendment) Act 2011 before arriving at the conclusion that organisations operating within the free trade zones are also liable to make contribution for industrial training fund provided it is shown that the organisation either requires approval for expatriate quota or utilizes customs services in matters of import and export.

The finding of the trial court on the provisions is adverse to the contention of the Respondents. The trial court rejected the contention of the Respondents that any enterprise operating within the free trade zone as the 1st Respondent is not liable to make any contribution under whatever circumstance. What this means is that the 1st Respondent is challenging that finding, seeking to reverse same and accordingly the 1st Respondent ought to have filed a cross-appeal instead of a Respondent's Notice. Where the aim of the Respondent in an appeal is to reverse, an adverse finding of the lower court the appropriate step is to cross-appeal. A respondent's Notice is not a substitute for a cross-appeal and it is not appropriate to reverse an adverse finding by the lower court. EBIOWEI TOBI, J.C.A in *Arogundade v. Skye Bank* (2020) LPELR 52304 CA (PP. 23-25 PARAS. B). Put the position thus:

> **"Where a respondent wants a reversal of a decision, a part thereof, or any conclusion of fact in the decision, his proper procedure is by way of a cross-appeal. A cross-appeal does not strictly depend upon an appeal having been filed; any person who has had a judgment in his favour but seeks to reverse the judgment or part of it or any important finding' therein can file a cross-appeal without waiting to be served with a notice of appeal by the unsuccessful party."**

See also *Obok & Ors v. Agbor & Ors* (2016) LPELR 41219 CA (PP. 7-8 PARAS. B); *Ageyaye v. Ogbogboyibo & Ors* (2014) LPELR 22610 CA, *Udotong v. Uno* (2019) LPELR 48166 CA; *Owoyele v. Mobil Producing, Nig.* (2020) LPELR 50352 CA.

It is my opinion that the Respondent's Notice is not competent. Even if the 1st Respondent's Notice is competent, it still cannot fly in this case in view of my endorsement of the trial court's finding that organisations operating within the free trade zones are also liable to make contribution for industrial training fund provided it is shown that the organisation requires approval for expatriate quota or utilizes customs services in matters of import and export. Similarly, I had held in the earlier part of this judgment that section 6 (3) of the Industrial Training Fund (Amendment Act) 2011 creates an exception to the general provisions of sections 8 and 18(4) of the Nigeria Export Processing Zone Act, 2004, thereby rendering organisations operating within the free trade zones liable to make contribution for industrial training fund provided any of the two alternative conditions exists. I therefore find no merit in the 1st Respondent's Notice and it is accordingly dismissed.

In conclusion, I hold that this appeal is meritorious, and it is allowed. I hereby set aside the judgment delivered by **C.M.A. OLATOREGUN J.** on the 7th October 2014 and in its place, I make an order granting reliefs a, b, c, d and e as prayed on the Appellant's Originating Summons dated 19th but filed on the 22nd December 2014.

As regards relief 'f', I take cognisance of the fact that the 1st Respondent was willing to cooperate with the Appellant in complying with the provision of the law *ab initio* until the 2nd Respondent stampeded it and discouraged it from so doing. It is a case of the 1st Respondent caught between the demand of the Appellant to pay its training contribution and the directive of the 2nd Respondent to the 1st Respondent not to yield to the demand of the Appellant.

Therefore, the 2nd Respondent is hereby directed to ensure that the 1st Respondent complies with all the orders made in this judgment.

Parties shall bear their respective costs.

BADA, JCA: I had the advantage of reading in draft a copy of the Leading Judgment of my Lord, ABUBAKAR SADIQ UMAR, JCA just delivered.

I have also perused the records of appeal as well as the briefs of argument filed and exchanged by the parties, and I agree with the reasoning and conclusion of my Lord that the appeal is meritorious.

It is also my view that there is merit in this appeal, and it is allowed by me.

I abide by the consequential orders made in the said lead Judgment including Order as to cost.

SIRAJO, JCA: My learned brother, ABUBAKAR SADIQ UMAR, JCA, obliged me with a draft of the leading Judgment which has just been delivered, and I had the advantage of reading it before now.

The judicial reasoning and conclusions reached on the issues raised in the Appeal and the Respondent's Notice accord with mine and I adopt same. I agree that the appeal has merit and ought to be and is hereby allowed.

Let me briefly comment on the manner the 1st Respondent attacked the competence of ground one of the Notice of Appeal and the issue formulated therefrom. The purpose of preliminary objection is to contend that a suit or an appeal is defective or incompetent. If sustained, the result will be striking out the suit or the appeal and truncate or abort the hearing on the merits. See *Itam v. Itam* (2021) LPELR-54121 (CA*); Ezeofor v. Honey King Media Ltd* (2018) LPELR-44558 (CA); *Okorie v. Onuoha* (2017) LPELR-42279 (CA). The procedure of preliminary objection is resorted to only where a Respondent opposes the hearing of the entire

appeal on the ground of defect or incompetence. This point was emphasized by the Apex Court in the recent case of *Ajuwon v. Governor of Oyo State & Ors.* (2021) LPELR-55339 (SC), where Eko, JSC - reiterated thus:

> **"A preliminary objection is only raised to the hearing of the appeal, and not to a few grounds of appeal. The purpose of preliminary objection is the termination or truncation of the appeal in limine. A preliminary objection should only be filed against the hearing of an appeal and not against one or more grounds of appeal when there are other grounds to sustain the appeal; which purported preliminary objection is, therefore, not capable of truncating the hearing of the appeal. In such a situation, a preliminary objection is not the appropriate procedure to deploy against defective grounds of appeal when there are other grounds, not defective, which can sustain the appeal: *Adejumo & Ors v. Oludayo* (2014) 12 NWLR (Pt. 1421) 252 (SC); (2014) LPELR-22997 (SC)."**

Where a Respondent's complaint is about the competence of a ground of appeal, the appropriate thing for him to do is to file a notice of motion to strike out the incompetent grounds and not a preliminary objection. The complaint of the 1st Respondent in its preliminary objection is against a ground of appeal and an issue formulated therefrom for determination. The complaint cannot be ventilated through the preliminary objection procedure since other grounds and issues for determination will still survive and sustain the appeal. The appropriate thing for the 1st Respondent to do was to seek to strike out the incompetent ground and issue for determination through the instrumentality of a Notice of Motion as provided for in the Rules of this Court, and not by way of preliminary objection.

It is for the above reason and the elaborate reasons given in the leading Judgment of my learned brother, UMAR, JCA, that I also dismiss the preliminary objection, allow the appeal and set aside the Judgment of the lower Court. I abide by all the orders made in the leading Judgment.

Cases cited in the Judgment

A.T. Limited v. A.D.H. Limited (2007) 15 NWLR (Pt. 1056) 118
Adejumo & Ors v. Oludayo Olawaiye (2014) 12 NWLR (Pt. 1421) 252 (SC); (2014) LPELR-22997 (SC
Ageyaye v. Ogbogboyibo & Ors (2014) LPELR 22610 CA
Ajuwon & Ors v. Governor of Oyo State & Ors (2021) LPELR 55339 SC
Akintola v. Solano (1986) 2 NWLR (Pt. 24) PG. 598
Amasike v. Registrar Federal Corporate Affairs Commission (2006) 3 NWLR (Pt. 968) 462
Arogundade v. Skye Bank (2020) LPELR 52304 CA (PP. 23-25 PARAS. B)
Bolanle v. Access Bank (2016) All FWLR (Pt. 831) 1405
Cooperative And Commercial Bank Plc v. Ekperi (2007) All FWLR (Pt. 355) 412

Dada v. Dosunmu (2006) 19 NWLR (Pt. 1010) 134; (2006) LPELR 909 (SC)
Efet v. INEC (2011) 1-2 SC (Pt. 111) 61
Ezeofor v. Honey King Media Ltd (2018) LPELR-44558 (CA)
Fecond Network Ltd. v. Okolo & Ors. (2018) LPELR 4685 CA
General Electric Co. v. Akande (2011) NSCQR 611
Itam v. Itam (2021) LPELR-54121 (CA)
Maersk (Nig.) Ltd & Anor v. Maersk (Nig.) Ltd & Anor (2017) LPELR-43578(CA)
Mogaji v. Odofin (1978) 4 SC 91
Mustapha v. CAC (2008) LPELR-3603(CA)
Nagarta Integrated Farms Ltd v. Nagoda & Ors (2016) LPELR-40266(CA)
Niger Chemists Limited v. Nigeria Chemists & Anor (1961) All NLR page 180
NJC v. Agumagu (2015) LPELR 24503 CA
Nwosu v. PDP (2018) LPELR 44386 SC
Obok & Ors v. Agbor & Ors (2016) LPELR 41219 CA (PP. 7-8 PARAS. B)
Odiba v. Muemue (1999) 6 SCNJ 245
Okafor v. Abumofuani (2016) All FWLR (Pt. 855) 1
Okorie v. Onuoha (2017) LPELR-42279 (CA)
Olly v. Tunji & Ors (2012) LPELR 791 CA
Omatek Computer Ltd v. FBN Ltd (2021) LPELR 56812 CA
Owie v. Ighiwi (2005) LPELR-2846(SC)
Owoyele v. Mobil Producing, Nig. (2020) LPELR 50352 CA
Polaris Bank Ltd v. Ohms Sources & Systems Ltd (2021) LPELR-54782(CA)
Raji v. Unilorin (2007) 15 NWLR (Pt. 1057) 259
Sambawa Farms Ltd & Another v. Bank of Agriculture Ltd. (2015) LPELR 25939 CA
SDV (Nig.) Ltd v. Ojo & Anor (2016) LPELR-40323(CA)
SPDC v. Amadi (2011) LPELR 3204 SC
Spring Bank Plc v. ACB Int'l Bank Plc & Anor (2016) LPELR 53014 CA
Udotong v. Uno (2019) LPELR 48166 CA
Yaradua & 9 Ors v. Yandoma & Ors (2014) 12 S.C. (Pt. 111) 64
Zenith Bank Plc v. John & Ors. (2015) LPELR 24315 SC

Statutes cited in the Judgment
Sections 6 (1) & (3) of the Industrial Training Fund (Amendment) Act 2011
Sections 8 and 18 (4) of the Nigeria Export Processing Zone Act, 2004
Section 9 of the Industrial Training Fund (Amendment Act) 2011
Sections 20, 21 (1) and 23 of the Evidence Act, 2011
Sections 30 and 41 of the Companies And Allied Matters Act, (CAMA) 2020
Sections 31 and 50 of Companies And Allied Matters Act

Rules of court referred to in the Judgment
Order 3 Rule 9 of the applicable rules of the lower court
History:

HIGH COURT
Federal High Court, Lagos

C. M. A. OLATOREGUN, J
Suit No: FHC/L/CS/2005/2014
Tuesday 7th October, 2014

COURT OF APPEAL (Lagos Division)
Jimi Olukayode Bada, JCA ***(Presided)***
Abubakar Sadiq Umar, JCA ***(Read the leading Judgment)***
Muhammad Ibrahim Sirajo, JCA

APPEARANCES:
M. C. Okwara for the Appellant
Respondent - Unrepresented

SEEMS NIGERIA LIMITED v. SHARAF SHIPPING AGENCY LIMITED

COURT OF APPEAL
(LAGOS DIVISION)

CA/LAG/CV/989/2019
WEDNESDAY 15TH MARCH, 2023

(DANIEL-KALIO; OTISI; SIRAJO, JJ.CA)

SHIPPING – Bill of Lading – explained.

SHIPPING – Bill of Lading – the bill of lading is issued to a shipper of goods in order to enable him to collect the goods from the master of the ship, the carrier, at the end of the destination.

CONTRACT – Contractual terms - a Court lacks the vires to re-write contractual terms that afford one party a discretion as to how it exercises its rights or fulfils its obligations.

CONTRACT – Contractual terms – interference by a court of law – a Court may inquire into the reasonableness of an exercise of discretion by a party in a commercial contract, and if the result of such exercise is found to be completely unreasonable, the Court may interfere.

JUDGMENT – Delivery of judgment – a party who contends that the judgment of the lower court was not delivered within 90 days, must show that such delay occasioned miscarriage of justice.

APPEAL – Determining of miscarriage of justice – the appellate Court has to be satisfied that the miscarriage is substantial and not simply one of mere technicality.

Facts:

The Appellant purchased a total of 4380 sheets of standard Gypsum Board, comprised of 2190 sheets of 1200 x 300mm x 12.0mm standard Gypsum Board and 2190 sheets of 1200 x 2500mm x 12.0mm standard Gypsum Board at the total cost of US$15,321.24 from Shandong Baier Building Materials Company Limited based at Shandong, China. The Nigerian Naira equivalent of the cost of the consigned goods was ₦2,390,000.00. The cost of freight to ship the goods to Nigeria through Sunny Worldwide Logistics Shenzhen Limited was US$7,800.00, and same was packaged by Pingyi Baier International Import-Export Company Limited aboard the vessel Ocean Motor Vessel named CSAV Lingue/01114/S, owned by Compania Sud-Americana De Vapores S. A. (CSAV, S.A.). The Respondent was

the Nigeria Shipping agent of the said company. The case of the Appellant was that the Bill of Lading No. PBNDR5Z00, issued in favour of the Appellant, was lost by STO Courier Service, which was engaged by Sunny Worldwide Logistics Shenzhen Limited. When the vessel berthed at the Apapa Port, Lagos, Nigeria, the Appellant's director was verbally informed by the Respondent that the cargo would be released upon the Appellant fulfilling some conditions in lieu of presentation of the original bill of lading. These conditions were:

i. Affidavit of loss of original bill of lading;

ii. Newspaper advert to the effect that the original bill of lading is missing; and

iii. Police report.

The Appellant obtained and presented the said documents to the Respondent. However, the Respondent further requested a Bank Guarantee to cover the value of the consignment, which the Appellant obtained, But the Respondent rejected the said Bank Guarantee and requested for another Bank Guarantee to cover 200 of the value of goods to be valid for a tenor of 2 years. The Appellant, in compliance with the new directives of the Respondent, obtained another Bank Guarantee from Union Bank of Nigeria Plc, but the Respondent again rejected the said Bank Guarantee from Union Bank of Nigeria Plc on the ground that Union Bank of Nigeria Pic was not a First Class Nigerian Bank. As a result of the Respondent's unending demands, which the Appellant saw as being unreasonable, the Appellant instituted this action at the Federal High Court (lower court), seeking certain reliefs, which the Respondent contested against.

At the conclusion of the hearing, the learned trial Judge in the judgment dismissed the Appellant's claims, holding that the Appellant had failed to meet the conditions for the release of its cargo by the Respondent.

Dissatisfied with the decision of the lower Court, the Appellant appealed to the Court of Appeal.

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

[1] ***Shipping – Bill of Lading – explained.***

A bill of lading is a legal document that acts as a receipt for goods transported by a carrier or freight forwarder. It serves as evidence of the contract of carriage and outlines the particulars of the shipment, including quantity, weight, and destination. A bill of lading is defined in the Black's Law Dictionary, Ninth Edition, page 188, as:

"A document acknowledging the receipt of goods by a carrier or by a shipper's agent and the contract for the transportation of those goods; a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods."

Generally, a bill of lading performs the following functions:

(1) It is evidence of the contract of affreightment.

(2) It is a receipt for goods shipped and contains certain admissions as to their quantity and condition when put on board.

(3) It is a document of title, without which delivery of the goods cannot normally be obtained.
(P. 92 lines 3 - 22)

[2] ***Shipping – Bill of Lading – the bill of lading is issued to a shipper of goods in order to enable him to collect the goods from the master of the ship, the carrier, at the end of the destination.***

… Originally, the bill of lading was issued to a shipper of goods in order to enable him to collect the goods from the master of the ship, the carrier, at the end of the destination. The Bill of Lading is a contract between the ship owner/carrier and the shipper/consignee with respect to the goods mentioned therein.

The bill of lading is issued to the shipper in sets of three or four. Where the shipper/consignee sells the cargo to a third party and endorses the bill of lading to that third party, the shipper transfers his title to the goods by endorsing the bill of lading to the purchaser who becomes the consignee. The parties to the bill of lading would then be the shipowner/carrier, the shipper/consignee on the one part and, the consignee/endorsee on the other…By the endorsement and delivery of the bill of lading to any sub buyer, the latter as assignee steps into the shoes of the consignee. The consignee or the third party/consignee, is entitled to the release or delivery of the goods by the carrier upon the production of the original bill of lading. Without production of the original bill of lading, the consignee would not be entitled to the goods. See *Kaycee (Nigeria) Limited v. Prompt Shipping Corporation and Another* (1986) 1 NWLR (Pt.15) 180; *Pacers Multi-Dynamics Ltd v. M. V. Dancing Sister & Anor* (2012) LPELR-7848(SC); *"K" Line Inc v. K.R. Int'l (Nig.) Ltd & Anor* (1993) LPELR-14928(CA).
(P. 92 lines 25 - 28; 30 - 45)

[3] ***Contract – Contractual terms - a Court lacks the vires to re-write contractual terms that afford one party a discretion as to how it exercises its rights or fulfils its obligations.***

Contractual terms in which one party to the contract is given the power to exercise discretion, or to form an opinion as to relevant facts, are extremely common. Commercial contracts that afford one party a discretion as to whether or how it exercises its rights or fulfils its obligations are not uncommon…Fundamentally, a Court lacks the vires to re-write the agreement of the parties, which gives one of them power to exercise a discretion, for the Court cannot substitute itself for the contractually agreed decision-maker. See *A.G. Nasarawa State v. A.G. Plateau State* (2012) LPELR-9730(SC); *Union Bank v. Ozigi* (1994) LPELR-3389(SC); *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948) 1 KB 223; *Braganza v. BP Shipping Ltd* (2015) UKSC 17; *Iwuji v. Federal Commissioner for Establishment & Anor* (1985) LPELR-1568(SC). **(P. 95 lines 21 - 24; 28 - 30)**

[4] ***Contract – Contractual terms – interference by a court of law – a Court may inquire into the reasonableness of an exercise of discretion by a party in a commercial contract, and if the result of such exercise is found to be completely unreasonable, the Court may interfere.***

…It is clear that circumstances in which the Court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. Extrapolating this principle, it is my considered view that a Court may inquire into the reasonableness of an exercise of discretion by a party in a commercial contract, and if the result of such exercise is found to be completely unreasonable, the Court may interfere. The concern is that the exercise of discretion should not be abused. A contractual discretion must therefore be exercised in good faith and not be irrational, arbitrarily or capriciously. **(P. 97 lines 24 - 32)**

[5] ***Judgment – Delivery of judgment – a party who contends that the judgment of the lower court was not delivered within 90 days, must show that such delay occasioned miscarriage of justice.***

…A decision given by a Court after ninety days of conclusion of hearing, as constitutionally provided, does not automatically become a nullity unless the appellant has suffered a miscarriage of justice in consequence. The appellant has to satisfy the Court that failure to deliver the judgment within the stipulated time has occasioned a miscarriage of justice to him; Section 294(5) of the 1999 Constitution, as amended. See also *Akoma v. Osenwokwu* (2014) LPELR-22885(SC); *Atungwu v.*

Ochekwu (2013) LPELR-20935(SC); *Ifemesia v. Ecobank Nigeria Plc* (2018) LPELR-46589(CA); *Union Bank v. Gap Consultants Ltd* (2017) LPELR-45361(CA); *Ecobank (Nig.) Ltd v. Honeywell Flour Mill Plc Ltd* (2021) LPELR-56261(CA). **(P. 102 lines 21 - 30)**

[6] ***Appeal – Determining of miscarriage of justice – the appellate Court has to be satisfied that the miscarriage is substantial and not simply one of mere technicality.***

In determining whether or not there has been a miscarriage of justice, the appellate Court has to be satisfied that the miscarriage is substantial and not simply one of mere technicality, which has caused no embarrassment or prejudice to the appellant… Where a real miscarriage of justice has not been established, the judgment of the lower Court shall not be declared a nullity. See *Savannah Bank of Nig. Ltd v. Starite Industries Overseas Corporation* (2009) LPELR-3020; *Adebayo v. A.G. of Ogun State* (2008) LPELR-80(SC); *Famfa Oil Ltd v. A.G. of Federation* (2003) LPELR-1239(SC). **(P. 102 lines 32 - 39)**

OTISI, JCA (Delivering the lead Judgment): This appeal was lodged against the judgment of the Federal High Court, Lagos Division, Coram R. M. Aikawa, J., delivered on May 7, 2018, in which the Appellant's claims were dismissed.

The facts leading to this appeal, as presented by the Appellant, may be summarized in this manner: The Appellant purchased a total of 4380 sheets of standard Gypsum Board, comprised of 2190 sheets of 1200 x 300mm x 12.0mm standard Gypsum Board and 2190 sheets of 1200 x 2500mm x 12.0mm standard Gypsum Board at the total cost of US$15,321.24 from Shandong Baier Building Materials Company Limited based at Shandong, China. The Nigerian Naira equivalent of the cost of the consigned goods was ₦2,390,000.00. The cost of freight to ship the goods to Nigeria through Sunny Worldwide Logistics Shenzhen Limited was US$7,800.00, and same was packaged by Pingyi Baier International Import-Export Company Limited aboard the vessel Ocean Motor Vessel named CSAV Lingue/01114/S, owned by Compania Sud-Americana De Vapores S. A. (CSAV, S.A.). The Respondent was the Nigeria Shipping agent of the said company.

The case of the Appellant was that the Bill of Lading No. PBNDR5Z00, issued in favour of the Appellant, was lost by STO Courier Service, which was engaged by Sunny Worldwide Logistics Shenzhen Limited. When the vessel berthed at the Apapa Port, Lagos, Nigeria, on 17/5/2011, the Appellant's director was verbally informed by the Respondent that the cargo would be released upon the Appellant fulfilling some conditions *in lieu* of presentation of the original bill of lading. These conditions were:

i. Affidavit of loss of original bill of lading;

ii. Newspaper advert to the effect that the original bill of lading is missing; and

iii. Police report.

The Appellant obtained and presented the said documents to the Respondent. However, the Respondent further requested for a Bank Guarantee to cover the value of the consignment, which the Appellant obtained on 25/5/2011. But the Respondent rejected the said Bank Guarantee and requested for another Bank Guarantee to cover 200 of the value of goods to be valid for a tenor of 2 years. The Appellant, in compliance with the new directives of the Respondent, obtained another Bank Guarantee from Union Bank of Nigeria Plc on 27/7/2011. The Appellant averred that the new Bank Guarantee was in excess of 200 of the value of the consignment, and was for a tenor of 6 months, renewable every 6 months. But the Respondent again rejected the said Bank Guarantee from Union Bank of Nigeria Plc on the ground that Union Bank of Nigeria Pic was not a "First Class Nigerian Bank".

As a result of the Respondent's unending demands, which the Appellant saw as being unreasonable, the Appellant approached the lower Court seeking the following reliefs:

1. *A DECLARATION that in the place of the missing original Bill of Lading, copy issued in favour of the Plaintiff, the sworn affidavit of Mr. Deji Oluwole of No. 23B Ixora Drive, MKO Garden, Ikeja, Lagos, the Police Report of 18/05/2011, and other documents relating to the Action are sufficient proof of the Plaintiff's Ownership of the 4380 sheets of imported Award Gypsum Board detained at the Nigeria Ports, Apapa, Lagos by the Defendant.*

2. *A DECLARATION that the Defendant is obliged to deliver to the Plaintiff the 4380 sheets of imported Standard Gypsum Board detained at the Nigeria Port, Apapa, Lagos.*

3. *A DECLARATION that the Defendant's continued detention of the Plaintiff's goods is unreasonable, illegal and in breach of the terms of the Bill of Lading #PBNDR5200.*

4. *AN ORDER of this Honourable Court compelling the Defendant to release the detained 4380 sheets of imported standard Gypsum Board to the Plaintiff forthwith.*

5. *Special Damages to the total sum of ₦3,358,925.00 which represents:*

i. The excess cost incurred for the Defendant's charges in the sum of ₦1,160,585.00 as particularized in paragraph 25 above in the Defendant's letter dated 8/06/2011; and

ii. The terminal charges, cost etc of ₦2,198,379.00 which accrued on the Plaintiff's goods detained at the Nigeria Port due by the Defendant, which charges are as particularized in paragraph 35 above and in the APM Terminal receipts respectively dated 08/06/2011 and 12/07/2011 and the Defendant's Proforma Invoice dated 01/07/2011.

6. THE ALTERNATIVE TO PRAYERS 4 AND 5 ABOVE:

a. The sum of US$23,121.24 (the official legal tender in the United States of America or its naira equivalent at the prevalent exchange rate) being the sum of the purchase price of US$15,321.24 of the Plaintiff's goods detained at Apapa Port, Lagos, Nigeria by the Defendant and the CCOF of freight of US$7,800.

b. The sum of ₦1,551,913.00 being the import duties, charges and tax paid on the Plaintiff's goods detained at the Nigeria Port, Apapa, Lagos by the Defendant.

c. Special damages in the total sum of ₦8,458,475.00 which sum represents:

i. The excess cost incurred for the Defendant's charges in the sum of ₦1,160,585.00 as particularized in paragraph 25 above and in the Defendant's letter dated 8/06/2011; and

ii. The terminal charges, cost etc. of ₦2,198,380.00 which accrued on the Plaintiff's goods detained at the Nigerian Port due by the Defendant, which charges are as particularized in paragraph 35 above and in the APM Terminal receipts respectively dated 08/06/2011 and 12/07/2011 and the Defendant's Proforma invoice dated 01/07/2011; and

iii. The least expected income of ₦4,099,520.00.

7. General damages in the sum of ₦20,000,000.00 for the unreasonable detention of the Plaintiff's goods, the disruption of its

business, loss of its customers, exposure of the Plaintiff to periodical accumulation of demurrage cost, terminal and other sundry port charges and the hardships thereby caused the Plaintiff by the Defendant.

8. Interest on the aforesaid sums awarded at the rate of 25% per annum from 17/05/2011 up till date of judgment and thereafter at the rate of 18 per annum till the entire sum is liquidated; and

9. The cost of this action in the sum of ₦5,000,000.00.

The Respondent denied the claims of the Appellant. It was the Respondent's case that it merely acted as an agent on behalf of the carriers, CSAV, S.A., and therefore, was only obliged to act according to the directions and instructions of its principal. The Respondent further averred that: (a) it was not privy to the contract of carriage between the Appellant and CSAV, S.A., (b) the Appellant failed to produce the original Bill of Lading to entitle it to the release of the cargo as contracted under the Bill of Lading #PBNDR5Z00, and that (c) the Appellant failed to comply with the alternative conditions for release of the cargo prescribed by the CSAV, S.A., being, amongst others, the provision of a bank guarantee issued by a first-class Nigerian bank with a 2-year validity period for an amount representing 200 of the value of the cargo. These alternative conditions were damage control measures put in place strictly by the Respondent's principal to protect itself against anyone who may come into lawful possession of the original Bill of Lading. However, when the Appellant failed to meet the said requirements, CSAV, S.A. declined to issue instructions to Respondent to release the cargo to the Appellant.

At the conclusion of hearing, the learned trial Judge in the judgment delivered on 7/5/2018, dismissed the Appellant's claims, holding that the Appellant had failed to meet the conditions for the release of its cargo by the Respondent. Dissatisfied with the decision of the lower Court, the Appellant lodged the instant appeal on 1/8/2018 by Notice of Appeal on five grounds of appeal, pages 449 to 456 of the Record of Appeal.

The parties filed Briefs of Argument, pursuant to the Rules of this Court. The Appellant's Brief was filed on 9/11/2020 but deemed properly filed and served on 17/3/2022. The Respondent's Brief was filed on 18/3/2022, while the Appellant's Reply Brief was filed on 16/6/2022 but deemed properly filed and served on 19/9/2022. At the hearing of this appeal on 18/1/2023, the Briefs of Argument were, respectively, adopted by Abayomi Adeniran, Esq., for the Appellant, and by Paul Omaidu, Esq., with Folashade Callisto, Esq., and Michael Popola for the Respondent. The Court was urged to allow the appeal by Mr. Adeniran, while Mr. Omaidu urged the Court to dismiss the appeal.

i. *Whether the learned trial court was right having earlier agreed with the Appellant that changing of the terms and conditions imposed by the Respondent for the release of the Appellant's consignment imported vide Bill of Lading No. PBNDRSZOO dated 8th April 2011 in lieu of presentation of the original Bill of Lading is arbitrary and unreasonable but thereafter held that the act of the Respondent in imposing the arbitrary terms and conditions on the Appellant in lieu of presentation of the original bill of lading cannot be interfered with by the court and that the Appellant failed to meet the conditions imposed by the Respondent?*
(Distilled from grounds 1, 2 and 4 of the Notice of Appeal).

ii. *Having regard to the improper evaluation of evidence by the Appellant before the lower court and failure of the lower court to deliver judgment within 3 months which had occasioned a miscarriage of justice, whether the judgment of the lower court is liable to be set aside?*

(Distilled from grounds 3 and 5 of the Notice of Appeal).

The Appellant distilled two issues for the determination of this appeal as follows:

For the Respondent, the issues for determination of this appeal were rather framed in this manner:

i. *Whether the learned trial judge was not right in holding that the Respondent acted rightly when it refused to deliver the cargo to the Appellant without the production of the original bill of lading and that the Appellant failed to meet some of the alternative requirements imposed by the Respondent?" (Grounds 1, 2 & 4).*

ii. *Whether it can correctly be said that the learned trial Judge failed in his duty to properly evaluate the evidence adduced before him and if yes, whether the said failure as well as the failure to deliver judgment within three (3) months occasioned any miscarriage of justice to warrant the setting aside of the judgment of the trial court? (Grounds 3 & 5).*

The parties seek similar resolution but have tailored the issues as best reflects the position of the party. I shall adopt the issues as framed by the Appellant, whose appeal this is.

Arguments of Parties

Issue 1

Reviewing the facts of the case, for the Appellant, it was not disputed that in order to successfully seek the release of the consignment sent by cargo, the consignee must present the original bill of lading. Where the shipping agent releases the consignment to a third party without presentation of the original bill of lading and, the consignee thereafter claims the consigned goods by presenting the original bill of lading in respect of the consigned goods which had earlier been released to a third party, the shipping company shall be liable to the holder of the original bill of lading to the extent of the value of the consignment. The original Bill of Lading No. PBNDR5Z00 dated 8/4/2011, which covered that cargo, was lost by the carrier company engaged to transmit the original bill of lading from China to Nigeria.

The Appellant notified the Respondent about the loss of the Bill of Lading before the arrival of the cargo and was orally informed by the Respondent that the cargo can be released without presentation of the original Bill of Lading upon some conditions. In fulfilment of these conditions, the Appellant procured the following documents:

i. Affidavit of loss sworn by Deji Oluwole, one of the Directors of the Appellant on 10/5/2011;

ii. The Nigeria Police Crime Diary Extract dated 18/5/2011.

iii. Compass Newspaper advert of 19/5/2011.

Upon presentation of these documents, the Respondent further requested that the Appellant obtain a Bank Guarantee from a reputable bank. Consequent upon which the Appellant obtained a Bank Guarantee dated 25/5/2011 from Union Bank of Nigeria Plc for the sum of ₦2,390,000.00 to cover the value of the consignment. Based on the assurance of the Respondent, the Appellant paid the relevant port charges which include demurrage, fees, port charges etc in total sum of ₦1,160,585.00.

After all these payments, which were done based on the assurance given by the Respondent, the Respondent rejected the Bank Guarantee of 25/5/2011 and requested the Appellant to obtain a Bank Guarantee to cover 200% of the value of the consignment and for a tenor of 2 years. The Appellant complied with this further condition and obtained another Bank Guarantee dated 27/7/2011 in the sum of ₦5,000,000.00 for the initial tenor of 180 days but renewable every 6 months:

The Appellant also communicated its ordeal to its shipper, Pingyi Baier International Import-Export Co. Ltd, which issued a Power of Attorney dated 11/7/2011 in favour of the Respondent requesting the Respondent to release the shipment to the Appellant. The shipper also issued a letter of indemnity dated 27/7/2011

to the effect that it would indemnify the Respondent against any loss that may be incurred by the Respondent in the unlikely event that same arises or connected to the release of the consignment to the Appellant through a subsequent third-party claim.

From the pleadings of the Respondent, the requirement for release of the cargo as it relates to the Bank Guarantee were:

i. The value of the Bank Guarantee must be up to 200% of the value of the cargo;

ii. The validity period of the Bank Guarantee must be 2 years.

iii. The issuing bank must be a first-class bank in Nigeria.

The reason given by the Respondent for holding the position that the Appellant did not meet all these requirements, particularly the last requirement, was that Union Bank of Nigeria Pic was not worthy and competent to give a Bank Guarantee for ₦5,000,000.00 on the ground that it is not a *"first class bank in Nigeria"*.

It was not in dispute that the value of the consignment was ₦2,390,000.00. 200% of the value of the consignment was ₦4,780,000.00. The Appellant contended that the Bank Guarantee obtained from Union Bank of Nigeria Pic, being for the sum of ₦5,000,000.00, was in excess of the 200% cover requested by the Respondent. The tenor of the Bank Guarantee was for a minimum period of 6 months and the life span was at the pleasure of the Respondent, which meant that the tenor was more than the 2 years requested by the Respondent.

The Appellant argued that Union Bank of Nigeria Plc, which was one of the foremost banks and regarded as an "old generation bank", has a capital base of over ₦100 Billion, which could absorb an indemnity of ₦5,000,000.00. The classification of only Zenith Bank Pic as a first-class bank in Nigeria, was described as strange and absurd. That there are no such classifications of banks in Nigeria, more so as Union Bank Nigeria Pic is a reputable bank with huge financial base.

The lower Court, considering the posture of the Respondent on the capacity of Union Bank Pic to stand as guarantor to the Respondent in the event of an adverse claim, stated as follows, page 447 of the Record of Appeal:

> "For instance, I do not see the logic for the Defendant to insist on a 2-year guarantee which is renewable every six months or for it to insist on a guarantee of 200% value of the cargo against 100% offered in the guarantee. I wonder also by what technical yardstick the Defendant classifies only Zenith Bank in the entire Nigerian banks as the only first-class bank in Nigeria."

The Appellant submitted that having not seen the reasonability of the Respondent's insistence that the Bank Guarantee must be from Zenith Bank Plc, the lower Court ought to have interfered with the exercise of discretion by the Respondent by holding that it was unreasonably exercised and, hold that the Appellant complied with the conditions imposed by the Respondent to enable the Respondent release the consignment to the Appellant in lieu of presentation of the original Bill of Lading. The lower Court being a Court of record is empowered by virtue of Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to adjudicate on disputes validly submitted to the Court for adjudication.

The learned trial Judge had further said that:

> "As I said earlier, I do not think I can interfere with the discretion of the Defendant in imposing whatever alternative conditions, but I think in the subsequent attempt to resolve this impasse, the Defendant might find my observation relevant."

The Appellant contended that the position of the lower Court was an attempt to oust the jurisdiction of the Court from interfering with the discretion of the Respondent, thereby the lower court failed to discharge its judicial duty and that the Appellant was thereby prejudiced. Where the exercise of discretion is not subject to review, it is generally open to abuse. The pronouncements of the Supreme Court in plethora of cases to the effect that even the Courts in exercising its discretion must exercise same judicially and judiciously in *Williams v. Hope Rising Voluntary Society* (1982) 1 All NLR (Pt. 1) 1; *Eronini v. Iheuko* (1989) 3 NWLR (Pt. 101) 46 at 60-61, were cited and relied on.

Further, that by stating that the Respondent may impose whatever alternative conditions is to cloth the Respondent with arbitrary power to impose any unreasonable condition to deprive a consignee of his goods whenever the original bill of lading is lost when it is not due to the fault of the consignee, as it is in the instant case. That the duty of the court includes determining any controversy legitimately placed before it, citing *Ukiri v. EFCC* (2018) 1 NWLR (Pt. 1599) 155 at 171. The Appellant submitted that the lower Court acted in violation of Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) when it avoided its judicial responsibility to determine whether the Respondent exercised its discretion appropriately by the unending terms imposed on the Appellant in lieu of production of the original bill of lading.

The Appellant had fulfilled all the conditions imposed by the Respondent in lieu of production of original bill of lading. The reason for refusal by the Respondent to release the consignment to the Appellant was because the Bank Guarantee was not from a *first-class* Nigerian Bank. Having held that the classification of banks as first class was illogical and unreasonable, the lower Court ought to have

resolved the issues in favour of the Appellant.

The Appellant relied on the evidence adduced to submit that the learned trial Judge ought to have interfered with the exercise of discretion by the Respondent. The Court was urged to resolve the issue in favour of the Appellant.

For the Respondent, primarily, the Respondent was under no contractual obligation to deliver the cargo to the Appellant without production of the original bill of lading. A bill of lading is a contract between the Carrier and the Consignee with reference to the goods mentioned therein, citing *Kaycee v. Prompt Shipping Corp* (1986) N.S.C.C. Vol. 2 page 431, *S. C.; F. I. Onwadike & Co. Ltd v. Brawal Shipping (Nig.) Ltd. & Anor* (1996) 1 NWLR (Pt. 422) 65 at 80; *Boothia Maritime Inc. & Ors. v. Far East Mercantile Co. Ltd.* (2001) LPELR 792(SC).

The production of the original bill of lading entitles the receiver of the goods to the release or delivery of the goods by the carrier and in the absence of the original bill of lading the receiver is not entitled to the goods. This principle is strict, without exceptions, citing *Kline Inc. v. K.R. Int'l (Nig.) Ltd. & Anor* (1993) LPELR - 14928 (CA). A shipowner who delivers goods to the receiver without production of the bill of lading, does so at his peril, citing *Tung Bank Ltd v. Rambler Cycle Ltd* (1959) 3 All ER 182 at 184.

Reliance was also placed on *Nigerian National Supply Co. v. Owners of MV "Albion 1"* (1990) III NSC 200 at 207. The opinion of the learned author of Modern Bills of Lading (2nd Edition), Paul Todd at pages 244,246, 247 and 248, paragraphs 17.02 and 17.03, was also cited and relied on.

The facts before the trial Court made it clear that the Appellant did not have and could not produce the original bill of lading in order to take delivery of the cargo from the carrier or its agent. As established from the authorities cited above, the Appellant, that was unable to produce the original bill of lading for the release of the cargo, had no basis to claim that it was entitled to the delivery of the cargo. The Respondent was only bound to deliver the cargo covered by the relevant bill of lading only upon the production of the original bill of lading, which was also admitted by the Appellant's witness under cross-examination. The Court was urged to affirm the judgment of the lower Court on this premise.

Upon discovery that the Appellant's original bill of lading was missing, the carrier, CSAV through its agent, the Respondent, gave their procedure for the loss of original bill of lading procedure, which measures were taken to protect the carrier for which it is risky to deliver the cargo without production of the original bill of lading in the peculiar circumstances of this case. It was submitted that since the Appellants failed to comply with the conditions given by the Respondent's principal in order for them to undertake the risks involved, the Appellant was solely to blame, as the carrier was not under any contractual obligation to release the

cargo without the production of the original bill of lading.

The Respondent referred to the evidence of the Appellant on the loss of the bill of lading and submitted that the Appellant's conflicting accounts on the whereabouts of the original bill of lading in the pleadings and in the evidence of its witness made it crucial for the Respondent and its principal to be wary and deal cautiously with the Appellant in order to forestall any potential adverse claim that might arise on account of the missing original bill of lading. That the two bank guarantees of Union Bank provided by the Appellant did not meet the requirements stipulated by the Respondent's principal. None of the bank guarantees complied with the 2-year requirement stipulated by the Respondent. Notwithstanding the arguments of the Appellant, the documents speak for themselves. The contents of the said bank guarantees were relied on.

The Respondent described as misleading the argument in paragraph 4.15 of the Appellant's Brief of Argument that *"… the only requirement that the Respondent deemed that the Appellant did not fulfil is the aspect of the Bank Guarantee not being from a first-class bank in Nigeria".* The pleadings and evidence for the Respondent was relied on to submit that the Respondent had consistently maintained that the Appellant failed to meet its principal's requirement for a bank guarantee that has a 2-year validity period and for an amount representing 200% of the value of the cargo. DW1 also revealed under cross-examination that the Appellant's bank guarantee did not also meet the requirement of being from a first-class bank as stipulated by its principal in their loss of original bill of lading procedure. The Court was urged to hold that the Appellant, which did not produce the original bill of lading and, was unable to fulfil the conditions stated in the loss of original bill of lading procedure, was not entitled to the release of its cargo.

The Appellant had argued that the learned trial Judge should have held that the alternative conditions imposed by the Respondent's principal were arbitrary and unreasonable and that the Appellant has complied with the conditions having regard to the remarks made by the learned trial Judge in the judgment that, page 477 of the Record of Appeal:

> "For instance, I do not see the logic for the Defendant to insist on a 2 year when the Plaintiff has provided a guarantee which is renewable every six months or for it to insist on a guarantee of 200% value of the cargo against 100% offered in the guarantee. I wonder also by what technical yardstick the Defendant classifies only Zenith Bank in the entire Nigerian banks as the only first-class bank in Nigeria".

The Respondent submitted that these remarks by the learned trial Judge were *obiter dictum* and cannot be the basis for compelling the Respondent to deliver the cargo to the Appellant, despite its failure to comply with the conditions imposed by the Respondent's principal. On what constitutes *obiter dictum,* the decision in

Miss Nkiru Amobi v. Mrs Grace O. Nzegwu & Ors (2013) LPELR-21863(SC), was cited and relied on. Obiter dictum cannot form the basis for an appeal.

The Respondent submitted that the issue of whether or not the Respondent's principal exercised its discretion properly is inconsequential. The Appellant did not raise the issue of any wrongful exercise of discretion by the Respondent's principal at the trial Court, it cannot be a live issue in the instant appeal. It was submitted that the Court can only intervene where there is a wrongful exercise of a judicial discretion by the trial Court, which is not the case here; citing *National Judicial Council v. Hon. Justice Ya'u Ibrahim Dakwang & Ors* (2019) LPELR-46927(SC). That the trial Court rightly observed that, the lower Court cannot compel the Respondent's principal to exercise its discretion in favour of the Appellant, who has failed to meet the alternative conditions for releasing the cargo.

The Respondent argued that it would no longer be a discretion in a commercial sense if the Respondent's principal could be coerced as to what the terms of the alternative conditions for releasing the cargo to the Appellant should be, in the absence of the production of the original bill of lading, citing *Akin Akinyemi v. Odu'a Investment Company Limited* (2012) LPELR-8270(SC*); National Judicial Council v. Hon. Justice Ya'u Ibrahim Dakwang & Ors. (supra).* That the Appellant was, therefore, not in a position to question the alternative conditions imposed by the Respondent's principal having failed to produce the original bill of lading.

The Respondent was of the view that the learned trial Judge considered and determined the controversy between the parties. The controversy had to do with the propriety or otherwise of the Respondent's refusal to release the cargo to the Appellant in the absence of the original bill of lading and, without compliance with the alternative conditions imposed by the Respondent's principal. That the said controversy was resolved in favour of the Respondent and as against the Appellant. It was therefore wrong and misleading to contend, as the Appellant has done, that the trial court abdicated its judicial responsibilities by failing *"to determine whether the Respondent exercised its discretion appropriately by the unending terms imposed on the Appellant in lieu of production of the original bill of Lading".* The propriety or otherwise of the discretionary imposition of alternative conditions by the Respondent's principal was not in dispute before the trial Court. What was in dispute was whether or not the Appellant met those conditions. It was submitted that the Appellant cannot raise the said issue in this appeal without the prior leave of this Court. The Court was urged to resolve this issue in favour of the Respondent.

The Appellant in the Reply Brief mainly rehashed earlier arguments but submitted that the Appellant did not require leave of Court to raise the issue as to the reasonable exercise of discretion by the Respondent as it was borne out of the judgment of the lower Court on appeal.

Resolution

A bill of lading is a legal document that acts as a receipt for goods transported by a carrier or freight forwarder. It serves as evidence of the contract of carriage and outlines the particulars of the shipment, including quantity, weight, and destination. A bill of lading is defined in the Black's Law Dictionary, Ninth Edition, page 188, as:

> "A document acknowledging the receipt of goods by a carrier or by a shipper's agent and the contract for the transportation of those goods; a document that *indicates* the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods."

Generally, a bill of lading performs the following functions:

(1) It is evidence of the contract of affreightment.

(2) It is a receipt for goods shipped and contains certain admissions as to their quantity and condition when put on board.

(3) It is a document of title, without which delivery of the goods cannot normally be obtained.

Although developments in commercial practice have expanded the functions of a bill of lading, originally, the bill of lading was issued to a shipper of goods in order to enable him to collect the goods from the master of the ship, the carrier, at the end of the destination. The Bill of Lading is a contract between the ship owner/carrier and the shipper/consignee with respect to the goods mentioned therein.

The bill of lading is issued to the shipper in sets of three or four.

Where the shipper/consignee sells the cargo to a third party and endorses the bill of lading to that third party, the shipper transfers his title to the goods by endorsing the bill of lading to the purchaser who becomes the consignee. The parties to the bill of lading would then be the shipowner/carrier, the shipper/consignee on the one part and, the consignee/endorsee on the other; *Kaycee (Nigeria) Limited v. Prompt Shipping Corporation and Another* (1986) LPELR-1680(SC), (1986) 1 NWLR (Pt.15) 180; *Pacers Multi-Dynamics Ltd v. M. V. Dancing Sister & Anor* (2012) LPELR-7848(SC).

By the endorsement and delivery of the bill of lading to any sub-buyer, the latter as assignee steps into the shoes of the consignee. The consignee or the third party/consignee, is entitled to the release or delivery of the goods by the carrier upon the production of the original bill of lading. Without production of the original bill of lading, the consignee would not be entitled to the goods; *Kaycee (Nigeria)*

Limited v. Prompt Shipping Corporation and Another (supra); *"K" Line Inc v. K.R. Int'l (Nig.) Ltd & Anor* (1993) LPELR-14928(CA).

It was not in dispute that the Appellant did not have the original bill of lading. As the Respondent rightly pointed out, there were two different accounts of what happened to the bill of lading. One account was that the bill of lading was lost by STO Courier Service, which was engaged by Sunny Worldwide Logistics Shenzhen Limited, while the other account was that it was lost by the Appellant. The Appellant was, however, verbally informed by the Respondent that the cargo would be released upon the Appellant fulfilling certain conditions in lieu of presentation of the original bill of lading. According to the Appellant, these conditions were:

i. Affidavit of loss of original bill of lading;

ii. Newspaper advert to the effect that the original bill of lading is missing; and,

iii. Police report.

The evidence for the Appellant was that these conditions were met by the Appellant, but the Respondent failed to release the goods, rather laid out further demands. The Respondent's witness, DW1, under cross-examination, said, on page 417 of the Record of Appeal:

> "In the case of a missing original bill of lading, a mail will be sent by the agent to the principal for the loss(sic) Bill of Lading procedure. In this case, we sent a mail to CASB and they gave us a procedure for lost Bill of Lading. The procedure is
>
> a. Police report
>
> b. An Affidavit
>
> c. Newspaper advert.
>
> d. Bank Guarantee from a 1st Class Bank to a minimum of 2 years of 200% of the Cargo Value.
>
> The Plaintiff came to our office personally. We gave him the request which also included letter of Warranty from him and from the shipper."

DW1 continued his testimony under cross-examination and said that the guarantee brought by the Appellant was rejected because the Bank which gave the guarantee did not meet the requirement of being a first-class bank. Another bank guarantee supplied by the Appellant was also rejected for the same reason. DW1

categorically said:

> "The Defendant connote (sic) the rejection to the Plaintiff therefore one Mr. Oluwole, brought another guarantee which was also rejected. He was informed that it was rejected because his bank did not meet the requirement of one of the first-class banks."

See page 420 of the Record of Appeal. DW1 went on to say, on page 421 of the Record of Appeal:

> *"It is only Zenith Bank that is recognized in Nigeria as first-class bank."*

Thus, by the unequivocal evidence of DW1, there was no doubt that the main reason why the bank guarantee of the Appellant was rejected was because it was not issued by Zenith Bank, which the Respondent assessed to be the only first-class bank in Nigeria. Although the basis for this assertion was not provided, the clear testimony of DW1 revealed that irrespective of the indemnity covered by the guarantee, as long as the guarantee was not issued by Zenith Bank, which in the estimation of the Respondent was the only first-class Bank in Nigeria, it would be unacceptable to the Respondent.

The learned trial Judge, in line with the law, recognized the right of the shipping company represented by the Respondent to protect itself from any loss that may arise from releasing the cargo to the Appellant without the original bill of lading. The learned trial Judge was also of the view that the Respondent acted rightly in imposing alternative conditions on the Appellant in lieu of the original bill of lading. The lower Court did not quibble about its disapproval of the further condition regarding the bank guarantee, however, declared its inability to interfere with the discretion of the Respondent.

The learned trial Judge went on to say, on pages 466 - 447 of the Record of Appeal:

> "Unfortunately, as far as the evidence before me goes, the Plaintiff was unable to meet some of these alternative requirements either. I do not think it is within the competence of the court to determine for the Defendant what alternative requirements it should impose or limit them per se. It is entirely within its commercial wisdom to impose such terms as it deems necessary to safeguard it from unwarranted liability. I agree however that in imposing the alternative conditions, the Defendant should do so reasonably and realistically if there is to be a headway in resolving the issue otherwise the impasse would remain till eternity.
>
> For instance, I do not see the logic for the Defendant to insist on a 2-year guarantee when the Plaintiff has provided a guarantee which is renewable every six months or for it to insist on a guarantee of 200% the value of

> the cargo against 100% offered in the guarantee. I wonder also by what technical yardstick the Defendant classifies only Zenith Bank in the entire Nigerian banks as the only first-class bank in Nigeria".

He went further to spell out:

> "… I do not think I can interfere with the discretion of the Defendant in imposing whatever alternative conditions but I think in the subsequent attempt to resolve this impasse, the Defendant might find my observations relevant."

In other words, the trial Court declared itself powerless to dictate to the Respondent or control the commercial wisdom or discretion of the Respondent in imposing whatever alternative conditions it deemed fit.

To my mind therefore, one crucial question to be resolved in this appeal is whether the trial Court could have interfered with the exercise of discretion of the Respondent. Perhaps, put in another way, can the Court interfere with the exercise of discretion by one party in a commercial contract or relationship?

Contractual terms in which one party to the contract is given the power to exercise discretion, or to form an opinion as to relevant facts, are extremely common. Commercial contracts that afford one party a discretion as to whether or how it exercises its rights or fulfils its obligations are not uncommon. The question that is relevant in this appeal is whether the Court may interfere with or influence that discretion afforded a party in a commercial contract.

Fundamentally, a Court lacks the *vires* to re-write the agreement of the parties, which gives one of them power to exercise a discretion, for the Court cannot substitute itself for the contractually agreed decision-maker; *A.G. Nasarawa State v. A.G. Plateau State* (2012) LPELR-9730(SC); *Union Bank v. Ozigi* (1994) LPELR-3389(SC). This principle has been settled in matters of judicial review; *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* (1948) 1 KB 223; *Braganza v. BP Shipping Ltd* (2015) UKSC 17. In *Iwuji v. Federal Commissioner for Establishment & Anor* (1985) LPELR-1568(SC), Karibi-Whyte, JSC, explained:

> "The Court in the exercise of its supervisory jurisdiction over the exercise of administrative discretions is confined, as the person exercising the discretion, to the facts before it relevant to the determination of the issue before it. It is not the duty of the Court to substitute the exercise of its discretion for that being challenged. This is because where the facts are before the person exercising the discretion, he would be deemed to have taken them into consideration in the exercise of his discretion." (Emphasis mine).

The standard of review in judicial review of administrative actions was analysed in the case of *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (supra).* In that case, the judicial review of a decision made by Wednesbury Corporation was sought. The issue was whether the Court could overturn the decision on the contention that it was unreasonable. In deciding that the Court had no power to issue a *writ* of *certiorari* to quash the decision of the defendant, where the defendant had not gone beyond their legal powers, simply because the Court disagreed with it, Lord Greene, MR, elucidated:

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Lord Justice Warrington in *Short v. Poole Corporation* (1926) Chancery 66 on pages 90 and 91, gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."

His Lordship, the Master of the Rolls, then concluded:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority has kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere." (Emphasis mine).

In *Braganza v. BP Shipping Ltd* (2015) UKSC 17, the Court identified a parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute assigns a decision-making function to a public authority. In each case, the primary decision-maker is the contracting

party or the public authority, and not the Court. The Court therein, per Lady Hale, expressed the view that the standard of review generally adopted by the Courts to the decisions of a contracting party should be no more demanding than the standard of review adopted in the judicial review of administrative action. See also *CVG Siderurgicia del Orinoco SA v. London Steamship Owners' Mutual Insurance Association Limited 'The Vainqueur Jose'* (1979) 1 Lloyds Rep 557 in which it was held that whenever a discretion is afforded to a party by contract, it is an implied term that it must not be exercised unreasonably. The factors to be considered in the exercise of a contractual discretion include fairness, reasonableness, *bona fides* and absence of misdirection in law.

I am persuaded by these decisions on the limits to interference by the Court in matters involving the exercise of discretion in commercial contracts.

It is a settled position of our law that the decision of any foreign Court is of persuasive authority though not binding on our Courts. These decisions may be followed by the Court especially where there are no indigenous decisions of this Court or of the Supreme Court on the issues, and the said foreign decisions are *in pari materia* or not inconsistent with any relevant legislation; *Yahaya v. State* (2002) LPELR-3508(SC); *Sifax (Nig) Ltd & Ors v. Migfo (Nig.) Ltd & Anor* (2018) LPELR-49735(SC); *Inakoju & Ors v. Adeleke & Ors* (2007) LPELR-1510(SC); *Basinco Motors Ltd v. Woermann-Line & Anor* (2009) LPELR-756(SC).

From the settled position of the law, it is clear that circumstances in which the Court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. Extrapolating this principle, it is my considered view that a Court may inquire into the reasonableness of an exercise of discretion by a party in a commercial contract, and if the result of such exercise is found to be completely unreasonable, the Court may interfere. The concern is that the exercise of discretion should not be abused. A contractual discretion must therefore be exercised in good faith and not be irrational, arbitrarily or capriciously.

In the context of this appeal, the right of the Shipper and its exercise of discretion to put in place a procedure or conditions for the release of cargo, without producing the original bill of lading, in order to protect itself from any potential liability, cannot be censured. However, in my view, the Court can look into the nature of those conditions.

To the Shipper, the only bank guarantee acceptable was one by a first-class Bank in Nigeria, which DW1 declared:

> *"It is only Zenith Bank that is recognized in Nigeria as first-class bank."*

It is important to note that in giving the conditions to the Appellant, the Respondent

did not specify that the bank guarantee would only be accepted if it was used by Zenith Bank. It must also be noted that Nigeria has no categorization of banks into classes. Indeed, if there was such public classification, one may be quick to place ahead Union Bank that issued the guarantee, which was one of the earliest banks to open shop in Nigeria.

The Respondent gave no evidence on what parameters were used in adjudging Zenith Bank to be the only first-class bank in Nigeria. The status of a financial institution is assessed by looking at a variety of factors, which include capital adequacy and asset quality, consumer satisfaction levels, financial stability, and customer service levels. In addition, the bank should have a strong record of regulatory compliance and demonstrate risk management practices that are in line with industry standards. Although there is a classification of banks or financial institutions in the Nigerian banking system, it is not a matter that can be presumed. There has to be evidence on the said classification. Further, if the only bank guarantee acceptable to the Respondent was that of Zenith Bank, alleged by the Respondent to be the only first-class bank in Nigeria, this fact ought to have been made clear to the Appellant. As it stands, there was no such information made available to the Appellant. A situation where the Respondent changes the goal post without due notification to the Appellant is indicative of an arbitrary, capricious and unreasonable exercise of discretion. Any interference by the lower Court with the exercise of discretion by the Respondent would only be on this basis.

I will be clear that the Respondent was entitled to give the terms that they wanted to have the bank guarantee in effect for. The Respondent could even name preferred Banks to issue the guarantee. The Court cannot interfere with that aspect of the conditions. But going further, without notifying the Appellant on which Bank was expected to issue the bank guarantee, to ascribe the status of the only "first class" bank in Nigeria to Zenith Bank and reject every other bank guarantee, was a capricious, arbitrary and unreasonable exercise of discretion. The Court may, only to this extent, interfere. This means that if the Appellant met the other conditions required by the Respondent, without the addition of a Respondent-designated first class bank, then the Appellant would have complied with the conditions prescribed by the Respondent.

The learned trial Judge held that the Appellant failed to meet the conditions for the release of its cargo by the Respondent. On this basis, the Appellant's action was dismissed. Once more, the conditions for the release of the cargo, were:

1. Police report
2. An Affidavit
3. Newspaper advert.

4. Bank Guarantee from a 1st Class Bank to a minimum of 2 years of 200% of the Cargo Value.

The Appellant tendered Exhibit 7 as the Bank Guarantee they obtained. The relevant portion of Exhibit 7 read:

"WE, UNION BANK OF NIGERIA PLC hereby guarantee Sharaf Shipping Agency Limited the payment of the sum of ₦2,390,000.00 (Two Million Three Hundred and Ninety Thousand Naira Only) in the event that it suffers any loss as a result of releasing the cargo to Mr. Deji Oluwole without the original Bill of Lading.

WE, UNION BANK OF NIGERIA PLC of Stallion Plaza 36 Marina, Lagos, hereby agree to join in this indemnity always that the Bank's liability:

1. Shall be restricted to payment of the sum of ₦2,390,000.00 (Two Million Three Hundred and Ninety Thousand Naira Only) in relation to the Indemnity (and shall not extend to the provision of bailor other security)

2. …

3. The liability of the Bank under this indemnity is the same with the Bank Guarantee earlier issued for the same purpose and shall be limited to a sum or sums not exceeding ₦2,390,000.00 (Two Million Three Hundred and Ninety Thousand Naira Only).

4. Subject to proviso 5 below, shall terminate 180 days from the date herein except in respect of any demands for payment received by the Bank hereunder at the address indicated above on or before that date.

5. However, the indemnity shall be extended at your request from time to time for a period of six months at a time, provided that any request for extension is received by the Bank two weeks before the expiration of the tenure of this indemnity.

The liability of the Bank under this guarantee is limited to the sum of ₦5,000,000.00 (Five Million Naira only) and shall cease to exist upon delivery of the original bill of lading to you by the Consignee or after the tenor of this guarantee."

Paragraphs 4 and 5 of Exhibit 7, paraphrased, would read: that *the guarantee would be in effect for 180 days (six months), and can be renewed for another six months at any time, provided that two weeks' notice is given before the expira-*

tion of *the current tenor* of *the guarantee.* Placed against the condition that the guarantee was to be in effect for a minimum period of 2 years and for 200% of the Cargo Value, I find I must have to agree with the lower Court that Exhibit 7 did not conform with the condition. Being *in effect for six months* is not the same as being in effect for a *minimum of two years.* The learned trial Judge recognized this fact when he said:

> "For instance, **I do not see the logic for the Defendant to insist on a 2-year guarantee when the Plaintiff has provided a guarantee which is renewable every six months or for it to insist on a guarantee of 200% the value of the cargo against 100% offered in the guarantee**. I wonder also by what technical yardstick the Defendant classifies only Zenith Bank in the entire Nigerian banks as the only first-class bank in Nigeria". (Emphasis mine).

But it is what it is. Since the original bill of lading was not produced, these conditions were adopted by the Respondent to protect any potential liability. The Respondent wanted a bank guarantee of two years minimum and to cover 200% value of the cargo. The Court cannot interfere with these conditions.

The conclusion of the learned trial Judge was that page 447 of the Record of Appeal:

> "As things stand however my view is that the Plaintiff has failed to meet the conditions for the release of its cargo by the Defendant."

I see absolutely no reason to interfere with this conclusion.

Having regard to the finding of this Court that the Respondent's unilateral designation of Zenith Bank as the only first-class bank in Nigeria was an arbitrary, capricious and unreasonable exercise of discretion, Issue 1 is resolved in part against the Appellant.

Issue 2

Trial concluded in this case on 4/7/2017 and, parties adopted their Final Written Addresses on 30/10/2017. However, judgment was not delivered by the lower Court until 7/5/2018, seven months after the parties adopted their final addresses. The Appellant contended that this was in breach of the provisions of Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), which provides that judgment or decision of a court must be rendered within 90 days from adoption of addresses. The rationale behind these constitutional provisions is to guard against miscarriage of justice.

Although, prior to when the lower Court read its judgment on 7/5/2018, the parties

re-adopted their written addresses on same date, the Appellant submitted that this was a mere formality in a bid to circumvent the violation of the constitutional provision, that the re-adoption of written addresses did not cure the defect.

A party who contends that the judgment of the lower court was not delivered within 90 days, must show that such delay occasioned miscarriage of justice, citing *Okon v. State* (2018) 12 NWLR (Pt. 1634) 558 at 573. The Appellant submitted that the delay occasioned miscarriage of justice, referring to the pleadings and, evidence adduced to submit that the judgment on appeal disclosed a misconception of the facts by the lower Court and thereby, occasioned miscarriage of justice; *Mobil Producing (Nig.) Unltd v. Johnson* (2018) 14 NWLR (Pt. 1639) 329. In particular, the Appellant complained that the lower Court failed to evaluate the bank guarantee of 27/7/2011, Exhibit 7. The Court was urged to hold that, the delay of the lower court in delivering judgment within 90 days accounted for the misconception which had occasioned miscarriage of justice. The Court was finally urged to allow the appeal.

The Respondent, in reply, submitted that there was no ground of appeal to support the issue of failure to evaluate the evidence before the trial Judge. That being the case, all the Appellant's arguments thereon will go to no issue and should be discountenanced. Evaluation of evidence is the appraisal of both oral and documentary evidence placed before the court and the ascription of probative value to the evidence resulting in the finding of facts; citing *Elvis Ezeani v. Federal Republic of Nigeria* (2019) LPELR-46800(SC).

It was submitted that the findings of fact by the trial Court were fully supported by the evidence adduced by both parties during trial. For the appellate Court to interfere in the primary responsibility of the trial Court regarding evaluation of evidence, it must be shown that the findings of fact were perverse, citing *Bilkisu Tinuola Gambari & Anor v. Miss Gbemisola R. Saraki & Ors.* (2009) LPELR-4182(CA).

The Respondent further submitted, assuming without conceding, that learned trial Judge actually failed to consider and evaluate the bill of lading of 27/7/2011, that alone cannot be a basis for setting aside its decision. The Appellant had a duty to show how the failure has occasioned a miscarriage of justice. The Appellant also failed to show how the miscarriage of justice was as a result of the delay in rendering judgment within the prescribed period. Reliance was placed on the provisions of Section 294(5) of the Constitution of The Federal Republic of Nigeria, 1999 (as amended). Also cited was the decision in *Akoma & Anor v. Osenwakwu & Ors.* (2014) LPELR-22885(SC).

It was not the case of the Appellant that the learned trial Judge did not take a proper advantage of having seen or heard the witnesses testify or that he had forgotten the demeanour of the witnesses who testified before him due to such inordinate delay. Further, it was not the case of the Appellant that the decision

given was inconsistent with its established rights. Rather, the grouse of the Appellant seems to be that the learned trial Judge allegedly failed to consider and evaluate Exhibit 7, which allegation was baseless.

The Court was urged to hold that the failure to deliver judgment within 90 days did not occasion a miscarriage of justice to the Appellant particularly, as the alleged failure to consider Exhibit 7 had nothing to do with evaluation of evidence based on the credibility or demeanour of the witnesses observed by the trial court while testifying.

In the Reply Brief, the Appellant submitted that the issue of improper evaluation of evidence by the lower Court was the fulcrum of grounds 3 and 5 of the Appellant's grounds of appeal from which Issue 2 of the Appellant's issues for determination was distilled. Arguments in respect of appeals are based on issues formulated for determination and not grounds of appeal, citing *Adebayo v. Shogo* (2005) 7 NWLR (Pt 925) 467. The Court was urged to discountenance the Respondent's submission in this regard, and allow the appeal.

Resolution

The point must quickly be made that a decision given by a Court after ninety days of conclusion of hearing, as constitutionally provided, does not automatically become a nullity, unless the appellant has suffered a miscarriage of justice in consequence. The appellant has to satisfy the Court that failure to deliver the judgment within the stipulated time has occasioned a miscarriage of justice to him; Section 294(5) of the 1999 Constitution, as amended. See also *Akoma v Osenwokwu* (2014) LPELR-22885(SC); *Atungwu v. Ochekwu* (2013) LPELR-20935(SC); *Ifemesia v. Ecobank Nigeria Plc* (2018) LPELR-46589(CA); *Union Bank v. Gap Consultants Ltd* (2017) LPELR-45361(CA); *Ecobank (Nig.) Ltd v. Honeywell Flour Mill Plc Ltd* (2021) LPELR-56261(CA).

In determining whether or not there has been a miscarriage of justice, the appellate Court has to be satisfied that the miscarriage is substantial and not simply one of mere technicality, which has caused no embarrassment or prejudice to the appellant; *Adebayo v. A.G. of Ogun State* (2008) LPELR-80(SC); *Famfa Oil Ltd v. A.G. of Federation* (2003) LPELR-1239(SC). Where a real miscarriage of justice has not been established, the judgment of the lower Court shall not be declared a nullity; *Savannah Bank of Nig. Ltd v. Starite Industries Overseas Corporation* (2009) LPELR-3020.

The Appellant herein has not shown that it has suffered any miscarriage of justice by the failure to deliver the judgment within three months. The complaint that there was improper evaluation of the evidence, particularly of Exhibit 7, is not borne out by the records. Rather, the Court in resolving Issue has affirmed the evaluation of Exhibit 7 by the learned trial Judge. I therefore see no merit in the Appellant's

contentions in this regard. Issue 2 is therefore resolved against the Appellant.

This appeal is therefore succeeds in part. Having found that the lower Court was right in its finding that the Appellant did not comply with the conditions laid down by the Respondent for the delivery of the of the cargo without the original bill of lading, it follows that this appeal fails.

The appeal is accordingly, hereby dismissed. Parties shall bear their costs.

DANIEL-KALIO, JCA: I agree with my lord ONYEKACHI AJA OTISI, JCA and I agree with my lord's reasoning and conclusion. I have nothing useful to add. I dismiss the appeal.

SIRAJO, JCA: The leading Judgment in this appeal, prepared by my learned brother, ONYEKACHI AJA OTISI, JCA, a draft copy of which was made available to me before now, has lucidly dealt with the issues for determination in the appeal leading to the conclusion that the appeal is unmeritorious. I hereby express my total concurrence with the leading Judgment which dismissed the appeal. Like in the leading Judgment, I also make no order as to costs.

Cases cited in the Judgment.
"K" Line Inc v. K.R. Int'l (Nig.) Ltd & Anor (1993) LPELR-14928(CA)
A.G. Nasarawa State v. A.G. Plateau State (2012) LPELR-9730(SC)
Adebayo v. A.G. of Ogun State (2008) LPELR-80(SC)
Adebayo v. Shogo (2005) 7 NWLR (Pt 925) 467
Akin Akinyemi v. Odu'a Investment Company Limited (2012) LPELR-8270(SC)
Akoma & Anor v. Osenwakwu & Ors. (2014) LPELR-22885(SC)
Atungwu v. Ochekwu (2013) LPELR-20935(SC)
Basinco Motors Ltd v. Woermann-Line & Anor (2009) LPELR-756(SC)
Bilkisu Tinuola Gambari & Anor v. Miss Gbemisola R. Saraki & Ors. (2009) LPELR-4182(CA)
Boothia Maritime Inc. & Ors. v. Far East Mercantile Co. Ltd. (2001) LPELR 792(SC)
Ecobank (Nig.) Ltd v. Honeywell Flour Mill Plc Ltd (2021) LPELR-56261(CA)
Elvis Ezeani v. Federal Republic of Nigeria (2019) LPELR-46800(SC)
Eronini v. Iheuko (1989) 3 NWLR (Pt. 101) 46
Famfa Oil Ltd v. A.G. of Federation (2003) LPELR-1239(SC)
Ifemesia v. Ecobank Nigeria Plc (2018) LPELR-46589(CA)
Inakoju & Ors v. Adeleke & Ors (2007) LPELR-1510(SC)
Iwuji v. Federal Commissioner for Establishment & Anor (1985) LPELR-1568(SC)
Kaycee (Nigeria) Limited v. Prompt Shipping Corporation and Another (1986) LPELR-1680(SC), (1986) 1 NWLR (Pt.15) 180
Kline Inc. v. K.R. Int'l (Nig.) Ltd. & Anor (1993) LPELR - 14928 (CA)
Miss Nkiru Amobi v. Mrs Grace O. Nzegwu & Ors (2013) LPELR-21863(SC)
Mobil Producing (Nig.) Unltd v. Johnson (2018) 14 NWLR (Pt. 1639) 329
National Judicial Council v. Hon. Justice Ya'u Ibrahim Dakwang & Ors (2019)

LPELR-46927(SC)
Nigerian National Supply Co. v. Owners of MV "Albion 1" (1990) III NSC 200
Okon v. State (2018) 12 NWLR (Pt. 1634) 558
Pacers Multi-Dynamics Ltd v. M. V. Dancing Sister & Anor (2012) LPELR-7848(SC)
S. C.; F. I. Onwadike & Co. Ltd v. Brawal Shipping (Nig.) Ltd. & Anor (1996) 1 NWLR (Pt. 422) 65
Savannah Bank of Nig. Ltd v. Starite Industries Overseas Corporation (2009) LPELR-3020
Sifax (Nig) Ltd & Ors v. Migfo (Nig.) Ltd & Anor (2018) LPELR-49735(SC)
Ukiri v. EFCC (2018) 1 NWLR (Pt. 1599) 155
Union Bank v. Gap Consultants Ltd (2017) LPELR-45361(CA)
Union Bank v. Ozigi (1994) LPELR-3389(SC)
Williams v. Hope Rising Voluntary Society (1982) 1 All NLR (Pt. 1) 1
Yahaya v. State (2002) LPELR-3508(SC)

Foreign cases cited in the Judgment
Associated Provincial Picture Houses Ltd v. Wednesbury Corporation (1948) 1 KB 223
Braganza v. BP Shipping Ltd (2015) UKSC 17
CVG Siderurgicia del Orinoco SA v. London Steamship Owners' Mutual Insurance Association Limited 'The Vainqueur Jose' (1979) 1 Lloyds Rep 557
Short v. Poole Corporation (1926) Chancery 66
Tung Bank Ltd v. Rambler Cycle Ltd (1959) 3 All ER 182

Statutes cited in the Judgment
Section 6(6)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)
Section 294(1), (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

Books referred to in the Judgment
Black's Law Dictionary, Ninth Edition
Modern Bills of Lading (2nd Edition), Paul Todd
History:

HIGH COURT
Federal High Court, Lagos
Coram R. M. AIKAWA, J
Suit No: FHC/L/CS/70/2012
Monday 7th May, 2018

COURT OF APPEAL (Lagos Division)
Obietonbara O. Daniel-Kalio, JCA ***(Presided)***
Onyekachi Aja Otisi, JCA ***(Read the leading Judgment)***
Muhammad Ibrahim Sirajo, JCA

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Paul Omaidu, Esq., with Folashade Callisto, Esq., and Michael Popola for the Respondent

ADAMAC INDUSTRIES LIMITED v. FORTUNE INTERNATIONAL BANK; NIGERIA DEPOSIT INSURANCE CORPORATION

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/150/2013
FRIDAY 17TH MARCH, 2023

(BADA; UMAR; SIRAJO, JJ.CA)

COMPANY LAW – Winding up – actions for winding up – an action for the winding-up of a company incorporated under the Companies and Allied Matters Act is governed by the Companies Winding-Up Rules – Rule 19 Companies Winding-Up Rules of 2001.

COMPANY LAW – Winding up – where a winding-up Order has already been granted against the company, any action against the company in any Court must be commenced with leave of court.

COMPANY LAW – Winding up – where a provisional liquidator is appointed under the Nigeria Deposit Insurance Corporation Act, leave of the court will not be required to commence winding up proceeding against a company – Section 40 of the Nigeria Deposit Insurance Corporation Act, 2006.

APPEAL – Commencement of an appeal – any person other than a party who has sufficient interest in a matter can commence an appeal but with the leave of either the court.

APPEAL – Ground of appeal – every ground of appeal must relate to and constitute a challenge to the ratio of the decision appealed against – exception.

COURT – Jurisdiction – a matter determined without jurisdiction of the court amounts to a nullity.

Facts:

The 2nd Respondent being the Petitioner at the Federal High Court (trial court) commenced an action vide a Petition seeking to wind up the 1st Respondent on grounds of insolvency amongst other grounds. The Appellant filed an Application for Joinder together with a Notice of Intention to Appear in the winding-up proceedings at the lower Court pursuant to Rule 23 of the Company Winding Up Rules, 2001. The lower Court dismissed the Application for Joinder amidst the determination of an avalanche of other interlocutory applications. At the conclusion of the hearing of the winding up proceedings, the lower Court delivered its judgment and granted all the reliefs sought in the Petition.

Being dissatisfied with the Judgment of the Lower Court, the Appellant appealed to the Court of Appeal.

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

[1] ***Company Law – Winding up – actions for winding up – an action for the winding-up of a company incorporated under the Companies and Allied Matters Act is governed by the Companies Winding-Up Rules – Rule 19 Companies Winding-Up Rules of 2001.***

…The rules governing proceedings in an action for the winding up of a company incorporated under the Companies and Allied Matters Act Cap C20, Laws of the Federation of Nigeria, 2004, is the Companies Winding-Up Rules of 2001, which is a subsidiary legislation made pursuant to the provision of the Act. The relevant provision of the Rules in relation to the instant case is as follows: Rule 19 states: (1) "No petition shall be advertised until the judge hearing the petition or a judge before whom the petition is first mentioned in open Court so orders. (2) The order for advertisement of a petition shall be as follows: a. The petition shall be advertised fifteen clear days before the hearing; b. The petition shall be advertised once or as many times as the Court may direct, in the Gazette and in one national daily newspaper and one other newspaper circulating in the state where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the Court. c. The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor, and shall contain a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitor, within the time and manner prescribed by this rule and any advertisement of a petition for the winding-up of a company by the Court which does not contain such a note shall be deemed irregular. (3) A petition not advertised within the time prescribed or in the manner prescribed shall be struck out, unless, for sufficient reason given, the Court otherwise orders. (4) Advertisement of the petition shall be in Form 9 or 10 in the Appendix with such variations as circumstances may require" Rule 23 states: (1) "Every person who intends to appear on the hearing of a petition shall give to the petitioner, notice of his intention in accordance with this rule. (2) The notice shall contain the address of the person intending to appear, shall be signed by him (or by his solicitor) and shall otherwise be in Form 12 with such variations as circumstances may require. (3) The notice shall be served or sent by post to petitioner or his solicitor, at the address stated in the advertisement of the petition. (4) The notice shall be served (or if sent by post shall be posted in such time as in ordinary

course of past to reach the address) not later than five days before the hearing. (5) A person who has failed to comply with this rule shall not, without the special leave of the Court, be allowed to appear in the hearing of the petition. (Underline mine) A community reading of the Rule 19 (2) (c) and 23 (1) & (5) reproduced above would reveal what the law requires of a Respondent who intends to appear on the hearing of a petition. Apparently, such a Respondent is only required to send notice of his intention to the petitioner' and nothing more. See *Afribank & Ors v. NDIC* (2015) LPELR-246543(CA).
(P. 116 lines 39 - 45; P. 117 lines 1 - 45; P. 118 line 1)

[2] ***Company Law – Winding up – where a winding-up Order has already been granted against the company, any action against the company in any Court must be commenced with leave of court.***

…Where a winding up order has been made against a Company or where a provisional liquidator has been appointed for the purposes of winding up a company, no action or proceeding can be commenced against that company except by leave of court…The leave of Court referred to in Section 417 of CAMA is only applicable where a party intends to commence an action against the company during the pendency of its winding-up proceedings or upon the appointment of the Provisional Liquidator. This is because a company under a winding-up proceeding is still alive though on a sick bed. See *Co-operative and Commerce Bank (Nig.) Ltd v. Onwuchekwa* (1999) LPELR-5512(CA); *Omaghoni & Ors v. Nigeria Airways Ltd (In Liquidation)* (2006) LPELR-7609(CA).
(P. 122 lines 19 - 22; 31 - 36)

[3] ***Company Law – Winding up – where a provisional liquidator is appointed under the Nigeria Deposit Insurance Corporation Act, leave of the court will not be required to commence winding up proceeding against a company – Section 40 of the Nigeria Deposit Insurance Corporation Act, 2006.***

… I will reproduce Section 40 of the Nigeria Deposit Insurance Corporation Act, 2006 which states thus:

> **1. Whenever the licence of an insured institution is revoked by the Central Bank of Nigeria, the Corporation shall act as liquidator of such failed insured institution with powers conferred on a liquidator under the Companies and Allied Matters Act, 1990 and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for the purpose of that Act.**

2. Immediately following the publication in the gazette of the revocation of the license of the failed insured institution, the Corporation shall apply to the Federal High Court for an Order to wind up the affairs of the failed institution.

The implication of the above provisions is that upon the revocation of the licence of the 1st Respondent by the Central Bank of Nigeria, the 2nd Respondent is already deemed to have been appointed as provisional liquidator by the Federal High Court to wind up the 1st Respondent by operation of law as such no further leave is required. See *Chinwedu & Ors v. NDIC & Anor* (2018) LPELR-50090(CA); *NDIC v. Rahman Brothers Ltd* (2018) LPELR-46781 (CA); *Bank PHB v. NDIC* (2019) LPELR-47597. **(P. 123 lines 19 - 41)**

[4] ***Appeal – Commencement of an appeal – any person other than a party who has sufficient interest in a matter can commence an appeal but with the leave of either the court.***

…It is not only a party to an action that can commence an appeal against the decision of a court in the action. Thus, any person other than a party who has sufficient interest in such a matter can also appeal but with the leave of either the High Court or the Court of Appeal… The rationale behind this constitutional provision is to enable the Court to determine whether it is proper in law to grant a party leave to appeal in the circumstance of the case and to ensure a fair determination of the issues between the parties. See *Owena Bank (Nig.) Plc v. N.S.E. Ltd* (1997) LPELR-2843(SC); *Okonkwo & Anor v. UBA Plc* (2011) LPELR-23010(SC); *APGA v. Oye & Ors* (2018) LPELR-45196(SC); *Waziri v. Gumei & Anor* (2012) LPELR-7816(SC). **(P. 116 lines 19 - 29)**

[5] ***Appeal – Ground of appeal – every ground of appeal must relate to and constitute a challenge to the ratio of the decision appealed against – exception.***

The law is unequivocal, and this Court has stated consistently that every ground of appeal must relate to and constitute a challenge to the ratio of the decision appealed against. The only exception is where the ground challenges the jurisdiction of the court. Therefore, any ground of appeal that does not arise or flow from the judgment being appealed against is incompetent and liable to be struck out. See *Ehigiator v. Obazee* (2021) LEPLR-54134(CA); *Kirk Holdings (Nig.) Ltd v. FBN & Anor* (2016) LPELR-41463 (SC); *Achonu v. Okuwobi* (2017) LPELR-42102(SC). **(P. 119 lines 28 - 34)**

[6] ***Court – Jurisdiction – a matter determined without jurisdiction of the court amounts to a nullity.***

It is trite law that jurisdiction is the life wire in any adjudication. Consequently, where there is no jurisdiction to hear and determine a matter, everything done in the absence of jurisdiction is a nullity. See *Nweke v. FRN* (2019) LPELR-46946(SC); *Shelim & Anor v. Gobang* (2009) LPELR-3043(SC); *Obu & Ors v. SPDC Ltd & Anor* (2013) LPELR-21241 (CA). **(P. 122 lines 5 - 9)**

UMAR, JCA (Delivering the lead Judgment): This is an appeal against the Decision of the Federal High Court, Lagos Judicial, Division ("the lower court" or "the trial court") delivered on the 19th day of November 2012 coram I. N. Buba, J. in Suit No: FHC/L/CP/36/2006 wherein the lower Court granted the reliefs sought by the 2nd Respondent.

The 2nd Respondent being the Petitioner at the trial court commenced an action vide a Petition seeking to wind up the 1st Respondent on grounds of insolvency amongst other grounds. The following reliefs were sought from the lower court by the 2nd Respondent to wit:

i. That the Respondent may be wound up by this Honourable Court under the provisions of the Companies and Allied Matters Act, 1990 as amended, section 38 of Banks and Other Financial Institutions Act, 1991 and other relevant statutes.

ii. AND FOR SUCH Order or other orders as the Honourable Court may deem fit to make in the circumstances."

The Appellant filed an Application for Joinder together with a Notice of Intention to Appear in the winding-up proceedings at the lower Court pursuant to Rule 23 of the Company Winding Up Rules, 2001. The lower Court dismissed the Application for Joinder amidst the determination of an avalanche of other interlocutory applications. At the conclusion of the hearing of the winding up proceedings, the lower Court delivered its judgment on 19 November 2012 and granted all the reliefs sought in the Petition.

Being dissatisfied with the Judgment of the Lower Court, the Appellant commenced an appeal by a Notice of Appeal dated and filed on 19 November 2012. The Appellant also filed a Motion for leave to amend its Notice of Appeal dated 9th November 2017 and filed on 11 November 2017. The Appellant's application for the amendment of its Notice of Appeal was granted on 15 November 2018. Further to the foregoing, the Appellant filed an Amended Notice of Appeal on the 1st of July 2019 ("Amended Notice of Appeal").

In compliance with the rules of court, parties filed and exchanged their respective Briefs of Argument. The Appellant's Brief of Argument was settled by DONG WILLIAM JOHN, ESQ. Counsel to the Appellant formulated the following Issues for the determination of this Appeal to wit:

"1. Whether the Lower Court erred in law when it held that it is only the interim committee appointed by the Central Bank of Nigeria and not the shareholders of the 1st Respondent Bank that should appoint legal representation for the 1st Respondent?

2. Whether the Lower Court erred in law when it held that the license of the 1st Respondent bank having been revoked by the Central Bank of Nigeria (CBN), the shareholders cannot take steps to defend the interest of the bank?

3. Whether the Lower Court erred in law when it held that the advertisement of the winding up petition and appointment of provisional liquidator for the 1st respondent Bank pursuant to an ex parte Application was proper and in line with the provisions of CAMA and the winding up Rules, 2011 and that the Appellant's Objection has no merit?

4. Whether the Lower Court erred in law when it held that the leave to advertise for the winding up of the 1st Respondent Bank along with appointment of provisional liquidator for the 1st Respondent Bank both granted by way of Ex parte motion without giving the 1st Respondent bank the opportunity to be heard does not violate the constitutional right to fair hearing of the 1st Respondent bank?

5. Whether the Lower Court erred in law when it held that the non-service of the Winding Up Petition as well as the motion for leave to advertise for the winding up of the 1st Respondent Bank along with appointment of provisional liquidator for the 1st Respondent bank is not fatal to the winding up petition?

6. Whether the Lower Court erred in law when it held that the petition does not amount to an abuse of Court process in view of the pendency of Suit No: FHC/L/CS/307/2006 between Liberty Bank Plc. & Ors v. CBN & Ors, challenging the revocation of the license of the 1st Respondent Bank?

7. Whether the Lower Court erred in law when it held that it is

just and equitable to wind up the 1st Respondent Bank, the pendency of Suit No: FHC/LS/307/2006 challenging the revocation of the license of the Appellant Bank notwithstanding?

8. Whether the Winding up Petition as constituted and commenced before the Lower Court was competent for the Court to assume the requisite jurisdiction to have entertained it ab initio?

9. Whether the entire judgment of the Court and the proceedings leading thereto is not a nullity and given without jurisdiction as leave of the Federal High Court was not first sought and obtained before instituting the winding up Petition in line with Section 417 of the Companies and Allied Matters Act, 2004, the 2nd Respondent having been appointed as the Provisional Liquidator of the 1st Respondent Bank pursuant to Section 40 of the Nigeria Deposit Insurance Corporation Act, LFN, 2004?"

The 1st Respondent's Brief of Argument was settled by BERNARD A. OTUKAM-IYAMA ESQ. The 1st Respondent in its Brief raised a Preliminary Objection challenging the jurisdiction of the court to adjudicate on this appeal. In addition, the 1st Respondent contended that the Amended Notice of Appeal contains incompetent grounds of appeal, and that the Appellant's Brief of Argument is incompetent. Counsel to the 1st Respondent thereafter formulated two issues for the determination of this Appeal in his Brief of Argument to wit:

1. Whether in view of the provisions of Section 40(5) of the Nigeria Deposit Insurance Corporation Act Cap. N102 Law of the Federation, 2010, the Company Winding Up Rules are applicable to the winding up of 1st Respondent, being a failed insured bank by the Nigeria Deposit Insurance Corporation (the 2nd Respondent herein).

2. Whether in view of the provisions of Section 40 (1) & (2) of the Nigeria Deposit Insurance Corporation Act, Cap. N102 Law of the Federation of Nigeria, 2010, the revocation of the banking license of the 1st Respondent was not a sufficient ground for its liquidation by the 2nd Respondent herein."

The 2nd Respondent's Brief of Argument was settled by AJAYI SEUN OLUWAGBENGA, ESQ. The 2nd Respondent also raised a Preliminary Objection challenging the jurisdictional competence of this Honourable Court to adjudicate on the instant appeal. In addition, the 2nd Respondent contended that the grounds in the Amended Notice of appeal and the Appellant's Brief of Argument are incom-

petent. It is also the contention of the 2nd Respondent that the Appellant does not have the capacity to institute this appeal. Counsel to the 2nd Respondent thereafter formulated three issues for the determination of this Appeal in his Brief of Argument to wit:

> ***"1. Whether the winding up petition amount to an abuse of Court process?***
>
> ***2. Whether there was a breach of constitutional right to fair hearing of the 1st Respondent throughout the proceeding at the lower Court?***
>
> ***3. Whether it is just and equitable to wind up the 1st Respondent's Bank?"***

Learned Counsel to the Appellant responded by filing a Reply Brief on the 8th day of November 2021. The respective Briefs of argument of the Appellant and the Respondents were deemed argued on 7th April 2022.

Before I proceed to consider the merit of the instant appeal, I shall determine the preliminary objection raised by the 1st and 2nd Respondents.

1st & 2nd RESPONDENTS' ARGUMENT ON PRELIMINARY OBJECTION

As highlighted above, the 1st and 2nd Respondents' objections against the instant appeal are on the ground that this Honourable Court does not have the jurisdiction to adjudicate the instant appeal. The 1st and 2nd Respondents have also submitted that the grounds in the Amended Notice of Appeal and the Appellant's Brief of Argument are incompetent.

Counsel to the 1st Respondent argued that a winding up petition is *sui generis* and is strictly between the Petitioner and the company. According to the 1st Respondent's counsel, creditors, shareholders or directors of the company are excluded from a winding up proceeding. He argued that a court order is not binding on a person who is not a party to the action before the court. It was submitted by the 1st Respondent's counsel that a person who is not a party to a suit cannot appeal against the decision of the Court. The case of *Ladoja v. Ajimobi & Ors* (2016) Vol. 2 MJSC (Pt. III) 1 was cited and relied on.

Relying on the provisions of Section 243 of the 1999 Constitution of the Federal Republic if Nigeria (as amended), learned Counsel to the 1st Respondent submitted that the right of appeal in civil proceedings from the lower Court to the Court of Appeal is only exercisable by a party who was part of the civil proceedings at the lower Court. He submitted that any other person not being a party to the civil proceedings at the lower Court but having sufficient interest in the matter can

also appeal as an interested party but with the leave of the Court. The cases of *Otobaimere v. Akporehe* (2004) 14 NWLR (Pt. 894) 591; *Nwaogu v. Atuma* (2013) 9 NWLR (Pt. 1358) 113 were relied on to buttress the submission.

The learned counsel to the 1st Respondent reiterated that the right to appeal of an interested person is only exercisable with leave of this Honourable Court and that since the Appellant neither sought nor obtained the leave of this Court to appeal as an interested party, the instant appeal ought to be dismissed. Reliance was placed on the decision in *Muhammed v. Olawumi* (1990) 2 NWLR (Pt.133) 458. Counsel to the 2nd Respondent made similar arguments on this point, and I need not belabour the argument by repeating same.

On the competence of the grounds of appeal, the 1st Respondent's counsel submitted that seven (7) of the nine (9) grounds of appeal contained in the Amended Notice of Appeal are incompetent. Relying on the cases of *Cooperative and Commerce Bank Plc. & Anor v. Ekperi* (2007) Vol. 4 MJSC 172; *Ikweki v. Ebele* (2005) Vol. 7 MJSC 125, the 1st Respondent's counsel argued that a competent ground of appeal should challenge the ratio of the decision of a lower Court The case of *Ikweki v. Ebele* (2005) Vol. 7 MJSC 125 was relied on to buttress this argument.

Also relying on the case of *Ajayi v. Ojomo* (2000) 14 NWLR (Pt. 688) 447, the 1st Respondent's counsel argued that where an interlocutory appeal is contained in the same Notice of Appeal against the final judgment, it is mandatory to obtain the leave of Court as well as an order extending time within which to initiate the appeal against the interlocutory decision. According to the 1st Respondent's counsel, the Appellant neither sought nor obtained such leave or Order of Court. It was on the basis of the foregoing that the 1st Respondent's counsel concluded that the Amended Notice of Appeal ought to be struck out for being incompetent.

Learned Counsel to the 2nd Respondent made a similar argument but extended the scope of its objection and argued that the entire nine (9) grounds of appeal are incompetent as they do not constitute a challenge to the Judgment of the lower Court. The 2nd Respondent's counsel placed reliance on the case of *Iloabachie v. Iloabachie* (2000) 5 NWLR (Pt. 656) 203. It was further argued that the Notice of Appeal constitutes an abuse of Court process and should be struck out by this Court. The case of *Arubo v. Aiyeleru* (1993) 3 NWLR (Pt. 280) 126 was cited and relied on. Quite apart from its submissions on the incompetence of the grounds of appeal, learned Counsel to the 1st Respondent also contended that the Appellant's Brief of Argument is incompetent for non-compliance with Rule 10(1), (2) and (3) of the Rules of Professional Conduct of the Legal Profession, 2007 which mandates all legal practitioners to affix their stamp and seal to every Court process prepared by them. The 1st Respondent's counsel submitted that a Court process in contravention of Rule 10 of the Rules of Professional Conduct is deemed improperly signed and cannot be said to be competent before this Honourable Court. Reliance was placed on the case of *Yaki & Anor v. Abubakar*

& Ors. (2015) 10-11 SC (Pt. 1) 46. He, therefore, urged the Court to strike out the Appellant's Brief of Argument.

In opposition to the submissions of the 1st and 2nd Respondents, as it relates to their respective Notices of Preliminary objection, the Appellant's counsel submitted that the Appellant was a proper party to the Winding Up Proceeding having filed a Notice of Intention to Appear at the hearing of the Petition dated 6th June 2006 in compliance with the provisions of Rule 23 of the Winding Up Rules, 2001. The cases of *International Merchant Bank Nig. Ltd v. Speegaffs Company Limited* (1997) 3 NWLR (Pt. 494) Pg. 423 at 435 were relied on to buttress the submission. Learned Counsel to the Appellant submitted further that it was the Notice of Intention to Appear that granted the Appellant the participatory right as a party to the winding up proceeding and consequently afforded the Appellant the right to Appeal the Judgment of the lower Court.

The Appellant's counsel submitted that the Notice of Intention to Appear is equivalent of the Application for Joinder provided for in the regular civil procedure rules of the Federal High Court and that because winding up proceeding is *sui generis,* the Winding Up Rules provides for the specific procedure to be followed when a person seeks to be joined as a co-Respondent in the winding up proceeding. It is the submission of the Appellant's counsel that the Appellant participated actively in the winding up proceedings having disclosed sufficient interest in the 1st Respondent.

Counsel to the Appellant contended that several applications were filed by the Appellant as a party during the proceeding at the Lower Court and said applications were adjudicated upon by the lower Court. He submitted that the Appellant being a party at the proceedings before the lower Court does not require the leave of Court to appeal the decision of the lower court.

In response to the argument challenging the grounds of appeal, the Appellant's counsel submitted that its grounds of appeal which are premised on jurisdiction of the court is competent and can be raised at any time even for the first time on appeal. The case of *Ishaku v. Kantiok* (2012) 7 NWLR (Pt. 1300) Pg. 457 was relied on to buttress the submission. He therefore urged this Honourable Court to dismiss the 1st and 2nd Respondent's preliminary objection and allow the Appeal.

RESOLUTION OF THE 1ST AND 2ND RESPONDENTS' PRELIMINARY OBJECTION

It is the argument of the Respondents that the Appellant does not have the capacity to appeal as of right without leave to appeal being sought and obtained from the court by the Appellant. In resolving this argument, it is apposite to consider the Constitutional provision on right to appeal as provided under Section 243 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) ("the

Constitution"), which states thus:

> ***"Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this Constitution shall be –***
>
> ***(e) exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court or High Court or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or, subject to the provisions of this Constitution and any powers conferred upon the Attorney General of the Federation or the Attorney-General of a state to take over and continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed."***

The above provision of the Constitution is clear and unambiguous that it is not only a party to an action that can commence an appeal against the decision of a court in the action. Thus, any person other than a party who has sufficient interest in such a matter can also appeal but with the leave of either the High Court or the Court of Appeal. See *Owena Bank (Nig.) Plc v. N.S.E. Ltd* (1997) LPELR-2843(SC); *Okonkwo & Anor v. UBA Plc* (2011) LPELR-23010(SC). The rationale behind this constitutional provision is to enable the Court to determine whether it is proper in law to grant a party leave to appeal in the circumstance of the case and to ensure a fair determination of the issues between the parties. See *APGA v. Oye & Ors* (2018) LPELR-45196(SC); *Waziri v Gumei & Anor* (2012) LPELR-7816(SC).

The Respondents have submitted that the Appellant was not a party to the proceeding at the trial court. According to the Respondents, the Appellant's application for joinder was struck out by the lower court. Curiously, the Respondents failed to take cognizance of the Notice of Intention to Appear in the Petition filed by the Appellant pursuant to Rule 23 of the Winding-up Rules, 2001. The Winding-Up Petition, being a sui generis civil proceeding has its distinct procedure for the joinder of a party to the proceeding.

The rules governing proceedings in an action for the winding-up of a company incorporated under the Companies and Allied Matters Act is the Companies Winding-Up Rules which is a subsidiary legislation made pursuant to the provision of the CAMA. This Court in *Afribank & Ors v. NDIC* (2015) LPELR-246543(CA) held per Obaseki-Adejumo, JCA thus:

> ***"... Therefore, I need not restate that the rules governing proceed-***

ings in an action for the winding up of a company incorporated under the Companies and Allied Matters Act Cap C20, Laws of the Federation of Nigeria, 2004, is the Companies Winding-Up Rules of 2001, which is a subsidiary legislation made pursuant to the provision of the Act. The relevant provision of the Rules in relation to the instant case is as follows: Rule 19 states: (1) "No petition shall be advertised until the judge hearing the petition or a judge before whom the petition is first mentioned in open Court so orders. (2) The order for advertisement of a petition shall be as follows: a. The petition shall be advertised fifteen clear days before the hearing; b. The petition shall be advertised once or as many times as the Court may direct, in the Gazette and in one national daily newspaper and one other newspaper circulating in the state where the registered office, or principal or last known principal place of business, as the case may be, of such company is or was situate, or in such other newspaper as shall be directed by the Court. c. The advertisement shall state the day on which the petition was presented, and the name and address of the petitioner, and of his solicitor, and shall contain a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner, or to his solicitor, within the time and manner prescribed by this rule and any advertisement of a petition for the winding-up of a company by the Court which does not contain such a note shall be deemed irregular. (3) A petition not advertised within the time prescribed or in the manner prescribed shall be struck out, unless, for sufficient reason given, the Court otherwise orders. (4) Advertisement of the petition shall be in Form 9 or 10 in the Appendix with such variations as circumstances may require" Rule 23 states: (1) "Every person who intends to appear on the hearing of a petition shall give to the petitioner, notice of his intention in accordance with this rule. (2) The notice shall contain the address of the person intending to appear, shall be signed by him (or by his solicitor) and shall otherwise be in Form 12 with such variations as circumstances may require. (3) The notice shall be served or sent by post to petitioner or his solicitor, at the address stated in the advertisement of the petition. (4) The notice shall be served (or if sent by post shall be posted in such time as in ordinary course of past to reach the address) not later than five days before the hearing. (5) A person who has failed to comply with this rule shall not, without the special leave of the Court, be allowed to appear in the hearing of the petition. (Underline mine) A community reading of the Rule 19 (2) (c) and 23 (1) & (5) reproduced above would reveal what the law requires of a Respondent who intends to appear on the hearing of a petition. Apparently, such a Respondent is only required to send notice of

> ***his intention to the petitioner' and nothing more. In this instant case, the Respondent challenging the competence of this appeal has not raised any objection as to the fact that the 2nd to 6th Appellant failed to comply with the above provisions of the Rules. What is evident from the records of appeal, particularly at pages 392 to 393, is that the 2nd to 6th Appellants as persons interested in the hearing of the petition served on the Petitioner a notice of intention to appear on the petition to wind up Afribank Nigeria Plc. dated 18/01/2012 and filed on 19/01/2012. What more does the Respondent require the Appellants to do apart from what they have done? Meanwhile, a cursory reading of Rule 24 of the Companies Winding-Up Rules would reveal that it is the obligation of the Petitioner to prepare the list of the names and addresses of persons who appear on the petition. Nothing on records shows that this was done by the Respondent. Therefore, due to the special nature of winding up proceedings, once 'any person interested' in appearing in the hearing of the petition has served the required notice as provided under the Rules, such a person(s) is deemed to be a party to the winding-up proceedings. (underline mine)"***

As it can be gleaned from the records before this court, it is manifestly evident that the Appellant indeed filed a Notice of Intention to appear in the proceedings at the Court below. This Notice of Intention to appear in the Proceedings dated 06 June 2006 was filed same day with the ill-fated Motion for joinder, (See page 149 of the Record). In the Ruling of the lower Court striking out the application for joinder filed by the Appellant, the learned trial Judge rightly held thus:

> ***"the Notice filed pursuant to Rule 23 could have achieved the same purpose which the application for joinder seeks to achieve, i.e. right to be heard in the Petition"*** *see* page 320 of the record.

Therefore, the Appellant having filed its Notice of Intention to Appear in the winding up proceeding and having also participated in the proceedings before the lower court up until Judgment was delivered in the action is deemed a party to the Petition at the lower Court. See *Afribank & Ors. v. NDIC (supra)*. In the circumstance, the Appellant does not require leave of either the lower Court or this Honourable Court to bring the instant appeal as an interested party.

The second phase of both Respondents' preliminary objection challenges the competence of the grounds of appeal as contained in the Appellant's Amended Notice of Appeal. The Respondents vehemently contended that the grounds of appeal do not arise from the decision of the lower Court. The 1st Respondent queried seven (7) of the total nine (9) grounds of Appeal in the Amended Notice of Appeal while the 2nd Respondent contended that the entire 9 grounds of the Amended Notice of Appeal are incompetent.

The Appellant merely submitted that grounds 8 and 9 of its Amended Notice of Appeal are competent as they challenge the jurisdiction of the lower Court and as such, can be raised at any time. With regards to the competence or otherwise of Grounds 1 to 7 of the Amended Notice of Appeal as challenged by the 1st Respondent, the Appellant failed to respond to said arguments. It is trite that where an appellant fails to file a reply brief or fails to respond to the new issues arising from the Respondent's brief in his reply brief, the issues remain uncontested and admitted, he shall be deemed to have conceded the issues arising from the respondent's brief. See *Olowu v. Abolore* (1993) 6 NWLR (Pt. 293) P 255; *Abdulmumini v. State* (2015) LPELR-40414(CA); *Asaboro & Anor v. Pan Ocean Oil* (2017) LPELR-41558(SC). I have considered the entire grounds as contained in the Amended Notice of Appeal and I am of the view that grounds 1 to 7 therein did not stem from the Judgment of the lower Court. (See pages I 1266 to 1271 volume 3 of the printed record).

Upon perusal of the grounds of appeal *vis-a-vis* the entire record of Appeal, it is my respective view that Grounds 1, 3 and 6 of the Amended Notice of Appeal arose from the several and separate rulings on various interlocutory applications filed at the lower Court and not the final Judgment of the lower Court. (See pages 126 to 138 Volume 1 of the Records; pages 816 to 819 Volume 2 of the Records.) What the Appellant ought to have done was to file an application for an extension of time and leave to appeal those interlocutory decisions of the lower Court. See *Ajayi v. Ojomo* (2000) LPELR-8171; *Chukwu & Ors v. Agu* (2021) LPELR-54690(CA). Also, grounds 2, 4, 5 and 7 of the Amended Notice of Appeal did not emanate from the Judgment of the lower Court and it did not challenge any ratio of the said Judgment of the lower Court.

The law is unequivocal, and this Court has stated consistently that every ground of appeal must relate to and constitute a challenge to the ratio of the decision appealed against. The only exception is where the ground challenges the jurisdiction of the court. Therefore, any ground of appeal that does not arise or flow from the judgment being appealed against is incompetent and liable to be struck out. See *Ehigiator v. Obazee* (2021) LEPLR-54134(CA); *Kirk Holdings (Nig.) Ltd v. FBN & Anor* (2016) LPELR-41463 (SC). The above principle of law is in line with the pronouncement of the Supreme Court per Eko, JSC in the case of *Achonu v. Okuwobi* (2017) LPELR-42102(SC) thus:

> ***"Every ground of appeal shall arise from the judgment or decision appealed, it should constitute a challenge to, or an attack on the ratio of the decision on appeal. It therefore follows that where a ground of appeal, as formulated, does not arise from the judgment appealed against, as is evident in the instant appeal, the same is incompetent and liable to be struck out".***

From the foregoing, therefore, grounds 1 to 7 of the Notice of Appeal are hereby

struck out for being incompetent. The surviving grounds, that is, grounds 8 and 9 of the Notice of Appeal which challenged the jurisdiction of the lower Court will be considered anon.

On the competence of the Appellant's Brief of Argument, it is the Respondent's contention that the Appellant's Brief of Argument violates the provision of Rule 10 of the Rules of Professional Conduct in the Legal Profession, 2007 ("RPC") which mandates all legal practitioner to affix their stamp and seal to every court process prepared by them.

The provision of the said Rule 10 of the RPC IS hereunder reproduced thus:

> ***"10. (1) A lawyer acting in his capacity as a legal practitioner, legal officer or adviser of any Government department or ministry or any corporation, shall not sign or file a legal document unless there is affixed on any such document a seal and stamp approved by the Nigerian Bar Association.***
>
> ***(2) For the purpose of this rule, "legal documents" shall include pleadings, affidavits, depositions, applications, instruments, agreements, deeds, letters, memoranda, reports, legal opinions or any similar documents.***
>
> ***(3) If, without complying with the requirements of this rule, a lawyer sings or files any legal documents as defined in sub-rule (2) of this rule, and in any of the capacities mentioned in sub-rule (1), the document so signed or filed shall be deemed not to have been properly signed or filed."***

As evident in Rule 10(3) of the RPC, where there is noncompliance with the provisions of Rule 10(1) in the execution of a document, such document will be deemed not to have been properly signed and filed. It is on the strength of this provision that the Respondents urged this Honourable Court to discountenance the Appellant's brief of Argument.

I have examined the Appellant's Brief of Argument and I do not agree that the Appellant's Brief of Argument does not contain the seal of a legal practitioner. The Appellant's Brief of Argument dated 1st of July 2019 contains the seal of a legal practitioner Dong William John. The Brief of Argument was also signed by the legal practitioner. In this circumstance, I hold that this objection cannot be sustained in the face of glaring and clear evidence to the contrary. It is therefore my considered view that the Appellant's brief of Argument duly complied with the provisions of Rule 10 of the Rules of Professional Conduct of Legal Practitioners, 2007.

From the foregoing analysis, the Preliminary Objection raised by the Respondents against this Appeal is hereby sustained in part. I will now consider the issues raised by the Appellant from the two surviving grounds of appeal.

1. ***Whether the Winding Up Petition as constituted and commenced before the Lower Court was competent for the Court to assume the requisite jurisdiction to have entertained it ab initio?***

2. ***Whether the entire Judgment. of the Court and the proceeding leading thereto is not a nullity and given without jurisdiction as Leave of the Federal High Court was not first sought and obtained before instituting the Winding Up Petition in line with Section 417 of Companies and Allied Matter Act, LFN, 2004 the 2nd Respondent having been appointed as the Provisional Liquidator of the 1st Respondent Bank pursuant to Section 40 of the Nigeria Deposit Insurance Corporation Act, LFN, 2004.***

The Counsel to the Appellant argued issues 8 and 9 together and submitted that the 2nd Respondent who initiated the Winding Up Petition against the 1st Respondent was appointed the Provisional Liquidator of the 1st Respondent after the revocation of the Banking License of the 1st Respondent. He contended that by virtue of Section 417 of the Companies and Allied Matters Act, 2004 leave of Court is required to institute the said winding Up Petition against the 1st Respondent and the 2nd Respondent failed to obtain the said Leave before the Winding Up Petition was filed on the 17th of January 2006.

The Appellant's counsel submitted that the obtention of Leave of Court is a condition precedent to the commencement of the Winding Up Petition against the 1st Respondent in view of the appointment of the 2nd Respondent as the Provisional Liquidator of the 1st Respondent. According to the Appellant's counsel, failure to fulfil the condition precedent renders the action incompetent and robs the lower court of the jurisdiction to entertain same, the Appellant's counsel relied on the cases of *Captain Tito Ornagboni & Ors v. Nigeria Airways Limited (in Liquidation) & Ors.* (2006) 18 NWLR (Pt. 1011) 310 at 328-329; *Progress Bank of Nigeria Plc v. O.K. Contact Point Holdings Limited* (2008) 1 NWLR (Pt. 1069) 514 at 531-532 to buttress his submission.

Both Respondents did not canvass any argument in response to the submissions in Issues 8 and 9 raised in the Appellant's Brief of Argument. Issues 8 and 9 as raised in the Appellant's Brief of Argument can be reformulated as a lone issue in order to properly and succinctly resolve what is left in this Appeal. Therefore, the lone issue to be determined in this Appeal is:

Whether the lower Court had the jurisdiction to adjudicate on the winding up petition as constituted with regards to Section 417 of the Companies and Allied Matters Act, LFN 2004?

It is trite law that jurisdiction is the life wire in any adjudication. Consequently, where there is no jurisdiction to hear and determine a matter, everything done in the absence of jurisdiction is a nullity. See *Nweke v. FRN* (2019) LPELR-46946(SC); *Shelim & Anor v. Gobang* (2009) LPELR-3043(SC); *Obu & Ors v. SPDC Ltd & Anor* (2013) LPELR-21241 (CA). In resolving the issue of the question as raised in the Appellant's Brief of Argument, recourse must be made to Section 417 of the Companies and Allied Matters Act, 2004 (CAMA) which provides thus:

> ***417. If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose.***

The above provision is not ambiguous, and its implication is simple. In precis, where a winding up order has been made against a Company or where a provisional liquidator has been appointed for the purposes of winding up a company, no action or proceeding can be commenced against that company except by leave of court. I am of the considered view that the Appellant in its argument has misconstrued this intendment of Section 417 of the CAMA.

In the instant case, the 2nd Respondent had been appointed as the Provisional Liquidator of the 1st Respondent pursuant to Section 40(1) of the Nigeria Deposit Insurance Corporation Act, 2004. There is no statutory enactment which requires that leave of court must be obtained by the Provisional Liquidator to continue in the winding-up proceedings.

The leave of Court referred to in Section 417 of CAMA is only applicable where a party intends to commence an action against the company during the pendency of its winding-up proceedings or upon the appointment of the Provisional Liquidator. This is because a company under a winding up proceeding is still alive though on a sick bed. See *Co-operative and Commerce Bank (Nig.) Ltd v. Onwuchekwa* (1999) LPELR-5512(CA).

In the same breath, where a winding-up Order has already been granted against the company, any action against the company in any Court must be commenced with leave of court. See *Omaghoni & Ors v. Nigeria Airways Ltd (In Liquidation)* (2006) LPELR-7609(CA). None of the above is the situation in this case. It is therefore a misinterpretation of Section 417 of CAMA to contend that leave of court is required before a winding up proceeding can be commenced against a company. See *NDIC v. Rahman Brothers Ltd* (2018) LPELR-46781 (CA). This Court in the case of *Reynolds Construction Co. Nig. Ltd v. Zenith Bank & Anor*

(2019) LPELR-50302(CA) per Mohammed Garba Lawal, JCA held that:

> ***"Beginning with the provisions of Section 417 of CAMA, they do not prohibit an action against a company for which a winding up order was made or a provisional liquidator appointed, completely, but only made the action subject to leave of the Court. By the provisions, an action can be taken against a company in respect of which an order for winding was made by a Court or a provisional liquidator appointed by the Court for the purpose of the winding up of the company, with the leave of the Court on such terms as it may impose. This was the decision of the Apex Court in the case of Onwuchekwa v. NDIC (supra) cited and relied on by the High Court in its judgment along with the case of ICON Limited v. FBN Limited (2003) 12 NWLR (831) 668 @ 667."***

It must also be noted that the 2nd Respondent derived his powers from the statute that is, the Nigeria Deposit Insurance Corporation Act as a liquidator and has been deemed by same statute to have been so appointed by the Federal High Court. For ease of reference, I will reproduce Section 40 of the Nigeria Deposit Insurance Corporation Act, 2006 which states thus:

> ***1. Whenever the licence of an insured institution is revoked by the Central Bank of Nigeria, the Corporation shall act as liquidator of such failed insured institution with powers conferred on a liquidator under the Companies and Allied Matters Act, 1990 and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for the purpose of that Act.***
>
> ***2. Immediately following the publication in the gazette of the revocation of the license of the failed insured institution, the Corporation shall apply to the Federal High Court for an Order to wind up the affairs of the failed institution.***

The implication of the above provisions is that upon the revocation of the licence of the 1st Respondent by the Central Bank of Nigeria, the 2nd Respondent is already deemed to have been appointed as provisional liquidator by the Federal High Court to wind up the 1st Respondent by operation of law as such no further leave is required. See *Chinwedu & Ors v. NDIC & Anor* (2018) LPELR-50090(CA); *NDIC v. Rahman Brothers Ltd* (2018) LPELR-46781 (CA); *Bank PHB v. NDIC* (2019) LPELR-47597.

In the circumstance and relying on the unambiguous provisions of the statutes and principles of law in the various judicial authorities cited above, I hold that the contention of the Appellant is of no moment, it has no basis in law and therefore

goes to no issue.

On the whole, I hold that this appeal is unmeritorious and hereby dismissed. Accordingly, the Judgment of the lower Court coram I. N. Buba, J. in Suit No: FHC/L/CP/36/2006 and delivered on the 19th day of November 2012 is hereby affirmed.

BADA, JCA: My Lord, ABUBAKAR SADIQ UMAR, JCA, made available to me a draft copy of the leading Judgment prepared by him and just delivered.

I agree entirely with the reasoning and conclusion of My Lord that this appeal lacks merit.

Having perused the records of appeal as well as the briefs of argument filed by both parties, I am also of the view that there is no merit in this appeal and it is dismissed by me.

SIRAJO, JCA: I had a preview of the leading Judgment just delivered in this appeal by my learned brother ABUBAKAR SADIQ UMAR, JCA.

Having also perused the Record of Appeal and the Briefs of Argument filed by the parties to this appeal, I agree with my lord's legal analysis and conclusions reached on the issues in this appeal.

For the reasons ably set out in the leading Judgment, it is also my considered view that this appeal is unmeritorious and deserves to be, and is hereby dismissed by me.

Cases cited in the Judgment

Abdulmumini v. State (2015) LPELR-40414(CA)
Achonu v. Okuwobi (2017) LPELR-42102(SC)
Afribank & Ors v. NDIC (2015) LPELR-246543(CA)
Ajayi v. Ojomo (2000) 14 NWLR (Pt. 688) 447
APGA v. Oye & Ors (2018) LPELR-45196(SC)
Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126
Asaboro & Anor v. Pan Ocean Oil (2017) LPELR-41558(SC)
Bank PHB v. NDIC (2019) LPELR-47597
Captain Tito Ornaqboni & Ors v. Nigeria Airways Limited (in Liquidation) & Ors. (2006) 18 NWLR (Pt. 1011) 310
Chinwedu & Ors v. NDIC & Anor (2018) LPELR-50090(CA)
Chukwu & Ors v. Agu (2021) LPELR-54690(CA)
Co-operative and Commerce Bank (Nig.) Ltd v. Onwuchekwa (1999) LPELR-5512(CA)
Cooperative and Commerce Bank Plc. & Anor v. Ekperi (2007) Vol. 4 MJSC 172
Ehigiator v. Obazee (2021) LEPLR-54134(CA)
ICON Limited v. FBN Limited (2003) 12 NWLR (831) 668

Ikweki v. Ebele (2005) Vol. 7 MJSC 125
International Merchant Bank Nig. Ltd v. Speegaffs Company Limited (1997) 3 NWLR (Pt. 494) 423
Ishaku v. Kantiok (2012) 7 NWLR (Pt. 1300) 457
Kirk Holdings (Nig.) Ltd v. FBN & Anor (2016) LPELR-41463 (SC)
Ladoja v Ajimobi & Ors (2016) Vol. 2 MJSC (Pt. III) 1
Iloabachie v. Iloabachie (2000) 5 NWLR (Pt. 656) 203
Muhammed v. Olawumi (1990) 2 NWLR (Pt.133) 458
NDIC v. Rahman Brothers Ltd (2018) LPELR-46781 (CA)
Nwaogu v. Atuma (2013) 9 NWLR (Pt. 1358) 113
Nweke v. FRN (2019) LPELR-46946(SC)
Obu & Ors v. SPDC Ltd & Anor (2013) LPELR-21241 (CA)
Okonkwo & Anor v. UBA Plc (2011) LPELR-23010(SC)
Olowu v. Abolore (1993) 6 NWLR (Pt. 293) 255
Omaghoni & Ors v. Nigeria Airways Ltd (In Liquidation) (2006) LPELR-7609(CA)
Otobaimere v. Akporehe (2004) 14 NWLR (Pt. 894) 591
Owena Bank (Nig.) Plc v. N.S.E. Ltd (1997) LPELR-2843(SC)
Progress Bank of Nigeria Plc v. O.K. Contact Point Holdings Limited (2008) 1 NWLR (Pt. 1069) 514
Reynolds Construction Co. Nig. Ltd v. Zenith Bank & Anor (2019) LPELR-50302(CA)
Shelim & Anor v. Gobang (2009) LPELR-3043(SC)
Waziri v Gumei & Anor (2012) LPELR-7816(SC)
Yaki & Anor v. Abubakar & Ors. (2015) 10-11 SC (Pt. 1) 46

Statutes cited in the Judgment
Section 38 of Banks and other Financial Institutions Act, 1991
Section 40 (1) & (2) of the Nigeria Deposit Insurance Corporation Act, Cap. N102 Law of the Federation of Nigeria, 2010
Section 40(5) of the Nigeria Deposit Insurance Corporation Act Cap. N102 Law of the Federation, 2010
Section 243 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)
Section 417 of the Companies and Allied Matters Act, LFN 2004 (CAMA)

History:

HIGH COURT
Federal High Court, Lagos
I. N. BUBA, J
Suit No: FHC/L/CP/36/2006
Monday 19th November, 2012

COURT OF APPEAL (Lagos Division)
Jimi Olukayode Bada, JCA ***(Presided)***

Abubakar Sadiq Umar, JCA ***(Read the leading Judgment)***
Muhammad Ibrahim Sirajo, JCA

APPEARANCES:
J. W. Dong for the Appellant
B. A. Otukan-Iyama with T. O. Onyefese for the 1st Respondent
H. O. Afolabi (SAN) with M. R. Olabisi for the 2nd Respondent

MR. OLAJUWON OLALEYE v. POLARIS BANK LIMITED; MR. NEBOLISAH ARAH; MR. STEPHEN ADAJI

NATIONAL INDUSTRIAL COURT
(LAGOS DIVISION)

TUESDAY 15TH DECEMBER, 2020
SUIT NO. NICN/LA/24/2011

(IKECHI GERALD NWENEKA, J)

PLEADINGS – Allegation of facts – a person who makes allegations in a pleading is, by the rules of pleading, bound to substantiate them.

PLEADINGS – Declaratory reliefs – a Claimant who seeks declaratory reliefs has the burden to prove his entitlement to the declarations.

EMPLOYMENT LAW – Employment dispute – must refer to the service agreement in resolution of the dispute.

ACTION – Proper parties – Where proper parties are not before the Court, it would lack the competence to hear the suit.

COMMERCIAL LAW – Agency – an agent of a disclosed principal incurs no liability and an action against an agent in his private capacity for acts done on behalf of his principal is incompetent.

EMPLOYMENT LAW – Employee – confirmation of an employee after probation – while confirmation of appointment of an employee is the domestic affair of an employer and not automatic, the employer has no right to keep the employee on probation indefinitely.

EMPLOYMENT LAW – Probation defined – where an employer extends probation – it must notify the employee of such extension.

EVIDENCE – Documentary evidence – a party tendering a document must satisfy the legal duty to link the document with his case.

DAMAGES – Aggravated damages – aggravated damages are awarded where a Defendant's conduct is sufficiently outrageous to merit punishment.

INTEREST – Pre-judgment interest – circumstances where interest would be awarded – explained.

COST – Award of cost – explained – the aim of cost is to indemnify the successful

party for his out-of-pocket expenses and be compensated for the true and fair expenses of the litigation.

Facts:

The Claimant's evidence is that he was employed by the defunct Afribank Nigeria Plc, which was changed to Mainstreet Bank Limited and later to Skye Bank Plc and then to Polaris Bank Limited (1st Defendant), as General Manager, e-Solutions for a probationary period of six months, subject to confirmation on the satisfaction of the following conditions: 1) Receipt of satisfactory reports from your last employers and referees; 2) A satisfactory medical report from our (bank) named medical consultant; 3) Report of satisfactory performance from your Branch Manager. The Claimant asserts that he satisfied the above conditions. In spite of this, his impressive job performance and approval of his confirmation appraisal by his line Executive Directors, the 2nd and 3rd Defendants treated his confirmation of employment with reckless indifference; and the Defendants' arbitrarily and unlawfully held up the confirmation of his employment without any justification. Notwithstanding the non-confirmation of his appointment, the 1st Defendant retained him in its employment, redeployed him as Head, Commercial Banking Strategic Business Unit, and granted him staff loan which was only for confirmed employees. The Claimants further stated that he was in the 1st Defendant's employment until when he was informed that his appointment could not be confirmed because his services were no longer required. He alleged that he was the only senior management staff whose employment was not confirmed after 31 months in the employment of the 1st Defendant. It is his case that the Defendants terminated his employment without notice about two years after the expiration of his probation and without payment of any severance benefits or entitlements for the period he worked in full capacity as General Manager. Thus, his claim is for the benefits that would have accrued to him as a General Manager in the Bank from 4th March 2009 to 7th April 2011. The Defendants' in contention filed their defense denying all the allegations and claims of the Claimant.

Upon the conclusion of trial, parties adopted their written address and the case was set down for judgment.

Held *(suit dismissed):*

[1] ***Pleadings – Allegation of facts – a person who makes allegations in a pleading is, by the rules of pleading, bound to substantiate them.***

It is settled law that a person who makes allegations in a pleading is, by the rules of pleading, bound to substantiate them…The burden of proof thus rests on the Claimant who initiated this suit on a set of facts which he claims entitles him to judicial relief. It is only when the Claimant makes out a prima facie case that the burden would shift to the Defendants to

prove their defence. Where the Claimant fails to make out a prima facie case, there will be nothing for the Defendants to rebut and the case will be dismissed. See *MTN Nigeria Communications Limited v. Mundra Ventures Nigeria Limited* (2016) LPELR-40343(CA) 35-36; *Anthony Ehidimhen v. Ahmadu Musa & Anor.* (2000) 4 SC (Pt. II) 166 at 184 and *Abayomi v. Saap-Tech Nigeria Limited* (2020) 1 NWLR (Pt. 1706) 453 at 492. **(P. 141 lines 32 - 44)**

[2] ***Pleadings – Declaratory reliefs – a Claimant who seeks declaratory reliefs has the burden to prove his entitlement to the declarations.***

… A Claimant who seeks declaratory reliefs has the burden to prove his entitlement to the declarations. Declaratory reliefs are not granted as of course. The Claimant must establish his right before the Court can pronounce on it. Evidence which will support a legal right must be credible, cogent and convincing. See *Ibrahim v. Garki & Anor.* (2017) 9 NWLR (Pt. 1571) 377 at 390; *Ilori & Ors. v. Ishola & Anor.* (2018) 15 NWLR (Pt.1641) 77 at 94. **(P. 142 lines 1 - 7)**

[3] ***Employment Law – Employment dispute – in an employment dispute, the Court must refer to the service agreement in resolution of the dispute.***

… In an employment dispute, the Court must refer to the service agreement in resolution of the dispute. See *Gbedu & Ors. v. Itie & Ors.* (2020) 3 NWLR (Pt.1710) 104 at 126 and *Adekunle v. United Bank for Africa Plc* (2019) 17 ACELR 87 at 108. **(P. 142 lines 9 - 12)**

[4] ***Action – Proper parties – Where proper parties are not before the Court, it would lack the competence to hear the suit.***

The question of proper parties is fundamental to any adjudication. It affects the jurisdiction of the Court to determine the suit before it. Where proper parties are not before the Court, it would lack the competence to hear the suit. Thus, before an action can succeed, the parties to it must be shown to be the proper parties to whom rights and obligations arising from the cause of action attach. See *Cotecna International Limited v. Churchgate Nigeria Limited & Anor.* (2010) 12 SC (Pt. II) 140 at 185-186 and *U.O.O. Nigeria Plc v. Mr. Maribe Okafor & Ors.* (2020) 2-3 SC (Pt. II) 135 at 163-164. **(P. 143 lines 26 - 31)**

[5] ***Commercial Law – Agency – an agent of a disclosed principal incurs no liability and an action against an agent in his private capacity for acts done on behalf of his principal is incompetent.***

… An agent of a disclosed principal incurs no liability and an action against an agent in his private capacity for acts done on behalf of his principal is incompetent… where the agent contracts on behalf of a foreign principal, the agent is liable for his engagements even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negative his personal liability. See *Samuel Osigwe v. PSPLS Management Consortium Ltd. & Ors.* (2009) 1-2 SC (Pt. I) 79 at 96-97; *The Federal Government of Nigeria & Ors. v. Shobu Nigeria Ltd. & Anor.* (2013) LPELR-21457(CA) 20; *B. B. Apugo & Sons Limited v. Orthopaedic Hospital Management Board (supra)*.
(P. 146 lines 40 - 42; P. 147 lines 5 - 9)

[6] ***Employment Law – Employee – confirmation of an employee after probation – while confirmation of appointment of an employee is the domestic affair of an employer and not automatic, the employer has no right to keep the employee on probation indefinitely.***

…Confirmation of appointment of an employee is the domestic affair of an employer and not automatic and, in a master and servant relationship, an employee cannot compel his employer to confirm him or place him in a particular position; nonetheless, the employer has no right to keep the employee on probation indefinitely. **(P. 156 lines 39 - 43)**

[7] ***Employment Law – Probation defined – where an employer extends probation – it must notify the employee of such extension.***

As the word implies, probation is a period of trial, observation and evaluation. It affords the employer an opportunity to ascertain the suitability of the employee for the job. Probation is a short-term measure and where, at the end of his probation, the employee is adjudged unsuitable for the job, the employer could extend the probation or terminate the employment. Where the employer opts for the first option, it must inform the employee that it has adjudged him unsuitable for his job role but would be giving him another opportunity to justify his employment. Extension of probation cannot be implied and a probation which exceeds the agreed period without a formal extension will amount to unfair labour practice. In that case, the employer will be deemed to have confirmed the employee's appointment and cannot argue otherwise… This is based on the equitable principle of estoppel which is to the effect that where a person by words or conduct wilfully causes another to believe the existence of a state of affairs and induces him to act in reliance thereof, he will be bound by the fair inference to be drawn from his words or conduct. See *Anaeze v. Anyaso* (1993) LPELR-480(SC) 42-43, *Chukwuma v. Ifeloye* (2008) 12 SC (Pt. II) 291 at 325-326; *Mandilas Limited v. Ekhator Ayanru* (2000) LPELR-6870(CA) 13; *OAU v. Dr. Kola Onabanjo* (1991) 5 NWLR

(Pt. 193) 549 at 565. **(P. 156 lines 43 - 45; P. 157 lines 1 - 17)**

[8] ***Evidence – Documentary evidence – a party tendering a document must satisfy the legal duty to link the document with his case.***

… A document duly pleaded, tendered and admitted in evidence is the best evidence of its contents. However, it is settled law that the fact that a document was tendered in the course of proceedings does not relieve a party from satisfying the legal duty placed on him to link the document with his case. See *Prof. Bukar Bababe v. Federal Republic of Nigeria* (2018) 7-10 SC 1 at 122; *Uwua Udo v. The State* (2016) LPELR-40721(SC) 12. **(P. 161 lines 16 - 22)**

[9] ***Damages – Aggravated damages – aggravated damages are awarded where a Defendant's conduct is sufficiently outrageous to merit punishment.***

Where there is a wrong, there must be a remedy. I found in this judgment that the failure to confirm the Claimant's employment after 31 months of continuous service is arbitrary, exploitative and wrongful. Aggravated damages which are within the discretion of the Court to grant, and are awarded where the Defendants' conduct is sufficiently outrageous to merit punishment. The motive and conduct of the Defendants are taken into account in making the award. See *G.K.F. Investment Nigeria Ltd. v. Nigeria Telecommunications Plc* (2009) LPELR-1294(SC) 31-32; *Casmir Obok & Ors. v. Chief Christopher Agbor & Ors.* (2016) LPELR-41219(CA) 16-17; *Ogbolosingha & Anor. v. Bayelsa State Independent Electoral Commission & Ors.* (2015) LPELR-24353(SC) 43… How could the 1st Defendant celebrate the Claimant in Exhibit CW1C, re-assign him to a vital position as Head, Commercial Banking Strategic Business Unit in Exhibit CW1B and still find him unworthy of permanent employment? In the circumstance, this claim succeeds in part. Pursuant to Section 19(d) of National Industrial Court Act, 2006, I hold that the Claimant is entitled to aggravated damages for the 1st Defendant's wrongful conduct in holding up his confirmation after the stipulated six-month probationary period and retaining him in its employment for 31 months, only to discard him when it was convenient for it to do so. **(P. 163 lines 18 - 42)**

[10] ***Interest – Pre-judgment interest – circumstances where interest would be awarded – explained.***

…Interest may be awarded in two distinct circumstances, namely: as of right and where there is a power conferred by statute to do so in the exercise of the Court's discretion. Interest may be claimed as of right where it is contemplated by the agreement between the parties, under

a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship. Where interest is claimed as a matter of right, the proper practice is to claim entitlement to it in the originating process and plead facts which show such entitlement. See *Alhaja Sherifat Balogun & Anor. v. Egba Onikolobo Community Bank (Nigeria) Limited* (2007) 5 NWLR (Pt. 1028) 584 at 603; *Dantama v. Unity Bank Plc* (2015) LPELR-24448(CA) 22-23; *Interdrill Nigeria Ltd. & Anor. v. United Bank for Africa Plc* (2017) 13 NWLR (Pt.1581) 52 at 72-73. **(P. 164 lines 12 - 23)**

[11] ***Cost – Award of cost – explained – the aim of cost is to indemnify the successful party for his out-of-pocket expenses and be compensated for the true and fair expenses of the litigation.***

Costs fall into two broad categories namely: necessary expenses in the proceedings made by a party and cost in terms of the litigant's time and effort in coming to Court. The former category includes filing fees and Solicitors' fees and is akin to special damages which must be specifically pleaded and strictly proved. They are easily ascertainable by producing receipts and fee notes. That is why Order 55 Rule 5 of the Rules classifies it as 'expenses'. The latter category is for the litigant's time and effort in coming to Court. Under this category the Court usually takes the circumstances of the case into account including the number of appearances of the litigant and his counsel in Court. In all cases, costs are not meant to be a bonus to the successful party or serve as punishment against the losing party. It cannot also cure all the financial losses sustained in litigation and the winning party has a duty to mitigate his losses. The main aim of cost is to indemnify the successful party for his out-of-pocket expenses and be compensated for the true and fair expenses of the litigation taking the facts of each case into consideration. See *Generally Master Holding (Nig.) Limited & Anor. v. Emeka Okefiena* (2010) LPELR-8637(CA) 34-35 and *Lonestar Drilling Nigeria Ltd. v. New Genesis Executive Security Ltd.* (2011) LPELR-4437(CA) 11-12. **(P. 165 lines 5 - 25)**

JUDGMENT (Delivered by NWENEKA, J):

1. The Claimant commenced this suit against Afribank Nigeria Plc and the two Defendants by General Form of Complaint and Statement of Facts dated 20th April 2011. The name of the 1st Defendant was changed to Mainstreet Bank Limited and later to Skye Bank Plc with the leave of Court granted on 6th December 2017 and then to Polaris Bank Limited by order of Court made on 13th December 2018.

By his amended General Form of Complaint and amended statement of facts dated 28th December 2018, the Claimant claimed against the

Defendants jointly and severally for:

a. A declaration that the Defendants' refusal or failure to confirm Claimant's employment despite fulfilling the bank's criteria as contained in the letter of appointment dated 29th August 2008 is exploitative, inequitable and unlawful.

b. A declaration that the Claimant is entitled to full benefits of his General Manager position wrongfully held-up by the Defendants from March 4, 2009 to April 8, 2011.

c. An order directing the Defendants to pay to the Claimant the sum of ₦37,950,862.00 (Thirty Seven Million, Nine Hundred And Fifty Thousand, Eight Hundred And Sixty Two Naira) only being the accumulated travel/passage allowances as well as annual variable pay due to the Claimant as General Manager of the 1st Defendant from March 4, 2009 to April 8, 2011.

d. The sum of ₦20,000,000.00 (Twenty Million Naira) as aggravated damages for Defendants' wrongful conduct in holding-up his confirmation after the stipulated six-month probationary period and for wrongful termination of his employment.

e. Pre-judgment interest on the sum claimed in (c) above at the Central Bank of Nigeria rate from April 8, 2011 till the date of judgment.

f. Interest at 21% per annum from the date of judgment until final liquidation of the judgment sum.

g. The cost of this action.

2. The Defendants, after receipt of the originating processes, caused their Solicitors to enter appearance and file their defence processes on 24th May 2011. After several adjournments and two appeals, the case was re-assigned to me on 25th October 2018 and fixed for 23rd November 2018 for mention. There was a flurry of applications and adjournments, but the case eventually proceeded to trial on 9th April 2019. On that date, the Claimant adopted his statement on oath dated 20th December 2018 as his evidence in proof of his claims and tendered 8 documents, which were marked as Exhibits CW1A to CW1H and was cross-examined. The case was adjourned by consent of counsel to 11th April 2019 for defence, but on that date learned counsel for the Defendants sought for an adjournment to 25th June 2019 to amend his defence processes to plead the purchase and assumption agreement. The Court did not sit

on 25th June 2019 because the Judge was on national assignment, and the case was adjourned to 29th October 2019 and then to 14th November 2019 and finally to 22nd January 2020 on application by the Defendants. On 22nd January 2020, the Defendants argued their application dated 13th January 2020 for leave to substitute their witness which application was granted as prayed and the matter proceeded to hearing of the defence. The Defendants' witness, Mr. Babatunde Odusanya, adopted his statement on oath dated 13th January 2020 and tendered 5 documents, which were marked as Exhibits DW1 to DW1D and he was cross-examined. Thereafter, the case was adjourned to 9th March 2020 for adoption of final written addresses and subsequently to 30th March 2020, at the instance of the Claimant, which date fell within the Covid-19 lockdown. Counsel for the parties adopted their respective final written addresses on 4th November 2020 and the case was set down for judgment.

3. In the written address filed on behalf of the Defendants on 28th February 2020, their counsel formulated five issues for determination, to wit:

a. Whether in view of the Purchase and Assumption Agreement and the principle of agent of a disclosed principal, the Claimant can sue the Defendants, Polaris Bank Limited, Mr. Nebolisa Arah and Mr. Stephen Adaji for reliefs claimed in the amended writ of summons?

b. Whether the Claimant can sustain this suit without joining the receiver manger (sic), Nigerian Deposit Insurance Company (sic) and the principal of second and third Defendants in this suit, the Central Bank of Nigeria?

c. Whether this Court can retrospectively, exercise judicial powers to confirm a staff who had since left the services of the bank?

d. Whether the Claimant proved or adduced sufficient evidence to succeed in the monetary reliefs sought herein?

e. Whether the Claimant who collected his salaries and terminal benefits can turn around and in equity under the doctrine of estoppel demand restitution to a post and accrued benefits thereof?

Canvassing issue one, learned counsel submitted that the Claimant wrongly joined the 1st Defendant in this suit because there is no contract of employment between him and the 1st Defendant; and the 1st Defendant is not the receiver/manager or successor of Skye Bank Plc, and the 2nd and 3rd Defendants were never Managing Director and Executive Director respectively of the 1st Defendant. Counsel argued that upon appointment

of a receiver, the receiver/manager is the right person to sue or be sued for pending liabilities, and upon the intervention of the Central Bank of Nigeria in a distressed Bank, the Nigerian Deposit Insurance Corporation, by operation of law, becomes the receiver/manager. He explained that a willing buyer and a willing seller transaction under the purchase and assumption agreement is not a takeover, merger or acquisition. Relying on page 1 paragraphs (A), (B), (C), (E), page 7 clause 2.1 (j) and (k), page 13 clause 8.1 of the purchase and assumption agreement, counsel noted that the 1st Defendant is a distinct entity and not a successor of Skye Bank Plc and actions arising from contracts of employment are excluded; and assets not purchased remained with the Nigerian Deposit Insurance Corporation ("NDIC"). The Court was urged to dismiss the suit against the 1st Defendant because the Claimant failed woefully to prove that there was a takeover, merger and acquisition of Skye Bank Plc by the 1st Defendant which transferred the liabilities in this suit to the 1st Defendant; and the terms of the purchase and assumption agreement between the 1st Defendant and NDIC expressly excluded contracts of employment.

4. On the second issue, learned counsel argued that the proper party to sue is the NDIC, who is the official receiver/provisional liquidator of Afribank Plc now Skye Bank Plc pursuant to Section 28(1) of the Nigerian Deposit Insurance Corporation Act. He relied on the case of *Alhaji Ahmed & Ors. v. Crown Merchant Ltd* (2006) All FWLR (Pt. 295) 680 at 694. He posited that only the NDIC, as official receiver, can sue and be sued in the name of the Bank. The cases of *Nigerian Supplies Manufacturing Company Ltd v. Arif Roz and Chief Evans Enwerem* (1986) 2 C.A. (Pt. 1) 379 and *Nigerian Deposit Insurance Corporation v. Mr. Obende* (2002) FWLR (Pt. 116) 921 at 938-9 were cited in support.

Relying on Section 417 of Companies and Allied Matters Act and the cases of *Onwuchekwa v. The Nigerian Deposit Insurance Corporation* (2002) 5 NWLR (Pt. 760) 371, *C.C.B. (Nig.) Plc v. Mbakwe* (2002) 3 NWLR (Pt. 755) 523 and *S.B.N. Plc v. N.D.I.C* (2006) 9 NWLR (Pt. 986) 424, he contended that Skye Bank Plc is in receivership and for the Claimant to continue this suit as constituted, he requires leave of the Federal High Court, which has not been obtained.

It was argued that the onus is on the Claimant to prove that this suit is one of the liabilities acquired by the 1st Defendant, which burden he has not discharged. Counsel called in aid the cases of *George v. United Bank for Africa Limited* (1967-1975) 2 Nigerian Banking Law Report 414 and *British and French Bank Ltd v. El Assad* (1967-1975) 2 Nigerian Banking Law Report 28. He maintained that the Claimant was not an employee of Mainstreet Bank Limited, Skye Bank and the 1st Defendant. It was

further argued that the 2nd and 3rd Defendants were wrongly sued in this suit as they were not directors of the 1st Defendant but, assuming without conceding that they were, they were agents of a disclosed principal who alone can be sued. He cited a number of cases including the case of *Carlen (Nig.) Limited v. University of Jos* (1994) 1 NWLR (Pt. 323) 631.

Arguing issue three, counsel contended that specific performance cannot be granted in the circumstances of this case because the Claimant is not challenging termination of his employment; and in a claim for specific performance impossibility of performance is a defence. He explained that the Claimant cannot be restored to the position of a confirmed staff having already left the services of the Bank and the particulars of loss of income arising from his non-confirmation is not before the Court. He stated that the Bank complied with the law in paying the Claimant based on quantum meruit for services rendered after the expiration of 6 months from the date of his employment and urged the Court to refuse the relief on compensation as a confirmed staff because the parties did not agree on the amount to be paid upon confirmation and there is no such evidence before the Court.

He posited that in terminating the appointment of a probationary staff, the freedom to hire and fire lies with the employer; and the Claimant was still on probation when his employment was terminated, noting that the Claimant's case is that there was an objective appraisal of his performance which he passed, and the employer was bound to confirm him; failing which the Court should confirm him on behalf of the employer, which request the Court was urged to decline relying on *Wayo v. Judicial Service Commission, Benue State & Anor.* (2006) All FWLR (Pt. 302) 66 at 78-9. He pointed out that the issue of entitlement to a position an employee would occupy is not justiciable except in statutory employment and cited the case of *SPDC & Ors. v. E. N. Nwaka & Anor.* (2001) 10 NWLR (Pt. 720) 64 which decision was confirmed on appeal to the Supreme Court in *SPDC Nig. Ltd. & Ors. v. Nwaka* (2003) 1 SC (Pt. 11) 127.

Issues 4 and 5 were argued together. Learned counsel reviewed the claims and submitted that there is a distinction between general and special damages. While general damages are those the Court will presume to be the direct natural consequence of an act complained of, special damages are exceptional and denote pecuniary losses which have crystalized in terms of cash and value before trial and must be specifically pleaded, particularized and proved strictly. He relied on the cases of *Susan v. HFP Eng. Nigeria Ltd.* (2004) 3 NWLR (Pt. 861) 546 and *Ijebu Ode Local Government v. Adedeji Balogun and Co Ltd.* (1991) 1 SCNJ 1 at 18. He also submitted that the entitlement of a general manager is a special damage and must be specifically pleaded, but the entire claim is a lump

sum amount which this Court cannot grant either as special or general damages. He insisted that where the Claimant is not entitled to special or general damages, this Court cannot award aggravated damages or interests.

5. In response, learned counsel for the Claimant submitted four issues for determination, viz:

a. Considering the acquisition of Mainstreet Bank Limited by Skye Bank Plc and the subsequent acquisition of Skye Bank Plc by Polaris Bank Limited, should Polaris Bank Limited not be made a party to this suit?

b. The Defendants failed to confirm the Claimant's employment within the six (6) months' probation period, rather the Defendants continued engaging the Claimant's services for a period of thirty-one (31) months. Bearing the factual circumstances of this case, are the Defendants actions not arbitrary, exploitative and unlawful?

c. Having worked for a period of thirty-one months, is the Claimant not entitled to be paid his full emoluments and entitlements for the period he worked in the employment of the 1st Defendant?

d. Is the Claimant entitled to an award of damages as contained in the reliefs filed before this Honourable Court?

On the first issue, counsel submitted that having acquired the assets and liabilities of the defunct Skye Bank Plc, the 1st Defendant is a necessary party to this suit and would be bound by the decision of the Court and relied on the case of *Afolabi & Ors. v. Western Steel Works Ltd. & Ors.* (2012) LPELR-9340(SC). He explained the course of the suit leading to the application for leave to substitute Skye Bank Plc with the 1st Defendant, which application was not opposed by the Defendants and granted as prayed on 13th December 2018; and noted that attached to the application was an exhibit, the Central Bank of Nigeria press release of 21st September 2018 to the effect that the 1st Defendant assumed the assets and liabilities of Skye Bank Plc and would absorb all employees under a new contract. Counsel explained that Skye Bank Plc is no longer a legal entity capable of suing or being sued and the 1st Defendant is now responsible for all pending actions against the Bank. It was further submitted that while Section 417 of the Companies and Allied Matters Act provides that no proceedings can be commenced against a company which has been wound up, the law does not exclude the 1st Defendant from being a party in the suit as the acquiring Bank. Thus, he argued

that the judicial authorities cited by the Defendants are irrelevant and the Claimant has satisfied the statutory requirement by notifying the Court that Skye Bank Plc no longer exists and seeking leave to substitute it with the 1st Defendant. The Court was urged to hold that the 1st Defendant is a proper and necessary party to this suit.

Counsel also submitted that parties cannot by agreement violate statutory provisions, and noted that by its involvement as the assuming Bank of Skye Bank Plc, the 1st Defendant became a proper and necessary party to this suit because it is seen in law as the defunct bank. He relied on Section 38(1)(c) of the NDIC Act, 2007 and the case of *Adetona & Ors. v. Obaoku & Ors.* (2016) LPELR-41931(CA). It was argued that the onus is on the 1st Defendant to produce evidence of the restructuring adopted in the instant case; and that reference to Sections 590 and 591 of the Companies and Allied Matters Act is misplaced. Counsel opined that the applicable legislation is Section 119 of the Investment and Securities Act, 2007.

Relying on Section 39(6) of the NDIC Act, 2007, learned counsel contended that, having assumed the assets and liabilities of Skye Bank Plc, the 1st Defendant can no longer hide behind the curtains of a bridge bank noting that a restructuring involving purchase and assumption implies that the acquiring bank assumes the assets and liabilities of the failing bank; which is different from cherry picking as a form of external restructuring. Continuing, he argued that the Claimant is not privy to the purchase and assumption agreement between the 1st Defendant the Nigeria Deposit Insurance Corporation, and the responsibility of joining NDIC as a necessary party to the suit falls squarely on the 1st Defendant. He referred to Order 13 Rule 4, National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 and the case of *Shuwa v. Chad Basin Authority* (1991) 7 NWLR (Pt. 205) 250 amongst others.

Counsel further argued that the Defendants are estopped from challenging their interests in this suit and obligations to the Claimant. While conceding that the Defendants had the right to challenge the 1st Defendant's competence in the suit when the Claimant filed his motion to substitute Skye Bank Plc with it, he argued that they waived their right to do so when they failed to object to the motion; calling in aid the case of *Adebowale v. Oluwadamilola* (2017) LPELR-42696(CA). He stated that the Defendants' reliance on the purchase and assumption agreement is an after-thought and ought to be discountenanced. Further, he submitted that the case of *George v. United Bank for Africa Ltd.* SC 209/1971 is inapplicable to this suit and that the 1st Defendant changed its coprparte identity from Mainstreet Bank to Polaris Bank in Suit No. NICN/LA/412/2014, *Mr. Usanga Eyo Brian v. Polaris Bank Limited*, which judgment was delivered on 20th

March 2019. Counsel maintained that the rules of agency do not apply in this case in that the 2nd and 3rd Defendants acted as Group Managing Director and Executive Director respectively of the defunct Afribank Nigeria Plc when the Claimant was in the employment of Afribank Nigeria Plc and in that capacity issued the Claimant the note of deep appreciation (Exhibit CW1C) and non-confirmation of appointment (Exhibit CW1H). By so doing, they made themselves liable to the Claimant in any case of default regarding his employment. The case of *B. B. Apugo & Sons Limited v. Orthopaedic Hospital Management Board* (2016) LPELR-40598(SC) was cited in support. He submitted that the Defendants failed to show how an agency relationship exists between the parties and Central Bank of Nigeria, and as a result, the 2nd and 3rd Defendants are rightly sued in their personal capacity. The Court was urged to so hold.

6. On issue two, counsel argued that the refusal of the Defendants to confirm Claimant's employment after his probation is arbitrary, exploitative and unlawful. Relying on Black's Law Dictionary definition of probationary employee as "a recently hired employee whose ability and performance are being evaluated during a trial period of employment", he explained that it is Claimant's evidence that he followed due process for his employment and was successful at every given task and ought to have been confirmed upon expiration of his probation on 4th March 2009. He referred to paragraphs 12 to 28 of the Claimant's statement on oath and noted that the Claimant satisfied the 1st Defendant's requirement for confirmation of employment and was commended for outstanding job performance and his line Executive Director confirmed his appraisal and forwarded it to the 2nd and 3rd Defendants who frustrated the confirmation process. In spite of this, the Claimant was made to undertake tasks as Head, Commercial Banking Strategic Business Unit implying that his services were retained and he could access loans which is available to confirmed staff. Counsel referred to Section 169 of the Evidence Act, 2011 and the cases of *Dr. Ajewunmi Bili Raji v. Obafemi Awolowo University* (2014) LPELR-22088(CA), *OAU v. Dr. Kola Onabanjo* (1991) 5 NWLR (Pt.193) 549 and *Taylek Drugs Co. Ltd. v. Onankpa* (2018) LPELR-45882(CA) to the effect that by keeping an employee and paying his salary after expiration of the probationary period, the employer would be deemed by operation of law to have confirmed his appointment and the doctrine of "estoppel by conduct" would operate to prevent the employer from treating him as still on probation; and submitted that having retained the Claimant after his probation and granting him the same rights as confirmed employees, the Claimant is entitled to prior notice, payment of his full emoluments and entitlements and the Defendants' failure to do so is arbitrary, oppressive and unlawful. The Court was urged to so hold.

7. Canvassing issue three, learned counsel contended that the Claimant

is entitled to his outstanding emoluments and benefits for the period he served the 1st Defendant and stated that there is evidence that by his term of employment (Exhibit CW1A and paragraph 45 of his statement on oath), the Claimant was entitled to a total remuneration of ₦26,919,210.00 made up of ₦18,843,447.00 fixed pay and ₦8,075,763.00 variable pay but was denied the variable pay, travel/passage allowances and accompanying bonuses which are owed to him as General Manager of the Bank and to which he is entitled. He submitted that an employee whose appointment is unlawfully terminated is entitled to damages equivalent to the amount he would have earned for the period of notice citing a number of cases in support including the case of *Rivers State Vegetable Oil Company Ltd. v. Mrs. Mercy Egbukole* (2009) LPELR-8379(CA). The Court was urged to find for the Claimant.

On issue four, counsel argued that the Claimant is entitled to the reliefs sought in the amended complaint and amended statement of facts noting that one of the reliefs available to an aggrieved party where a breach of contract has occurred is damages. He posited that the usual contractual measure of damages is the wages and benefits which the employee would have earned if his employment was confirmed. Continuing, counsel explained that the general principle underlying assessment of damages in contract is *restitutio in integrum* but noted that this principle is restrictively applied to cases of wrongful termination of employment. The measure of loss for an employer's breach of contract in dismissing an employee is based on an assessment of what the employee would have earned if his employment was confirmed as at when due. He relied on *Osisanya v. Afribank Nigeria Plc* (2007) 6 NWLR (Pt.1031) 565.

Learned counsel further explained that in establishing the monetary reliefs, the Claimant relies on paragraphs 42, 43, 44 and 45 of his statement on oath and Exhibit CW1 which undeniably shows what he would have earned if his employment was confirmed by the 1st Defendant; and having established that he was denied his remuneration in the sum of ₦37,950,862.00, the Defendants are bound to pay it. He submitted that, as a matter of law, a document tendered in Court is the best proof of the contents of such document and no oral evidence will be allowed to contradict it except in cases of fraud relying on *MTN Nig. Communications Ltd. v. Sadiku* (2013) LPELR-21105. The Court was urged to grant the reliefs contained in the Claimant's amended statement of facts.

Counsel further contended that Section 19(d) of the National Industrial Court Act vests the Court with powers to award aggravated damages against the Defendants. Reliance was placed on the case of *Mrs. Titilayo Akisanya v. Coca-Cola Nigeria Limited & Anor.*, Suit No. NICN/LA/40/2012. He explained that the Claimant seeks aggravated damag-

es for the Defendants' wrongful conduct in holding-up his confirmation after the stipulated six-months' probationary period and for wrongful termination of his employment; noting that in order to justify an award of aggravated damages, an aggrieved party must show that the Defendants have not only committed the wrongful act, but that the Defendants conduct is high-handed, outrageous, insolent, oppressive, malicious and showing contempt of the aggrieved party's rights or disregarding every principle which actuates the conduct of civilized men. The case of *Odiba & Anor. v. Muemue* (1999) LPELR-2216 was cited to buttress his submission. Lastly, counsel maintained that this Court can grant aggravated damages in this case because the Claimant has sufficiently established that the Defendants deliberately humiliated and frustrated his diligent and commendable work while serving as the 1st Defendant's General Manager by refusing to confirm him on 4th March 2009 and unlawfully terminating his employment after 31 months; which conduct was arbitrary, exploitative and unlawful.

8. Defendants' issues one and two are in substance the same as Claimant's issue one. Claimant's issues two, three and four are similar to Defendants' issue four. Having carefully read the written addresses of the parties, three issues can be deduced from the nine issues for determination formulated by learned counsel for the parties. These are:

a. Whether the Defendants are proper parties to this suit?

b. Whether the non-confirmation of the Claimant's appointment after 31 months of continuous service to the 1st Defendant is arbitrary, exploitative and wrongful?

c. Whether the Claimant is entitled to judgment as claimed?

It is settled law that a person who makes allegations in a pleading is, by the rules of pleading, bound to substantiate them. See Sections 131, 132 and 136(1) of the Evidence Act, 2011 and the cases of *Anthony Ehidimhen v. Ahmadu Musa & Anor.* (2000) 4 SC (Pt. II) 166 at 184 and *Abayomi v. Saap-Tech Nigeria Limited* (2020) 1 NWLR (Pt. 1706) 453 at 492. The burden of proof thus rests on the Claimant who initiated this suit on a set of facts which he claims entitles him to judicial relief. It is only when the Claimant makes out a prima facie case that the burden would shift to the Defendants to prove their defence. See *Abayomi v. Saap-Tech Nigeria Limited (supra)*. Where the Claimant fails to make out a prima facie case, there will be nothing for the Defendants to rebut and the case will be dismissed. See *MTN Nigeria Communications Limited v. Mundra Ventures Nigeria Limited* (2016) LPELR-40343(CA) 35-36.

It is equally the law that a Claimant who seeks declaratory reliefs has the burden to prove his entitlement to the declarations. See *Ilori & Ors. v. Ishola & Anor.* (2018) 15 NWLR (Pt.1641) 77 at 94. Declaratory reliefs are not granted as of course. The Claimant must establish his right before the Court can pronounce on it. Evidence which will support a legal right must be credible, cogent and convincing. See *Ibrahim v. Garki & Anor.* (2017) 9 NWLR (Pt. 1571) 377 at 390.

Furthermore, in an employment dispute, the Court must refer to the service agreement in resolution of the dispute. See *Gbedu & Ors. v. Itie & Ors.* (2020) 3 NWLR (Pt.1710) 104 at 126 and *Adekunle v. United Bank for Africa Plc* (2019) 17 ACELR 87 at 108.

9. The Claimant's evidence is that he was employed by the defunct Afribank Nigeria Plc as General Manager, e-Solutions by letter dated 29th August 2008, Exhibit CW1A, ("the letter") for a probationary period of six months. Paragraph 2 of the letter states: "You will be on probation for six (6) months after which your appointment will be confirmed subject to the following conditions:

- Receipt of satisfactory reports from your last employers and referees.
- A satisfactory medical report from our named medical consultant.
- Report of satisfactory performance from your Branch Manager.

The Claimant asserts that he satisfied the above conditions. His former employers, United Bank for Africa Plc, and his three referees sent their references to the Head, Human Capital Management; the medical report from the Bank's designated Clinic was forwarded to the Bank and, since he was not under any Branch Manager by virtue of his position as General Manager, his line Executive Directors, sent reports of satisfactory performance. In spite of this, his impressive job performance and approval of his confirmation appraisal by his line Executive Directors, the 2nd and 3rd Defendants treated his confirmation of employment with reckless indifference; and the Defendants' conduct in holding up the confirmation of his employment without any justification is arbitrary, exploitative and unlawful. Notwithstanding the non-confirmation of his appointment, the 1st Defendant retained him in its employment, redeployed him as Head, Commercial Banking Strategic Business Unit, Exhibit CW1B, and granted him staff loan which was only for confirmed employees. He was in the 1st Defendant's employment until 7th April 2011 when he was informed that his appointment could not be confirmed because his services were no longer required, Exhibit CW1H. He alleged that he was the only se-

nior management staff whose employment was not confirmed after 31 months in the employment of the 1st Defendant. It is his case that the Defendants terminated his employment without notice about two years after expiration of his probation and without payment of any severance benefits or entitlements for the period he worked in full capacity as General Manager; and his claim is for the benefits that would have accrued to him as a General Manager in the Bank from 4th March 2009 to 7th April 2011. He tendered 8 exhibits marked as Exhibits CW1A to CW1H. These are letter of appointment with the attachments, redeployment letter, letter of appreciation, commercial banking ALCO report, Afribank Nigeria Plc new organizational chart, appraisal forms, bundle of emails between Claimant and Head, Human Capital Management and Executive Director, corporate, commercial and retail banking and letter of non-confirmation of appointment. Under cross-examination, he admitted that Mr. Sebastine Adigwe was the Managing Director when he was employed and when his probation expired, and he did not resign because the Bank continued to use and pay for his services. He confirmed that Afribank Nigeria Plc employed him and Mainstreet Bank, Skye Bank and Polaris Bank acquired Afribank but Afribank terminated his employment and the 2nd and 3rd Defendants were CBN appointed management staff.

10. This now takes me to the issues for determination.

Issue one: Proper Parties

The question of proper parties is fundamental to any adjudication. It affects the jurisdiction of the Court to determine the suit before it. Where proper parties are not before the Court, it would lack the competence to hear the suit. Thus, before an action can succeed, the parties to it must be shown to be the proper parties to whom rights and obligations arising from the cause of action attach. See *Cotecna International Limited v. Churchgate Nigeria Limited & Anor.* (2010) 12 SC (Pt. II) 140 at 185-186 and *U.O.O. Nigeria Plc v. Mr. Maribe Okafor & Ors.* (2020) 2-3 SC (Pt. II) 135 at 163-164.

In his issues 1 and 2, learned counsel for the Defendants argued that the Defendants are not proper parties to this proceeding because there was no employment relationship between Claimant, Mainstreet Bank Limited, Skye Bank Plc and the 1st Defendant; and the 1st Defendant is not the receiver/manager or successor of Skye Bank Plc. Further, that the 2nd and 3rd Defendants were never directors of the 1st Defendant and, even if they were, they were agents of a disclosed principal who alone can be sued. He relied on a number of cases including the case of *Carlen (Nig.) Limited v. University of Jos (supra)*. Counsel stated that upon the intervention of Central Bank of Nigeria in a distressed bank, in

this case Afribank Plc and now Skye Bank Plc, the Nigerian Deposit Insurance Corporation, by operation of law, becomes the receiver/manager of the bank and the proper person to sue or be sued for its liabilities. He explained that actions arising from contracts of employment are excluded from the liabilities assumed by the 1st Defendant under the purchase and assumption agreement, and assets not purchased remain with the Nigerian Deposit Insurance Corporation. He maintained that Skye Bank Plc is still alive but in receivership and leave of the Federal High Court is required for the Claimant to continue this suit as constituted. Reliance was placed on Section 417 of Companies and Allied Matters Act and the case of *Onwuchekwa v. Nigerian Deposit Insurance Corporation (supra)* amongst others.

Contrariwise, learned counsel for the Claimant maintained that having acquired the assets and liabilities of Skye Bank Plc, the 1st Defendant is a necessary party to this suit relying on *Afolabi & Ors. v. Western Steel Works Ltd. & Ors. (supra)*. He argued that the application for leave to substitute Skye Bank Plc with the 1st Defendant was not opposed by the Defendants and they are estopped from doing so now. He added that the Central Bank of Nigeria's press release of 21st September 2018 was attached to the application as an exhibit, and therein the Bank stated that the 1st Defendant would assume the assets and liabilities of Skye Bank Plc and absorb its employees under a new contract. While conceding that no proceedings can be maintained against a company undergoing winding up, counsel noted that the law did not exclude the 1st Defendant from being made a party to the suit as the acquiring bank; and by its involvement as the "assuming bank" of Skye Bank Plc, the 1st Defendant is a proper and necessary party to this suit. Reliance was placed on Section 38(1)(c) of the NDIC Act, 2006 and the case of *Adetona & Ors. v. Obaoku & Ors. (supra)*. Counsel submitted that the Claimant is not privy to the purchase and assumption agreement between the 1st Defendant and the Nigerian Deposit Insurance Corporation, and the responsibility of joining the Corporation as a necessary party to the suit rests on the 1st Defendant. He referred to Order 13 Rule 4, National Industrial Court of Nigeria (Civil Procedure) Rules, 2017.

In respect of the 2nd and 3rd Defendants, it was argued that the rules of agency do not apply because they acted as Group Managing Director and Executive Director respectively of the defunct Afribank Nigeria Plc when the Claimant was its employee and issued the letter of appreciation (Exhibit CW 1C) and non-confirmation of appointment (Exhibit CW 1H). By so doing, they held themselves out as liable to the Claimant in the event of any default regarding his employment. The case of *B. B. Apugo & Sons Limited v. Orthopaedic Hospital Management Board (supra)* was relied on.

11. A good starting point in this consideration is Order 13 Rule 4 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 ("the Rules") which provides that:

> "Any person may be joined as Defendant against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative. Judgment may be given against one or more of the Defendants as may be found to be liable, according to their respective liabilities, without any amendment."

The operative words in Rule 4 of Order 13 are "alleged to exist". It is an allegation which can only be disproved by evidence. Rule 8 of Order 13 of the Rules states that "Where a Claimant is in doubt as to the person from whom the Claimant is entitled to redress, the Claimant may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more Defendants, with the intent that the question as to which, if any, of the Defendants is liable and to what extent, may be determined as between all parties."

Invariably, the Claimant may join in a suit as many Defendants as he believes he has a claim against. However, in determining whether the Defendants so joined are proper parties in the action, the Court will examine the claims before it. See *U.O.O. Nigeria Plc v. Mr. Maribe Okafor & Ors. (supra)* at page 164 and *Ecobank Nigeria Plc v. Michael C. Metu & Ors.* (2012) LPELR-20846(CA) 31.

12. What are the Claimant's claims? These have been set out in full earlier in this judgment. The principal reliefs seek a declaration that the Defendants' refusal or failure to confirm Claimant's employment despite fulfilling the bank's criteria as contained in Exhibit CW1A is exploitative, inequitable and unlawful; and a declaration that the Claimant is entitled to the full benefits of his General Manager position wrongfully withheld by the Defendants from 4th March 2009 to 8th April 2011. The other reliefs are incidental to these reliefs. In support of his claims, the Claimant filed 48 paragraphs amended statement of facts dated 28th December 2018 which are reproduced in his statement on oath dated 20th December 2018. The paragraphs relevant to this issue are paragraphs 3, 4, 5, 24, 26, 27 and 29 of the amended statement of facts which describe the roles played by each of the Defendants. The Claimant averred in paragraphs 3, 4 and 5 that the 1st Defendant assumed the assets and liabilities of Skye Bank Plc, the successor of defunct Afribank Bank Plc and Mainstreet Bank Limited; while the 2nd and 3rd Defendants were Group Managing Director and Executive Director operations, information technology and human capital management of the 1st Defendant respectively. In paragraphs 24 and 27, he alleged that the 3rd Defendant was mandated to address the

issue of staff confirmation and his confirmation approval was forwarded to him but he refused to act on it. In paragraphs 26 and 29, he further alleged that he made representations to the 2nd and 3rd Defendants on the issue of his confirmation, but they treated it with reckless indifference.

Clearly, the 2nd and 3rd Defendants acted in the course of duty to Afribank Nigeria Plc, which is vicariously liable for whatever they did or failed to do. See Sections 65 and 66 of the Companies and Allied Matters Act, 1990, as amended, which was the law in force when the cause of action arose. Contrary to the submission of learned counsel for the Claimant that the 2nd and 3rd Defendants acted as Group Managing Director and Executive Director respectively of Afribank Nigeria Plc when the Claimant was in its employment and issued the letter of appreciation and non-confirmation of appointment; and by so doing, held themselves out as liable to the Claimant for any default regarding his employment; there is nothing in the amended statement of facts or evidence of the Claimant rendering them personally liable for non-confirmation of Claimant's employment, notwithstanding the averment in paragraph 29 of the amended statement of facts that they acted with reckless indifference. In fact, the Claimant acknowledged in paragraphs 19 and 20 of his statement on oath that the intervention of Central Bank of Nigeria on 14th August 2009 affected his confirmation and that of 500 employees, and the initial focus of the new management led by the 2nd Defendant was to achieve stability. They could not, in the circumstance, be held to have treated the issue of Claimant's confirmation with "reckless indifference", and I so hold.

13. In addition, Section 66(3) of the Companies and Allied Matters Act, 1990, as amended, provides "Nothing in this section shall derogate from the vicarious liability of the company for the acts of its servants while acting within the scope of their employment." The question is, were the second and third Defendants, at that material time, acting within the scope of their employment? The answer is a resounding yes. Section 65 of the Companies and Allied Matters Act, 1990, as amended, reads, in part, "Any act of the members in general meeting, the board of directors, or of a managing director while carrying on in the usual way the business of the company shall be treated as the act of the company itself and the company shall be criminally and civilly liable therefor to the same extent as if it were a natural person".

It is the law that an agent of a disclosed principal incurs no liability and an action against an agent in his private capacity for acts done on behalf of his principal is incompetent. See *Samuel Osigwe v. PSPLS Management Consortium Ltd. & Ors.* (2009) 1-2 SC (Pt. I) 79 at 96-97 and *The Federal Government of Nigeria & Ors. v. Shobu Nigeria Ltd. & Anor.* (2013) LPELR-21457(CA) 20. In *B. B. Apugo & Sons Limited v. Orthopaedic*

Hospital Management Board (supra) relied on by learned counsel for the Claimant, Aka'ahs, J.S.C. (as he then was), at page 91 of the report observed thus:

> "In cases of agency, where the agent contracts on behalf of a foreign principal, the agent is liable for his engagements even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negative his personal liability."

The emphasis in that decision is where an agent contracts on behalf of a foreign principal. This is not the case here. The 2nd and 3rd Defendants were directors of Afribank Nigeria Plc and acted as such in their dealings with the Claimant. Exhibits CW1B, CW1C and CW1H were all written for and on behalf of Afribank Nigeria Plc. Further, there was no employment relationship between the Claimant and the 2nd and 3rd Defendants and there was no personal duty owed by the 2nd and 3rd Defendants to the Claimant. For these reasons, I hold that the 2nd and 3rd Defendants are not proper parties to this proceeding and, having been wrongly joined, they are hereby stricken off from this suit.

14. The basis of the claim against the 1st Defendant is that it assumed the assets and liabilities of Skye Bank Plc which was the successor of Mainstreet Bank Limited, a bank that took over the business of Afribank Nigeria Plc. See paragraph 3 of the amended statement of facts. It is noteworthy that this suit was commenced against Afribank Nigeria Plc on 20th April 2011 and the Claimant has had to change the 1st Defendant from Afribank Nigeria Plc to Mainstreet Bank Limited, Skye Bank Plc and now Polaris Bank Limited to reflect the mutation of Afribank Nigeria Plc. The argument of learned counsel for the Defendants that the 1st Defendant is not a proper party to this suit is premised on clause 2.1(j) of Exhibit DW1D, the purchase and assumption agreement which is captured in paragraph 2 of the amended joint statement of defence dated 30th July 2019 and reproduced in paragraph 10 the Defendant's witness' statement on oath to the effect that the 1st Defendant is a new bank and only acquired the trading assets of Skye Bank Plc from the Nigerian Deposit Insurance Corporation excluding all staff liabilities and contingencies. He also contends that where a receiver or liquidator has been appointed, as in the case for Skye Bank Plc, only the receiver or liquidator can sue or be sued and that the onus of proof that this suit is one of the liabilities acquired by the 1st Defendant rests on the Claimant. He relied on *George v. United Bank for Africa Ltd. (supra)*.

Although, the Claimant filed a reply and further witness' statement on oath on 23rd May 2019 to the amended joint statement of defence, the further

statement on oath was not adopted during the trial; and consequently, the reply is deemed abandoned. See *Folorunsho Olusanya v. Adebanjo Osineye* (2013) LPELR-20641(SC) 24.

Nonetheless, counsel for the Claimant argued that the 1st Defendant is a proper party because by its involvement as the assuming bank of Skye Bank Plc, it became a proper and necessary party being seen in law as the defunct bank and parties cannot by agreement violate statutory provisions. He relied on Section 38(1)(c) of the NDIC Act 2006 and the case of *Adetona & Ors. v. Obaoku & Ors. (supra)*. He contended that a restructuring process involving purchase and assumption implies that the acquiring bank assumes all the assets and liabilities of the failing bank and, lastly, that the Claimant is not privy to the purchase and assumption agreement and the responsibility of joining the Nigerian Deposit Insurance Corporation falls on the 1st Defendant.

15. I will take these issues one after the other. Let me say here that there is no pleading and no evidence of any restructuring of Skye Bank Plc before the Court. So, the submission of learned counsel for the Claimant that a restructuring process involving purchase and assumption implies that the acquiring bank assumes all the assets and liabilities of the failing bank is not supported by evidence and goes to no issue. See *Klifco Nigeria Limited v. Nigeria Social Insurance Trust Fund Management Board* (2004) LPELR-5788(CA) 8-9.

It is trite law that a person who makes allegations in a pleading is bound to substantiate it. Section 136(1) of the Evidence Act, 2011 provides:

> "The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other."

See also *Anthony Ehidimhen v. Ahmadu Musa & Anor. (supra)*.

The Claimant averred in paragraph 3 of his amended statement of facts inter alia:

> "The 1st Defendant was formed in 2005 and in 2018 assumed all the assets and liabilities of Skye Bank Plc (previously the defunct Mainstreet Bank and Afribank Plc, whose commercial banking licences were revoked)." By his pleading, the Claimant has the burden to prove that the 1st Defendant assumed all the assets and liabilities of Skye Bank Plc, and thus a proper party to this

suit. See also the case of *Ferdinand George v. United Bank for Africa Ltd.* (1972) LPELR-1321(SC) cited by learned counsel for the Defendants. At page 14 of the report, Fatayi-Williams, J.S.C. (of blessed memory), who delivered the leading judgment observed thus:

> "In a case such as this, evidence relating to the terms and conditions of the take-over or assignment of the assets such as a debt and of the liabilities of the bank which was taken over should have been put before the court."

In *O. A. Afolabi & Ors. v. Western Steel Works Limited & Ors.* (2012) 7 SC (Pt. III) 64 at 85, Rhodes-Vivour, J.S.C., held:

> "The purchaser of a company buys its assets and liabilities. To prove to the satisfaction of the Court that a company had been bought by another company, the person who asserts must place before the Court documents from the Corporate Affairs Commission to justify the assertion."

While Order 13 Rule 4 of the Rules allows a Claimant to join as Defendant any person against whom the right to any relief is alleged to exist, it is a rule of evidence that he who asserts must prove. See Section 131(1) of the Evidence Act, 2011. It is evident, therefore, that the onus of proof that the 1st Defendant acquired the assets and liabilities of Skye Bank Plc rests squarely on the Claimant.

16. Apart from the bare assertion in paragraph 3 of the amended statement of facts, there is nothing in the Claimant's statement on oath or his Exhibits to prove the averment that the 1st Defendant assumed all the assets and liabilities of Skye Bank Plc. In paragraphs 25 and 26 of the Claimant's final written address, his counsel argued that "Since the 1st Defendant acquired the assets and liabilities of the defunct Skye Bank Plc, it has unequivocally consented to acquire any pending litigation dispute including monetary claims against such defunct company. The 1st Defendant cannot be seen to cherry pick the extent of its liabilities against the defunct Skye Bank Plc." He quoted a sentence from the decision of Rhodes-Vivour, J.S.C., in *Afolabi & Ors. v. Western Steel Works Ltd. & Ors. (supra)* to the effect that the purchaser of a company buys its assets and liabilities; and argued further that the unchallenged motion for substitution dated 13th November 2018, has a publication by Central Bank of Nigeria ("CBN") dated 21st September 2018 attached as an exhibit; wherein the CBN stated that the 1st Defendant has assumed the assets and liabilities of Skye Bank Plc.

The press release, although attached to the application, is not pleaded and was not tendered as an exhibit at the trial. The submission of learned counsel, with due respect, is not supported by evidence and goes to no issue. At any rate, the Supreme Court, in *Afolabi & Ors. v. Western Steel Works Ltd. & Ors. (supra)*, held that a party who asserts that a company has been acquired by another company must prove the assertion to the satisfaction of the Court.

While I am entitled to look at documents in my file – see *Ugochukwu v. Nwoke & Anor.* (2010) LPELR-11616(CA) 19, in deciding this case, I am only bound to consider evidence properly presented before me. See *Barrister Mike Nkwocha & Ors. v. MTN Nigeria Communications Ltd. & Anor.* (2008) LPELR-8494(CA) 19, *Nigerian Westminister Dredging and Marine Limited v. Chief Tunde Smoot & Anor.* (2011) LPELR-4619(CA) 30 and *Prince Joseph Olaloye & Ors. v. The Attorney General & Commissioner for Justice, Osun State & Ors.* (2014) LPELR-23795(CA) 62-63.

Assuming I am to consider the CBN press release, it will be read along with Exhibit DW1D, the purchase and assumption agreement.

17. Also, the fact that the application to substitute Skye Bank Plc with the 1st Defendant was not opposed by the Defendants is not a bar to a challenge of their interests in this matter as canvassed by learned counsel for the Claimant. The issue of proper parties in a suit goes to the foundation of the action and can be raised at any time. See *U.O.O. Nigeria Plc v. Mr. Maribe Okafor & Ors. (supra)*, *Agura & Anor. v. Orobiyi & Anor.* (2012) LPELR-7975(CA) 15 and *Hope Democratic Party v. INEC & Ors.* (2009) LPELR-8677(CA) 39.

Learned counsel for the Claimant argued, in paragraphs 38 to 41 of the Claimant's final written address, that the Claimant is not privy to the purchase and assumption agreement and is not expected to be aware of its provisions or bound by it. Also, that the responsibility of joining the Nigerian Deposit Insurance Corporation falls on the 1st Defendant. The law is firmly settled that a contract binds only the parties to it and cannot be enforced by or against a person who is not privy to it. See *Intercontinental Bank Plc v. Hilman & Bros Water Engineering Services Nigeria Limited* (2013) LPELR-20670(CA) 24-25 and *Agbareh & Anor. v. Mimra & Ors.* (2008) LPELR-235(SC) 24. To this extent, Exhibit DW1D binds only the 1st Defendant and the Nigerian Deposit Insurance Corporation. However, it is not the duty of the 1st Defendant to join the Nigerian Deposit Insurance Corporation as a Defendant in this suit. The duty to ensure that necessary or proper parties are before the Court remains that of the Claimant who has instituted the action. See *First Bank of Nigeria Plc v. J. O. Imasuen and Sons Nigeria Ltd.* (2013) LPELR-20875(CA) 37.

The question one may ask is, can I shut my eyes to Exhibit DW1D merely because the Claimant is not privy to it? I do not think so. The Claimant relies on the CBN press release as evidence that the 1st Defendant assumed all the assets and liabilities of Skye Bank Plc. The 1st Defendant tendered Exhibit DW1D, the assumption and purchase agreement, to show the extent of the assets and liabilities of Skye Bank Plc it assumed. This is consistent with the decisions in *Ferdinand George v. United Bank for Africa Ltd. (supra)* and *Afolabi & Ors. v. Western Steel Works Limited & Ors. (supra)*. Therefore, Exhibit DW1D countervails the CBN press release and ought, in the interest of justice, to be considered.

18. Clause 2.1(j) of Exhibit DW1D provides:

"In consideration of the transfer of the Assets contemplated herein, the Assuming Bank expressly assumes at Book Value (subject to adjustment pursuant to Clause 7) and agrees to pay, perform, and discharge all of the following liabilities of the Failing Bank as of the Effective Date, except as otherwise expressly provided in this Agreement (such liabilities referred to as "Liabilities Assumed"):

(j) Litigation liabilities to the exclusion of litigation liabilities arising out of trade union actions or contracts of employment;"

The proviso to clause 2.1 states

> "Provided that notwithstanding anything to the contrary in this Agreement, the Assuming Bank does not assume any Insider Deposits, Insider liability, tax liability, any liability emanating from or connected with an employment contract with the Failing Bank, any liability emanating from or connected with Retirement Benefit Obligations, and for the avoidance of doubt all unassumed liabilities remain with the Failing Bank."

Earlier, in the press release, the CBN wrote:

> "As a responsible and responsive regulator and in consultation with the Nigerian Deposit Insurance Corporation (NDIC), we have decided to establish a bridge bank, Polaris Bank, to assume the assets and liabilities of Skye Bank."

It is clear that the 1st Defendant was established as a bridge bank to assume the assets and liabilities of Skye Bank. In Exhibit DW1D, the assets and liabilities assumed by the 1st Defendant were delimited. Liabilities emanating from employment contracts with Skye Bank Plc are expressly excluded. In addition, the 1st Defendant denied any employment

relationship between it and the Claimant and between the Claimant and Mainstreet Bank Limited and Skye Bank Plc. Undoubtedly, there is no employment relationship between the Claimant and the 1st Defendant. The Claimant's employment with Afribank Nigeria Plc was terminated on 7th April 2011 before the take-over of the business of Afribank Nigeria Plc by Mainstreet Bank Limited. However, the issue of exclusion of liability did not arise in the case of Mainstreet Bank Limited and Skye Bank Plc, especially as this case was pending before the take-over of Afribank Nigeria Plc and would have been a non-issue if the 1st Defendant assumed all the assets and liabilities of Skye Bank Plc. That is not the case here.

19. Furthermore, Section 38(1)(c) of the NDIC Act 2006 does not support the submission of learned counsel in paragraphs 27 to 29 of Claimant's final written address to the effect that parties cannot by agreement violate statutory provisions. The Section provides, thus:

> "(1) The Corporation, in consultation with the Central Bank of Nigeria, may:
>
> (c) arrange a merger with or acquisition by another insured institution or contract to have the deposit liabilities assumed by another insured institution in which case – (i) the receiving or acquiring insured institution shall assume all the recorded deposit liabilities of the failing insured institution; (ii) the receiving insured institution shall receive those assets of the failing insured institution that are acceptable and an amount equal to the difference between the assumed deposit liabilities and acceptable assets shall be advanced to the receiving insured institution by the Corporation; (iii) the Corporation may receive such assets from the failing insured institution as it may consider acceptable as collateral for the advance of the receiving insured institution or purchase the assets from the failing insured institution and (iv) subject to paragraph (iii) above, any asset (including land) of the failing insured institution shall be transferred or be vested in the receiving insured institution or the corporation;"

Evidently, there is no obligation on the acquiring insured institution to assume all the assets and liabilities of the failing institution. In any event, whatever assets or liabilities of the failing institution that are not assumed by the acquiring institution automatically vests in the Nigerian Deposit Insurance Corporation. The proviso to clause 2.1 of Exhibit DW1D states that "all unassumed liabilities remain with the Failing Bank."

Pursuant to Section 122(2)(m) of the Evidence Act, 2011, I am entitled to take judicial notice of proceedings in any Court established under the Constitution. By an order of the Federal High Court made on 6th April 2019, in the matter of Skye Bank Plc and Nigerian Deposit Insurance Corporation, Suit no. FHC/L/CP/2101/2018, Skye Bank Plc was wound up and the Nigerian Deposit Insurance Corporation, as the statutory liquidator, was charged with the responsibility of overseeing the liquidation of the Bank; and ought to have been joined as a necessary party to this proceeding.

Arising from the foregoing, I hold that the 1st Defendant is not a proper party to this suit. Consequently, issue one is resolved in favour of the Defendants. It goes without saying that without the proper parties, this Court has no jurisdiction to entertain this action, which therefore fails. See *U.O.O. Nigeria Plc v. Mr. Maribe Okafor & Ors. (supra)* at page 167.

20. Assuming I am wrong, I will proceed to consider issues two and three.

Issue two: Non-confirmation of Claimant's appointment

The crux of this action is the Claimant's claim for benefits he would have earned if his employment as a General Manager was confirmed before its termination on 7th April 2011. The facts in support of his claim are pleaded in paragraphs 6 to 48 of the amended statement of facts. These paragraphs are reproduced as paragraphs 3 to 45 of his statement on oath. In proof of these facts, the Claimant tendered 8 Exhibits marked as Exhibits CW1A to CW1H. These are the letter of appointment with attachments, redeployment letter as head, commercial banking strategic business unit, a note of deep appreciation, commercial banking ALCO report, Afribank Nigeria Plc new organizational chart, appraisal forms, bundle of emails between Claimant and Head, Human Capital Management and Executive Director, corporate, commercial and retail banking and letter of non-confirmation of appointment.

Paragraph 2 of the letter of appointment states:

> "You will be on probation for six (6) months after which your appointment will be confirmed subject to the following conditions:
>
> - Receipt of satisfactory reports from your last employers and referees.
>
> - A satisfactory medical report from our named medical consultant.

- Report of satisfactory performance from your Branch Manager."

The Claimant asserts that he satisfied the above conditions. His former employers, United Bank for Africa Plc, and his three referees sent their references to the Head, Human Capital Management; the medical report from the Bank's designated Clinic was forwarded to the Bank and his line Executive Directors, sent reports of satisfactory performance. In spite of this and his impressive job performance, the 2nd and 3rd Defendants treated his confirmation of employment with reckless indifference; and the Defendants' conduct in holding up the confirmation of his employment without any justification is arbitrary, exploitative and unlawful. Notwithstanding the non-confirmation of his appointment, the 1st Defendant retained him in its employment, redeployed him as Head, Commercial Banking Strategic Business Unit, Exhibit CW1B, and granted him staff loan which was only for confirmed employees. He was in 1st Defendant's employment until 7th April 2011 when he was informed that his appointment could not be confirmed because his services were no longer required, Exhibit CW1H. He alleged that he was the only senior management staff whose employment was not confirmed after 31 months in the employment of the 1st Defendant. It is his case that the Defendants terminated his employment without notice about two years after expiration of his probation and without payment of any severance benefits or entitlements for the period he worked in full capacity as General Manager, and his claim is for the benefits that would have accrued to him as a General Manager in the Bank from 4th March 2009 to 7th April 2011.

The Defendants' response is in paragraphs 12 to 32 of the amended joint statement of defence dated 30th July 2019, which are reproduced in paragraphs 21 to 41 of the Defendants' witness' statement on oath dated 13th January 2020. A summary of the facts constituting the Defendants' defence is that the Claimant did not satisfy the Bank's criteria for confirmation which include ability to meet and surpass set targets, integrity, honesty and manners, and was a temporary staff at the time his appointment was terminated. They claim that the Bank has a discretion to terminate or extend the period of probation and the Claimant reserved the right to resign if the extension was unacceptable, but remained in the Bank and received his wages. The Defendants explained that it is the 1st Defendant's prerogative, under its terms of service, to assess or promote employees; and that the Claimant worked for 12 months without confirmation before the take-over of Afribank Nigeria Plc by a new management which gave the Claimant another opportunity to prove his competence on the job but he failed woefully leading to a protest by the trade union, and it is not bound to disclose the reason for not confirming him. The Defendants allege that there was no master and servant rela-

tionship between them and the Claimant, and submission of references, satisfactory medical report and satisfactory performance report are only requirements for employment and are in no way related to confirmation of an employee. They state that the Bank has a procedure for confirmation of staff and the final approval comes from the Chief Executive Officer of the Bank. All approvals must be given before a staff is confirmed. The Chief Executive Officer reserves the right to refuse a confirmation while departmental heads only recommend. They equally state that the appraisal forms filled by the Claimant were not approved by the management of the Bank, and granting of loans to staff is at the discretion of management irrespective of whether the staff is confirmed or not.

21. Learned counsel for the Defendants explained, under his issue three, that the Claimant's case is that there was an objective appraisal of his performance which he passed, and the employer was bound to confirm him; failing which the Court should confirm him on behalf of the employer, which request he urged the Court to reject relying on *Wayo v. Judicial Service Commission, Benue State & Anor. (supra)*. He posited that the issue of an employee's entitlement to a position is not justiciable except in statutory employment. The case of *SPDC & Ors. v. E. N. Nwaka & Anor. (supra)* was cited to buttress his submission.

On his part, learned counsel for the Claimant argued that the Defendants' refusal to confirm Claimant's employment after his probation is arbitrary, exploitative and unlawful. He noted that the Claimant satisfied the 1st Defendant's requirement for confirmation and was assigned a new task as Head, Commercial Banking Strategic Business Unit and could access loans which is only available to confirmed staff. Therefore, he argued, the Defendants are estopped from treating him as still on probation. Reliance was placed on Section 169 of the Evidence Act, 2011 and the cases of *Dr. Ajewunmi Bili Raji v. Obafemi Awolowo University (supra)* and *O.A.U. v. Dr. Kola Onabanjo (supra)* amongst others.

22. I have carefully read the parties' pleadings, depositions of witnesses and exhibits and, in my considered opinion, the following facts are established:

a. The Claimant was employed by Exhibit CW1A as General Manager and his employment was subject to six months probation after which it would be confirmed upon satisfying three conditions, viz:

- Receipt of satisfactory reports from his last employers and referees;
- Satisfactory medical report from the Bank's medical consultant; and

- Report of satisfactory performance from his Branch Manager.

b. The Claimant satisfied these conditions. Therefore, the Defendants' witness evidence that the Claimant did not satisfy the Bank's criteria for confirmation which include ability to meet and surpass set targets, integrity, honesty and manners is not correct. Apart from the viva voce of the Defendants' witness, there is no evidence that these alleged criteria formed part of the terms of Claimant's employment and that he did not satisfy the criteria.

c. The management of the Bank commended the Claimant by Exhibit CW1C personally signed by the Group Managing Director. The letter reads in part, "Yesterday we scaled a major hurdle/ milestone in our assignment. It is easy to forget having reached this point the hard work, commitment and contribution you have put in. Your support has been pivotal and strategic." Clearly, this is not a testimony of an employee who failed on his assignment.

d. In spite of this outstanding performance, the Claimant's employment was not confirmed but, by Exhibit CW1B, he was assigned a new job role as Head, Commercial Banking Strategic Business Unit and paid his salaries. Paragraph 3 of the letter states "We congratulate you on your new assignment and hope that you will continue to maintain the trust and confidence placed in you." Again, this contradicts Defendants' witness' testimony in paragraphs 24 and 26 of his statement on oath that the management of the Bank prior to CBN intervention adjudged the Claimant incompetent and not worthy of confirmation hence the extension of his probation and the CBN management gave him another opportunity to prove his competence on the job and he failed woefully.

e. The Claimant's employment was terminated with immediate effect by letter dated 7th April 2011, Exhibit CW1H, with a promise to compute and pay him one month's basic salary in lieu of notice.

23. While it is true, as argued by learned counsel for the Defendants, that confirmation of appointment of an employee is the domestic affair of an employer and not automatic and, in a master and servant relationship, an employee cannot compel his employer to confirm him or place him in a particular position; nonetheless, the employer has no right to keep the employee on probation indefinitely. As the word implies, probation is a period of trial, observation and evaluation. It affords the employer an opportunity to ascertain the suitability of the employee for the job. Proba-

tion is a short-term measure and where, at the end of his probation, the employee is adjudged unsuitable for the job, the employer could extend the probation or terminate the employment. Where the employer opts for the first option, it must inform the employee that it has adjudged him unsuitable for his job role but would be giving him another opportunity to justify his employment. Extension of probation cannot be implied and a probation which exceeds the agreed period without a formal extension will amount to unfair labour practice. In that case, the employer will be deemed to have confirmed the employee's appointment and cannot argue otherwise. See *OAU v. Dr. Kola Onabanjo* (1991) 5 NWLR (Pt. 193) 549 at 565. This is based on the equitable principle of estoppel which is to the effect that where a person by words or conduct wilfully causes another to believe the existence of a state of affairs and induces him to act in reliance thereof, he will be bound by the fair inference to be drawn from his words or conduct. See *Anaeze v. Anyaso* (1993) LPELR-480(SC) 42-43, *Chukwuma v. Ifeloye* (2008) 12 SC (Pt. II) 291 at 325-326 and *Mandilas Limited v. Ekhator Ayanru* (2000) LPELR-6870(CA) 13. This principle has been codified in Section 169 of the Evidence Act, 2011 which states:

> "When one person has either by virtue of an existing court judgment, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives in interest shall be allowed in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing."

24. By retaining the Claimant after expiration of his probation, redeploying him to head the Commercial Banking Strategic Business Unit, paying his salaries and allowing him benefits reserved for confirmed staff several months after expiration of his probation, this Court is entitled to infer that the Claimant is a permanent staff and the 1st Defendant is precluded from stating the contrary. The Court of Appeal, in applying this principle in *OAU v. Dr. Kola Onabanjo (supra)* at 570 held:

> "The appellant had delayed unnecessarily in making up their minds whether to terminate or confirm respondent's probationary appointment. By keeping him in his (sic, its) employment and continuing to pay him for four months after the probationary period of three years had expired, they would be deemed by operation of law to have confirmed his appointment, and the doctrine of "estoppel by conduct" would operate to prevent the appellant, from alleging and treating him as if he was still on probation."

This decision was cited with approval in *Dr. Ajewunmi Bili Raji v. Obafemi Awolowo University (supra)* 50-53.

Let me say here that the Court has not usurped the powers of the 1st Defendant to confirm a staff who has exited the Bank as contended by learned counsel for the Defendants in his issue three. It is an inference of law arising from the conduct of the 1st Defendant. The case of *Mbachu v. Anambra-Imo River Basin Development Authority* (2006) 7 SC (Pt. III) 134 and others cited by learned counsel for the Defendants are not applicable to this case. The issue here is not entitlement to a position or specific performance as contended by counsel, but non-confirmation of Claimant's employment after expiration of his probation and assigning functions to him thereby giving the impression that his employment is continuing and, subsequently, turn around to claim he was on probation. The inequity involved is such that the employer should not be allowed to eat its cake and still have it.

Consequently, I answer issue 2 in the affirmative and hold that the non-confirmation of the Claimant's appointment after 31 months of continuous service to the 1st Defendant is arbitrary, exploitative and wrongful.

25. **Is Claimant entitled to judgment as claimed?**

This leads me to the third issue for determination. The first relief is for a declaration that the Defendants' refusal or failure to confirm Claimant's employment despite fulfilling the bank's criteria as contained in the letter of appointment dated 29th August 2008 is exploitative, inequitable and unlawful. The facts in support of this claim are contained in paragraphs 6 to 36 of the amended statement of facts which facts are reproduced in paragraphs 3 to 33 of the Claimant's statement on oath. The Claimant's evidence is that he satisfied the Bank's requirement for confirmation, received commendation from the Bank and was assigned a new role as Head, Commercial Banking Strategic Business Unit in recognition of his competence and sterling performance. He relied on Exhibits CW1A, CW1B, CW1C, CW1D, CW1F and CW1G. Exhibit CW1D corroborates Exhibit CW1C and shows that the Bank witnessed growth and increased profitability during the period. I observe, however, that the second appraisal report of March 2011 was not signed by Claimant's line executive director. The Defendants' response is in paragraphs 12 to 21 of their amended joint statement of defence which are reproduced in paragraphs 21 to 30 of their witness' deposition. A summary of the Defendants' evidence is that the Bank adjudged the Claimant's job performance unsatisfactory and the Claimant was aware of the reasons for his non-confirmation and consented to the extension of his probation.

Learned counsel for the Defendants, in arguing his issues four and five, submitted that the entitlement of a general manager is a special damage which must be specifically pleaded, but the entire claim is a lump sum amount which the Court cannot grant. It was also argued that where the Claimant is not entitled to special or general damages, the Court cannot award aggravated damages or interests. Conversely, learned counsel for the Claimant contended that the Claimant is entitled to his outstanding emoluments and benefits for the period he served the 1st Defendant evidence of which can be found in Exhibit CW1A and paragraphs 42, 43, 44 and 45 of his statement on oath; noting that, as a matter of law, a document tendered in Court is the best proof of its contents. He submitted that an employee whose appointment is unlawfully terminated is entitled to damages equivalent to the amount he would have earned for the period of notice, but in this case, the measure of damages is the wages and benefits which the employee would have earned if his employment was confirmed as at and when due. He relied on Section 19(d) of the National Industrial Court Act, 2006 in urging the Court to award aggravated damages against the Defendants.

26. The jurisdiction of the Court to grant a declaration of right is predicated on the existence of the right. See *E. N. Nwaka v. The Shell Petroleum Development Company of Nigeria Ltd. & Ors.* (2003) 1 SC (Pt. II) 127 at 134. Notwithstanding the fact that the second appraisal report was not signed by Claimant's line executive director, there is sufficient evidence that the Claimant performed satisfactorily to earn a confirmation. Moreover, I found elsewhere in this judgment that the Claimant satisfied the conditions prescribed by the Bank for confirmation of his appointment and that the failure to confirm him after 31 months of continuous service is arbitrary, exploitative and wrongful. Having established his right, the Claimant is entitled to the declaration sought. Thus, this relief succeeds.

27. Relief two is for a declaration that the Claimant is entitled to full benefits of his General Manager position wrongfully held up by the Defendants from March 4, 2009, to April 8, 2011. This claim is an adjunct to relief one and flows necessarily from it. Learned counsel for the Defendants argued, in his issue five, that the Claimant who collected his salaries and terminal benefits cannot turn around and, in equity, demand restitution to a post and accrued benefits thereof. He contended that the Claimant is estopped from alleging unfair treatment and he who comes to equity must come with clean hands. Learned counsel for the Claimant did not respond to this submission. However, with all due respect to learned counsel, he missed the point. The issue is not one of choice but an inference of law. The Claimant was employed as a general manager for a probationary period of six months, after which his appointment would be confirmed. This was not done. His employment was summarily termi-

nated with an offer of one month's salary in lieu of notice. His claim is for benefits due to a general manager which were not paid to him because his employment was not confirmed. Does this taint his hands and make him unqualified to seek redress? I do not think so. Having laid him off, he is entitled to demand for his rights under the contract of employment. Like I said earlier, this relief flows from relief one and, having found relief one established, I hold that the Claimant is entitled to the benefits of his position as General Manager from 4th March 2009 to 8th April 2011.

28. The third relief is for an order directing the Defendants to pay to the Claimant the sum of ₦37,950,862.00 (Thirty-Seven Million, Nine Hundred And Fifty Thousand, Eight Hundred And Sixty-Two Naira) only being the accumulated travel/passage allowances as well as annual variable pay due to the Claimant as General Manager of the 1st Defendant from March 4, 2009, to April 8, 2011. The only pleading relating to this claim is paragraphs 9, 46, 47 and 48 of the amended statement of facts. These form paragraphs 6, 43, 44 and 45 of his statement on oath and for the sake of clarity it is set forth below:

> "6. Essentially, my Claim is for the benefits that would have accrued to me as a General Manager in the Bank from March 4, 2009, when the probationary period lapsed; and April 7, 2011, when the Defendants officially notified me of non-confirmation of my appointment and purportedly terminated my employment."

> "43. It will be inequitable and unfair to allow the 1st Defendant to deny me the full benefit of my service to the 1st Defendant from March 4, 2009 to April 8, 2011."

> "44. The Defendants are precluded by the equitable doctrine of estoppel from denying that I had been placed in full employment status and therefore entitled to the full benefits of the General Manager position in 1st Defendant's employment."

> "45. Further, the 1st Defendant is liable to me for the entitlements of a fully confirmed General Manager from 1st March 2009 (the end of the probation when my employment ought to have been confirmed or terminated) and 8th April 2011 on which date I received 1st Defendant's purported notice of termination."

29. Clearly, while the Claimant alluded to the benefits of a fully confirmed General Manager, he did not specify the benefits in his pleading and witness deposition. No reference was made to any documents in the paragraphs reproduced above. In paragraphs 10, 18(c), (d) and (g), 20, 22, 26, 27 and 40 of the amended statement of facts, the Claimant spe-

cifically made reference to and pleaded documents forming the basis of each averment. That was not done in paragraphs 9, 46, 47 and 48 of the amended statement of facts. The Defendants denied paragraphs 9, 46, 47 and 48 of the amended statement of facts in paragraphs 23, 32(e), (f), (g) and (h) of the amended joint statement of defence.

In his submission, learned counsel for the Defendants argued that the entitlement of a general manager is a special damage which must be specifically pleaded. On his part, learned counsel for the Claimant opined that the Claimant is entitled to his outstanding emoluments and benefits for the period he served the 1st Defendant and that justification for the claim can be found in Exhibit CW1A and paragraphs 42, 43, 44 and 45 of his statement on oath; noting that, as a matter of law, a document tendered in Court is the best proof of its contents.

30. I agree with learned counsel for the Claimant that a document duly pleaded, tendered and admitted in evidence is the best evidence of its contents, see *Uwua Udo v. The State* (2016) LPELR-40721(SC) 12. However, it is settled law that the fact that a document was tendered in the course of proceedings does not relieve a party from satisfying the legal duty placed on him to link the document with his case. See *Prof. Bukar Bababe v. Federal Republic of Nigeria* (2018) 7-10 SC 1 at 122.

Exhibit CW1A was tendered to prove the averment in paragraph 10 of the amended statement of facts which states:

> "10. By a letter of appointment dated 29th August, 2008, the Claimant was appointed as General Manager, e-Solutions. The e-Solutions Department is responsible for electronic banking, portal solutions, e-Government initiatives and facilitates Public-Private Partnership schemes between businesses and governmental bodies. The Claimant shall rely on the letter of appointment dated 29th August 2008."

The law is firmly established that a document is tendered to support facts relied on by the pleader, see *Brawal Shipping (Nigeria) Limited v. F. I. Onwadike Co. Limited & Anor.* (2000) LPELR-802(SC) 20 and *Mr. Osamata Macaulay Adekunle v. United Bank for Africa Plc* (2016) LPELR-41124(CA) 41. Further, where the Claimant relies on Exhibit CW1A to prove his claim for special damages, material parts of that document relating to the claim ought to have been set out in his pleading. See *Chief James Onyewuke v. Modu Sule* (2011) LPELR-9084(CA) 19-20. Additionally, and as rightly argued by learned counsel for the Defendants, this claim being one for entitlements is a claim for special damages which must be specifically pleaded and strictly proved. See *U. T. C. Nigeria Ltd.*

v. Samuel Peters (2009) LPELR-8426(CA) 34. Claims for benefits must be particularised and supported with contractual documents. This was not done in this case.

31. Assuming Exhibit CW1A is sufficient proof of this claim, paragraph 3 thereof states "The total pay for a GM is ₦26,919,210.00 made up of ₦18,843,447.00 fixed pay and ₦8,075,763.00 variable pay (details attached)." There is nothing in the Claimant's pleading, statement on oath and documents tendered which shows how much of the sum of ₦26,919,210.00 was paid to him. His pay slip or bank statement was not tendered to show what was actually paid to him. The evidence was elicited under cross-examination. In response to questions by Defendants' counsel, the Claimant said "I did not resign because they continued to use my services and paid me for my services…The bank gave me a bonus from day one, the salary was paid but the bonus was not paid." The performance-based bonus is ₦8,075,763.00 which is also described as variable pay. It is trite law that evidence elicited in cross-examination which is not supported by the pleading of either party is inadmissible. See *Citec International Estates Ltd. v. Kolawole Akanbi Yusuf & Anor.* (2016) LPELR-40207(CA) 20.

The same is true of the "travel/passage allowance". Although, the sum of ₦2,490,000.00 is specified for "overseas holiday", it is not clear if this is what the Claimant described as "travel/passage allowance". Assuming it is, the basis of computation of the sum of ₦37,950,862.00 is not manifest in his pleading and statement on oath. It is not for the Court to do the calculation. Cases are decided on cold facts and not on speculation. See *Ecobank Nigeria Limited v. Anchorage Leisures Limited & Ors.* (2016) LPELR-40219(CA) 34-35.

Section 131(1) of the Evidence Act, 2011, provides that "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist." The facts are within the Claimant's peculiar knowledge and he has the burden to prove it, which burden he has not discharged. As a result, this claim fails.

32. The next claim is for the sum of ₦20,000,000.00 (Twenty Million Naira) aggravated damages for the Defendants' wrongful conduct in holding up his confirmation after the stipulated six-month probationary period and for wrongful termination of his employment. This claim seeks damages for non-confirmation of the Claimant's appointment and for wrongful termination of employment. There is no fact alleging wrongful termination of employment. This suit is built around the Defendants' failure to confirm Claimant's employment. See paragraphs 9, 47 and 48 of the amended

statement of facts.

Counsel for the Defendants argued that the Claimant is not entitled to the claims and the Court lacks jurisdiction to award aggravated damages for failure to confirm a staff. In his submission, counsel for the Claimant referred to Section 19(d) of the National Industrial Court Act, 2006 and the case of *Mrs. Titilayo Akisanya v. Coca-Cola Nigeria Limited & Anor.*, Suit No. NICN/LA/40/2012 in urging the Court to award aggravated damages in favour of the Claimant for the Defendants' wrongful conduct in holding up his confirmation after the stipulated six months probationary period and for wrongful termination of his employment; noting that in order to justify an award of aggravated damages, an aggrieved party must show that the Defendants' conduct is high-handed, outrageous, insolent, oppressive, malicious and showing contempt of the aggrieved party's rights or disregarding every principle which actuates the conduct of civilized men.

33. Where there is a wrong, there must be a remedy. See *Ogbolosingha & Anor. v. Bayelsa State Independent Electoral Commission & Ors.* (2015) LPELR-24353(SC) 43. I found in this judgment that the failure to confirm the Claimant's employment after 31 months of continuous service is arbitrary, exploitative and wrongful. Aggravated damages which are within the discretion of the Court to grant, and are awarded where the Defendants' conduct is sufficiently outrageous to merit punishment. The motive and conduct of the Defendants are taken into account in making the award. See *G.K.F. Investment Nigeria Ltd. v. Nigeria Telecommunications Plc* (2009) LPELR-1294(SC) 31-32 and *Casmir Obok & Ors. v. Chief Christopher Agbor & Ors.* (2016) LPELR-41219(CA) 16-17. In view of Exhibits CW1A, CW1B, CW1C and CW1F particularly the first appraisal form dated 9th September 2009, the conduct of the 1st Defendant in refusing to confirm the Claimant's employment is reprehensible, extremely unfair and evidently worked great hardship on the Claimant. There was no justification for the 1st Defendant's action. How could the 1st Defendant celebrate the Claimant in Exhibit CW1C, re-assign him to a vital position as Head, Commercial Banking Strategic Business Unit in Exhibit CW1B and still find him unworthy of permanent employment? In the circumstance, this claim succeeds in part. Pursuant to Section 19(d) of National Industrial Court Act, 2006, I hold that the Claimant is entitled to aggravated damages for the 1st Defendant's wrongful conduct in holding up his confirmation after the stipulated six-month probationary period and retaining him in its employment for 31 months, only to discard him when it was convenient for it to do so. For a professional of the Claimant's stature, that was a very inhuman and degrading treatment. Accordingly, I award the sum of ₦5,000,000 (Five Million Naira) aggravated damages in favour of the Claimant.

34. Claims 5, 6 and 7 are for pre-judgment interest on the sum claimed in (c) above at the Central Bank of Nigeria rate from 8th April 2011 till the date of judgment; interest at 21% per annum from the date of judgment until final liquidation of the judgment sum and cost of this action.

Counsel for the Defendants contends that where the Claimant is not entitled to special or general damages, this Court cannot award aggravated damages or interests. Claimant's counsel did not urge anything on the Court in this respect.

The law on pre-judgment interest is well settled and, for emphasis, interest may be awarded in two distinct circumstances, namely: as of right and where there is a power conferred by statute to do so in the exercise of the Court's discretion. Interest may be claimed as of right where it is contemplated by the agreement between the parties, under a mercantile custom, or under a principle of equity such as breach of a fiduciary relationship. Where interest is claimed as a matter of right, the proper practice is to claim entitlement to it in the originating process and plead facts which show such entitlement. See *Alhaja Sherifat Balogun & Anor. v. Egba Onikolobo Community Bank (Nigeria) Limited* **(2007) 5 NWLR (Pt. 1028) 584 at 603**, *Dantama v. Unity Bank Plc* (2015) LPELR-24448(CA) 22-23 and *Interdrill Nigeria Ltd. & Anor. v. United Bank for Africa Plc* (2017) 13 NWLR (Pt.1581) 52 at 72-73.

In *In-Time Connection Limited v. Mrs. Janet Ichie* (2009) LPELR-8772(CA) 24, Eko, J.C.A., (as he then was), posited that the Defendant's obligation to pay interest on a debt must be strictly proved by evidence. There is no pleading and no evidence on the interest rate. Accordingly, I hold that the claim for pre-judgment interest has not been proved.

However, this Court is empowered by Order 47 Rule 7 of the Rules to award post-judgment interest at a rate not less than 10% per annum. This is what the Claimant is entitled to and this is what he will get.

35. Generally, cost follows events and a successful party is entitled to his cost. This Court has unfettered discretion to award costs which discretion must be exercised judicially and judiciously. See Order 55 Rules 1 and 4 of the Rules and *Nigerian Bank for Commerce and Industry & Anor. v. Alfijir (Mining) Nigeria Ltd.* (1999) 12 SC (Pt. II) 109 at 123-124.

Order 55 Rule 5 of the Rules provides that "in fixing the amount of costs, the principle to be observed is that the successful party is to be indemnified for the expenses to which the party has been unnecessarily put in the proceedings." The key phrases are 'successful party' and 'indemnified for the expenses to which the party has been unnecessarily put in

the proceedings'. The Black's Law Dictionary, 10th Edition, at page 886, defines indemnify as to 'reimburse another for a loss suffered because of a third party's or one's own act or default'.

Costs fall into two broad categories namely: necessary expenses in the proceedings made by a party and cost in terms of the litigant's time and effort in coming to Court. The former category includes filing fees and Solicitors' fees and is akin to special damages which must be specifically pleaded and strictly proved. They are easily ascertainable by producing receipts and fee notes. That is why Order 55 Rule 5 of the Rules classifies it as 'expenses'. The latter category is for the litigant's time and effort in coming to Court. Under this category the Court usually takes the circumstances of the case into account including the number of appearances of the litigant and his counsel in Court. See generally *Master Holding (Nig.) Limited & Anor. v. Emeka Okefiena* (2010) LPELR-8637(CA) 34-35 and *Lonestar Drilling Nigeria Ltd. v. New Genesis Executive Security Ltd.* (2011) LPELR-4437(CA) 11-12.

In all cases, costs are not meant to be a bonus to the successful party or serve as punishment against the losing party. It cannot also cure all the financial losses sustained in litigation and the winning party has a duty to mitigate his losses. The main aim of cost is to indemnify the successful party for his out of pocket expenses and be compensated for the true and fair expenses of the litigation taking the facts of each case into consideration.

From the Court's record, the Claimant spent about ₦150,000 as filing and service fees and attended Court only once during the trial while his counsel appeared before me ten times. The case has suffered two appeals. In the circumstance, cost of ₦500,000 is awarded in favour of the Claimant against the 1st Defendant.

36. However, having found that the Defendants are not proper parties to this suit in which case it is not properly constituted, this suit fails and it is hereby dismissed.

Judgement is entered accordingly.

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Order 55 Rules 1 and 4 of the Rules

History:

NATIONAL INDUSTRIAL COURT (Lagos Division)
IKECHI GERALD NWENEKA, J
15/12/2020

Attendance: Parties are absent.

APPEARANCES:
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