UNIVERSITY OF ILORIN v. MR. A. I. ADENIRAN

COURT OF APPEAL
(ILORIN DIVISION)

CA/IL/7/2005
TUESDAY 5TH DECEMBER 2006

(MUNTAKA-COOMASSIE; OGUNWUMIJU; AGUBE, JJ.CA)

EMPLOYMENT LAW *- Termination of Appointment - termination of an employee's appointment without strict adherence to laid down disciplinary procedures amount to a lack of fair hearing.*

CAUSE OF ACTION *- Accrued rights of parties - changes in the law will not affect accrued rights and obligation unless the change is specifically made retroactive by the law.*

LIMITATION OF ACTION *- Accrual of cause of action - proceedings cannot be instituted after the expiration of the statutory period.*

COURTS *- Interpretation of Statute - courts should not embark on a voyage of discovery in the interpretation of statute were the wordings of the statute are clear, plain, and unambiguous.*

Facts:

The respondent was the Bursar of the University of Ilorin, the appellant, and thus a principal officer of the institution. The respondent's appointment was terminated by the appellant on the 28th of February 1985. At that time the respondent did not protest and instead accepted six months salary in *lieu* of notice and other entitlements such as leave grants and leave bonuses. He thereafter took up appointment as an accountant with Messrs Oyamoye & Co., a firm of Chartered Accountant.

Six years less two days after the respondent's appointment was terminated by the University, he filed an action before the High Court of Kwara State sitting at Ilorin, where he asked the court *inter alia* for a declaration that the termination of his appointment by the University "due to poor performance of assigned responsibilities" without giving him the opportunity to defend himself against the allegation is contrary to the provisions of the University of Ilorin Decree, 1979 and section 33 of the Constitution of the Federal Republic of Nigeria and therefore unlawful, unconstitutional, null and void.

The trial Judge found in favour of the respondent and granted all the reliefs sought by the respondent except for his re-instatement by the appellant.

Dissatisfied with the decision of the lower court, the appellants appealed and it was contended that Kwara State High Court did not have jurisdiction in view of the provision of Decree 107 of 1993 and that the respondent's action in the trial court was statute-barred having been filed six years less two days after the termination of the respondent's appointment.

The Court allowing the appeal resolved the latter issue above in favour of the appellant and the issue of jurisdiction in view of decree 107,1993 in favour of the respondent who did not defend the appeal.

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

[1] ***Employment Law - Termination of Appointment - termination of an employee's appointment without strict adherence to laid down disciplinary procedures amount to a lack of fair hearing***

The issue at stake here is whether or not the appellant took the appropriate statutory steps in terminating the appointment of the respondent. The learned trial Judge in my view was right in his decision that the appellant did not give the requisite notice of misconduct to the respondent to provide the legitimate foundation for the subsequent disciplinary decision to terminate his appointment. Section 15(1) provides for a mandatory procedure to be followed by the University. If a formal query is issued, the Senior Staff Disciplinary and Appeals Committee must be called into the issue to examine the defence of the respondent and make appropriate recommendation to the council... The peremptory termination of the respondent's appointment by the council, side stepping the full disciplinary procedure stipulated by section 15(1) of the Unilorin Act in my opinion amounts to lack of fair hearing. (p. 41 lines 9 to p. 42 line 3)

Per Agube, JCA

The imputation of inefficiency and non-performance or call it professional in-competence for which the plaintiff's appointment was terminated peremptorily, carries with it some degree of infamy or stigma which is grave and grievous enough to warrant the adherence to the strict rules of natural justice before condemning him. This being not the case, I also agree with the position taken by my lord in his lead judgment that section 15(1) of the Unilorin Act was breached and consequently the termination of the plaintiff's appointment ought to be illegal, unconstitutional, null and void. (p. 52 lines 12 to 21)

[2] ***Cause of Action - Accrued Rights of Parties - changes in the law will not affect accrued rights and obligation unless the change is specifically made retroactive by the law***

One is bound to follow the opinion of the learned Justices of the Supreme Court, as they have rightly held in *OHMB v. Garba*, that the vested rights of the parties cannot be affected by subsequent legislation. To my mind, the vested rights of the parties would be rights vested in them in law and equity when the cause of action arose. Thus in law, a man may not have retroactive rights and privileges and cannot be subject to retroactive sanctions. It is one of the tenets of jurisprudence.

It is humbly opined that the change in law contained in sectiion 230(1)(q)(f) and (s) of the 1979 Constitution as amended by Decree 107 of 1993 even though has not affected the accrued or vested rights of the respondent but has only changed the venue of the trial to another court cannot be retroactive. (p. 38 lines 40 to p. 39 line 4)

Per Agube, JCA

Therein lies the efficacy of the decisions in *Adigun v. Ayinde* (1993) 8 NWLR (Pt. 313) 516; *A.G. Kwara State v. Olawale* (1993) 1 NWLR (Pt. 273) 643; *Alh. Abudu Akibu v. Oduntan* (2001) 7 SCNJ 189 and indeed *OHMB v. Garba* which followed the above cited cases, that the applicable law for determination of an action is the substantive law for all intents and purposes existing at the time the cause of action arose and hearing of the case commenced and that changes in law will not affect the rights and obligations unless the change is specifically made retroactive (p. 48 lines 22 to 28)

What emerges from the provisions of this section is that pending proceedings like the one now on appeal are automatically saved in spite of the promulgation of the Decree in question. Again there in nothing in Decree 107 by S.230 thereof that expressly divested High Courts of States of the jurisdiction to hear cases that hitherto were pending in such courts. If the promulgators of the Decree had so intended they would have expressly stated so as it appears that the provisions of the Interpretation Act. by Section6(1) thereof is mandatory by the use of the words “shall not”. In other words, there is the presumption against retroactive legislation by the above section of the Act .*See Ojokolobo v. Alamu 7 Ors*. (1987) 7 SCNJ 114 at 126 Held 7. (p. 49 lines 8 to 19)

It is therefore submitted that with the above stipulation, it is mandatory that in construing the Constitution of the Federal Republic of Nigeria 1979 nay Decree 107 the Supreme court with the greatest respect ought to

have given effect to section 6(1) of the Interpretation Act since it would appear that the said Act has been expressly incorporated into the Constitution. (p. 50 lines 26 to 30)

[3] ***Limitation of Action - Accrual of cause of action - proceedings cannot be instituted after the expiration of the statutory period***

Where a law prescribes a period for instituting an action, proceeding cannot be instituted after that period *Obiefuna v. Okoye* (1961) 1 All NLR pg.357, *P. N. Udoh v. Sunday Abere* (2001) 5 SCNJ 274.

The cause of action in this matter arose on 28/2/85 when the respondent's appointment was terminated. He had till the 28th day of May 1985 that is three months in calendar days to file his action. He waited for almost six years to file this action. It is apt to note that the relationship between the parties was governed by specific statute and not by common law. It was a contract with statutory flavour. See *Bamigboye v. Unilorin* (1999) 6 SCNJ 295. Theirs was not just a simple contract between individuals in which the general statute of limitation would apply, but a contract between the respondent as a "Public Officer" - an individual and a natural person and the appellant - a Federal Government Agency which is a "public service". In the circumstances, by the operation of section 2(a) of the Public Officers Protection Act, the action or the proceedings commenced by the respondent outside the three months period is totally barred as the right of the respondent - the injured person to commence the action has been extinguished by law. A cause of action no longer exists. The respondent waited for nearly six years before deciding to have his day in court, Needless to say, he left it too late. The first issue is resolved in favour of the appellant. (p. 33 lines 8 to p. 34 line 18)

Per Agube, JCA

In the instant case the plaintiff, like Rip Van Winkle slept over his right for almost six (6) years only to wake up on the 26th day of February 1991 to institute this action... From the above authorities it is clear that the present plaintiff/respondent's position is akin to a man who in local parlance waited, out of indolence, for the rain to stop before bringing out his water pots or containers to fetch water. Of course he would have nobody to blame if he comes back to meet his containers empty.

From the foregoing, therefore, by the Public Officers Protection Act Cap 379 Laws of the Federation of Nigeria 1990 nay the Public Officers Protection Law as applicable in Kwara State,the plaintiff's action in the lower court was statute-barred having been instituted almost six (6) years after the accrual of the cause action. (p. 44 lines 8 to p. 45 line 35)

[4] ***Court - Interpretation of Statute - courts should not embark on a voyage of discovery in the interpretation of statute were the wordings of the statute are clear, plain, and unambiguous***

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One of the canons of interpretation is that effect should be given to ordinary plain meaning of words when they are unambiguous and clear without resulting to external aid or importing words into the statute. See *Chief Okotie – Eboh v. Chief James Ebiowo & Ors* (2004) 12 SCNJ 139 .. It must be borne in mind that one of the tenets of interpretation of statutes is the need not to impute an intention to contravene the constitution to lawmakers and to adopt a construction which avoids inconsistency with the constitution See *Chief L. U. Okeahialam & Anor v. Nze J. U. Nwamara & Ors* (2003) 7 SCNJ 132.(p. 40 lines 3 to 16)

Per Agube, JCA

It is now elementary and a well established principle of interpretation in our jurisprudence that where the wordings of a statute are found to be clear, plain and unambiguous courts should not embark on a voyage of discovery to decipher the intention of the legislature beyond what it explicitly declares either expressly or by necessary implication.See *Nabhan v. Nabhan* (1967) All NLR 45 at 5849. (p. 47 lines 15 to 19)

OGUNWUMIJU, JCA (Delivering the Lead Judgment): This is an appeal against the judgment of Hon. Justice S. D. Kawu of the Kwara State High Court sitting at Ilorin delivered on the 30th day of July 2004.

The respondent was the Bursar of the University and thus a principal officer of the institution. The respondent's appointment was terminated by the appellant on the 28th day of February 1985. The respondent did not protest at the time. He accepted six months salary in *lieu* of notice. He also accepted other entitlements such as leave grants and leave bonuses paid to him on his termination by the appellant. He thereafter took up appointment as an accountant with Messrs Oyamoye & Co., a firm of Chartered Accounts.

On the 26/2/1991, six years less two days after the respondent's appointment was terminated, the respondent filed an action before the High Court of Kwara State sitting at Ilorin. The respondent asked for the following reliefs as contained in paragraph 30 of his Amended Statement of Claim dated 27/10/1992:

"Whereof the plaintiff's claim is for:

(1) A declaration that the termination of the plaintiff's appointment with the defendant vide a letter Reference No. UI/SSE/PF/866 of 28th February, 1985 "due to poor performance of assigned

responsibilities" without giving him an opportunity to defend himself against the allegation is contrary to the provisions of the University of Ilorin Decree, 1979 and section 33 of the Constitution of the Federal Republic of Nigeria 1979 and it is therefore illegal, unlawful, unconstitutional, null and void and of no effect.

(2) (A) A declaration that the employment of the plaintiff with the defendant as Bursar is still subsisting and that the plaintiff is entitled to all his emoluments from 28th February, 1985 to the date of judgment in this case.

or in the alternative

(B) (i) an award of the sum of ₦430, 856.00 being the emoluments to which the plaintiff is entitled from 28th February, 1985 when his appointment was purportedly terminated and 30th November 1999 when he is due for compulsory retirement, excluding the six months salary in lieu of notice paid at the time of the purported termination of appointment and tax due on the said emoluments; and

(ii) an order that the defendant shall pay to the plaintiff the appropriate gratuity and pension as and when due."

In elaboration of his claim, the plaintiff filed a 30 paragraph further Amended Statement of Claim while the defendant filed a 41 paragraph further Amended Statement of Defence.

In support of his claim, the plaintiff gave evidence on oath and tendered thirteen (13) Exhibits while the defendant in opposition to the claim called three (3) witnesses and tendered thirteen (13) Exhibits.

The Hon. Judge delivered a considered judgment in the Suit on 30/7/2004. The learned trial Judge found in favour of the respondent at the lower court. He awarded him the sum of ₦969,722.00k (Nine hundred and sixty nine thousand, seven hundred and twenty two Naira) as arrears of salary; gratuity in the sum of ₦192,287.00k (One hundred and ninety two thousand, two hundred and eighty seven Naira); pension in the sum of ₦4,398.24k (Four thousand, three hundred and ninety eight Naira, twenty four kobo) per month from 1st October 1999.

The appellant has appealed against the said judgment and orders of the learned trial Judge.

The appellant filed notice of appeal dated 16/8/2004 and filed on 17/8/2004. Leave was granted by this Court on 22/6/2005 for the appellant to file additional grounds of appeal and to argue new issues not raised at the trial court. He raised therein the issue of the jurisdiction of the court *vis-a-vis* the Statute of Limitation Act and the jurisdictional competence of the lower court.

The appellant's counsel on 12/10/2006 adopted the appellant's brief dated 8/9/2005 and filed the same day. The respondent did not file any respondent's brief and was not represented by counsel. He urged the court to hear and consider the appeal without his input since he had decided not to defend the appeal. He said he also decided not to engage counsel to defend the appeal.

We are now constrained to consider this appeal based only on the issues and argument canvassed by appellant's counsel.

Learned appellant's counsel identified three issues for determination –

> *"(1) Whether the action of the respondent against the appellant in the trial court was not statute-barred having been filed six (6) years less two (2) days after the termination of his appointment (Additional Ground 1. Leave granted by this honourable court on 22nd June, 2005)*
>
> *(2) Whether the Kwara State High Court has jurisdiction to try the case in view of decree 107 of 1993 which ousted the jurisdiction of State High Court. (Additional Ground 2. Leave granted by this honourable court on 22nd June 2005).*
>
> *(3) Whether the respondent was given fair hearing before his appointment was terminated by the appellant. (Grounds 2 and 3 of the original Grounds of Appeal)."*

Issue One

Issue one is whether or not the action of the respondent filed six years less two days after the termination of his appointment was not statute barred. This is an issue emanating from Ground one of the additional Ground of Appeal.

Learned appellant's counsel argued that the respondent's Writ of Summons dated 26/2/1991 filed the same day was issued six years less 2 days after his termination of appointment. It is to be noted that this issue being introduced for the first time in this Court, the learned trial Judge did not pronounce on it. A matter of jurisdiction affects the competence of the trial court to entertain the action. Thus the issue can be raised at any time even on appeal.

Learned appellant's counsel, Chief Arosanyin submitted that the action of the respondent was statute barred by the time the Writ of Summons was filed on 26/2/1991 in view of the provisions of the Public Officers Protection Act Cap.339 Laws of Nigeria 1990 and the Public Officers Protection Law of 1963 applicable in Kwara State of Nigeria which was a part of Northern Nigeria. He argued that both the law and the Act by virtue of section 2(a) have the same provision on this issue. He cited *Ibrahim v. JSC Kaduna* (1998) 12 SCNJ 259 at 272 lines 25-38. He submitted that since this is an issue of jurisdiction, even though the statute of limitation was not pleaded at the trial court, it could be raised at any time with leave even on appeal. He cited the following cases –

1. *Elhodagbe v. Okoye* (2005) All FWLR (Pt. 241) at 203 (Holding 1).
2. *Dangote v. Civil Service Commission Plateau State & 2 Ors* (2001) FWLR (Pt. 50) 1639 at 1643 (Holdings 1 and 2).
3. *Chief Emmigbe Omokafe & 2 Ors. v. Military Administrator Edo State of Nigeria & 3 Ors*. (2005) All FWLR (Pt. 243) 6299 at 633 (Holding 2 per Oguntade, J.S.C)
4. *Atitaye v. Perm. Sec. Borno State* (1970) NWLR (Pt.129) 728 at 730-731 (Holdings 1, 4, 5 and 6 in particular)

In my view, by the Public Officers Protection Act, (Order 39 of 1916 and Order 47 of 1951) the commencement date of which is 21st September, 1916, provision was made to provide for the Protection against actions of persons acting in the execution of public duties. It is of general application all over the Federal Republic of Nigeria section 2(a) of the Public Officers Protection Act Cap 379 Laws of the Federation applicable to the respondent state as follows:-

> *"Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, Law, duty or authority, the following provisions shall have effect -*
>
> *(a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in case of a continuance of damage or injury, within three months next after the ceasing thereof"*

Is the University of Ilorin a "Public officer" within the meaning of the Act? I think so and all the authorities say so. University of Ilorin is a Federal Government Agent or Institution established by an Act of the National Assembly. See Akeem *v. Unibadan* (2003) 10 NWLR (Pt. 829) 584 at 596.

Iguh, J.S.C. defined "any person" referred to in section 2(a) of the Public Officers Protection Act as both artificial and natural persons alike. His Lordship laid down the decision law that the Act protects as distinct entities in certain cases "Public Officers" holding "Public offices" in the "Public Service". This includes corporation sole or public bodies corporate or incorporate. See *Ibrahim v. J. S. C.* (1998) 14 NWLR (Pt. 584) 1 at 38; (1998) 12 SCNJ 259 P.259 at 272.

Where a law prescribes a period for instituting an action, proceeding cannot be instituted after that period *Obiefuna v. Okoye* (1961) 1 All NLR pg.357; *P. N. Udoh v. Sunday Abere* (2001) 5 SCNJ 274.

In the SCNJ report His Lordship Iguh, JSC held thus in the case of *Ibrahim v. JSC* (*supra*)

> *"It suffices to state that a statute of limitation, such as the Public Officers (Protection) Law Cap. 111 Vol. 3, Laws of Northern Nigeria, 1963 removes the right of action, the right of enforcement and the right to judicial relief in a plaintiff and this leaves him with a bare and empty cause of action which he cannot enforce if the alleged cause of action is statute barred, that is to say, if such a cause of action is instituted outside the three months.*

His Lordship continued at line 32-37 thus –

> *"The general principle of law is that where a statute provides for the institution of an action within a prescribed period proceedings shall not be brought after the time prescribed by such statute. Any action that is instituted after the period stipulated by statute is totally barred as the right of the plaintiff or the injured person to commence the action would have been extinguished by such law."*

It is pertinent to note that the law interpreted in *Ibrahim v. JSC* is in *pari materia* with the Act in this case.

Niki Tobi, JCA (as he then was) in *Aina v. Jinadu* (1992) 4 NWLR (Pt. 233) 91 said –

> "*The determination of when the cause of action arose in the light of the factual position is a fairly slippery matter".*

His Lordship went on to say at page 110 -

> *"In order to determine whether an action is statute barred or not, the court must be involved in the exercise of calculation of years, months and days, to the minutest detail. It is really an arithmetic exercise, which needs a most accurate answer ...."*

The cause of action in this matter arose on 28/2/85 when the respondent's appointment was terminated. He had till the 28th day of May 1985 that is three months in calendar days to file his action. He waited for almost six years to file this action. It is apt to note that the relationship between the parties was governed by specific statute and not by common law. It was a contract with statutory flavour. See *Bamigboye v. Unilorin* (1999) 6 SCNJ 295. Theirs was not just a simple contract between individuals in which the general statute of limitation would apply, but a contract between the respondent as a "Public Officer" - an individual and a natural person and the appellant - a Federal Government Agency which is a "public service".

In the circumstances, by the operation of section 2(a) of the Public Officers Protection Act, the action or the proceedings commenced by the respondent outside the three months period is totally barred as the right of the respondent - the injured person to commence the action has been extinguished by law. A cause of action no longer exists. The respondent waited for nearly six years before deciding to have his day in court. Needless to say, he left it too late. The first issue is resolved in favour of the appellant.

I will go on to decide the other issues raised in this appeal. It is my belief that it is useful and expedient to take argument on and decide other issues raised in the appeal after dealing with the issue of jurisdiction. A court should decide the merit of a case upon all the issues canvassed before it. This is because if this court is reversed on the issue of jurisdiction by the Supreme Court it would prevent the necessity of the Supreme Court remitting the case back to resolve other issues arising from the appeal. See *Katto v. CBN* (1991) 9 NWLR (Pt. 214) 126 at 149 *per* Akpata, JSC.

Issue Two

The second issue for determination is whether a court hearing a suit before the commencement of Decree 107 of 1993 ceases to have such jurisdiction thereafter.

Learned appellant's counsel submitted that a court entertaining a suit before the coming into effect of Decree 107 of 1993 loses its jurisdictional power immediately the decree came into effect. In essence, the State High Court had lost its powers to hear the matter which by operation of law had been transferred to the Federal High Court. He submitted that the jurisdiction of a court to entertain a suit is different from the law applicable at the time of filing of a suit. Whereas the law in existence at the time of filing a suit is applicable to the suit throughout the hearing of the suit, a statute can remove the suit from the court entertaining such a suit. He further submitted that section 230(1)(q)(r) & (s) of Decree 107 of 1993 confers jurisdiction exclusively on the Federal High Court in the matter at the time the State High Court heard and determined the case. The appellant being a Federal Government agency came under the Decree.

In this present case, the Writ of Summons was filed by the plaintiff/respondent on 25/2/1991. Thereafter there were several amendments by both parties. The plaintiff/respondent, apart from severally amending his Statement of Claim, also amended the Writ of Summons on 14/10/95 (pages 56-61, the Record of Proceedings). This amendment was made two years after Decree 107 of 1993. The hearing of the suit did not commence until 23/5/96 – that is over a year after the amendment of the Writ of Summons and over three years after the suit was filed.

He pointed that as at 23/5/96 when hearing began before the court below, the court had lost jurisdiction to hear and determine the matter. He cited *Olutola v. University of Ilorin* (2005) All FWLR (Pt. 245) 115 at P.1184. He also cited the following cases – *University of Abuja v. Ologe* (1996) 4 NWLR (Pt. 455) at 706, 709; *Ali v. CBN* (1997) 4 NWLR (Pt. 498) 192; *Egypt Air v. Abdullahi* (1997) 11 NWLR (Pt. 528) 179; *Madukolu v. Nkemdilim* (1962) 2 All NLR 587 at 595; *Ojukwu v. Onyiabo* (1991) 7 NWLR (Pt. 203) 286*; Fawehinmi v. Akilu* (1998) 4 NWLR (Pt.88) 370; *Ani v. Inland Revenue* (1996) 4 NWLR (Pt. 440) 101; *Adigun v. A.G. Oyo State*(1987) NWLR (Pt. 53) 678 at 682.

At the trial court the appellant by motion on notice filed on 18/12/97 had applied for an order dismissing the suit for incompetency and lack of jurisdiction. Counter-affidavit was filed and the motion argued. The learned trial Judge in his considered ruling dated 24/4/98, relied on the opinion of Opene, JCA in *7up Bottling Co. Ltd. v. Abiola & Sons Bottling Co.* (1996) 7 NWLR (Pt. 403) 714 at 741-745 his Lordship held as follows –

> "In view of the fact that Decree 107 of 1993 does not make any provision for the pending cases, it is deemed not to affect any pending case.
>
> I am of the view that the present suit being a pending case before the commencement of Decree 107 of 1993 is not affected by the said Decree.
>
> Since the plaintiff herein filed his Writ on 25/2/91, a period of more than two years before Decree 107 of 1993 came into effect without being retrospective. I hold that this case is properly before this court and that the court has the jurisdiction to entertain it."

The learned trial Judge then proceeded with the hearing of the suit. In his judgment dated 30/7/04 the learned trial Judge confirmed his earlier position as follows –

> *"Although a party is entitled to raise the issue of jurisdiction at any stage of the proceedings and as many times as possible, there are no new reasons why this court should depart from its ruling of 24th April, 1998. I stand by that decision and hold that the court can competently adjudicate upon the subject matter of this suit."*

In this case, the action was instituted in 1991 before the promulgation of Decree 107 of 1993. Our attention has been drawn to the case of *Olutola v. Unilorin* (2004) 18 NWLR (Pt. 905) 416 decided by the Supreme Court in 2004. The decision in that case contradicts the earlier decision of the Supreme Court in *OHMB v. Garba* (2002) 14 NWLR (Pt. 788) 538. Both *Olutola v. Unilorin* (*supra*) and OHMB v. Garba have facts similar in this context to the facts of this case. In *OHMB v. Garba,* the Supreme Court *Coram* Uwais CJN, Kutigi, Oguntade, Mohammed, Kalgo, JJSC were unanimous in holding that Decree 107 of 1993 had no retroactive effect and could therefore not affect the jurisdiction of the State High Court since the plaintiffs had acquired their right to sue in the State High Court when the cause of action arose, the suit was filed and hearing started before the promulgation of Decree 107 of 1993. The learned Justices of the Supreme Court even though agreed that Decree 107 of 1993 was essentially an amendment to the 1979 Constitution refused to give it retroactive effect notwithstanding that it came into effect during the pendency of the trial. Thus it is safe to say in *OHMB v. Garba* the Supreme Court held that the applicable law for determination of an action is the substantive law for all intents and purposes existing at the time the cause of action arose and hearing of the case commenced; thus changes in law will not affect accrued rights and obligations unless the change is specifically made retroactive. The cases of *Adigun v. Ayinde* (1993) 8 NWLR (Pt. 313) 516*; A.G Kwara v. Olawale* (1993) 1 NWLR (Pt. 272) P. 645; *Alh. Abudu Akibu v. Alh. Oduntan* (2001) 7 SCNJ 189 were followed.

Whereas the Supreme Court two years later held a contrary view in *Olutola v. Unilorin Coram* Onu, Katsina-Alu, Ejiwunmi, Tobi and Edozie, JJSC that the impact of Decree 107 of 1993 on the jurisdiction of the Federal High Court per Ejiwunmi, JSC in the lead judgment is as follows –

> *"What this means is that provisions of 1979 Constitution, which gave unlimited jurisdiction to State High Courts to hear and determine both civil and criminal causes automatically lapsed or ceased to have effect or are impliedly repealed and abrogated by Decree No. 107 of 1993. See Onyema & Ors. v. Oputa & Ors. (1987) 3 NWLR (1987) 3 NWLR (Pt. 60) 259; (1987) 2 NSCC 900 and Flannagan v. Shaw (1929) 3 K.B. 96 at 105 where Scrutton L.J. stated the principle of <u>implied repeal by plain repugnancy.</u> The provisions of Decree No.107 of 1993 and those of the 1979 Constitution cannot stand together."*
>
> (underlining mine)

The learned Justices of the Supreme Court in *Olutola v. Unilorin* made a clear distinction between the law applicable to a cause of action and the law applicable to the determination of the jurisdiction of a court. The learned Justices of the Supreme Court opined as follows at page 464-466 of the NWLR per Tobi, JSC:

> *"The law which supports a cause of action is not necessarily co-existent*

with the law which confers jurisdiction on the court which entertains the suit founded on that cause of action. The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose whereas the jurisdiction of the court to entertain an action is determined upon the state of the law conferring jurisdiction at the point in time the action was instituted and heard. In the instant case, it was puerile for the appellant to argue as he did that the cause of action arose when the State High Court had jurisdiction over the matter, regardless of the fact that when the action was heard, the court had been divested of such power by reason of the amendment of section 230(1) of the 1979 Constitution by Decree 107 of 1993, (Adah v. NYSC (2004) 13 NWLR (Pt. 891) 639 referred to).

..In the instant case, it was common ground that the cause of action arose in October, 1989 and the appellant filed an action on 13th January, 1993. Decree No. 107 of 1993 which vested in the Federal High Court the jurisdiction to entertain the matter came into effect on the 17th of November, 1993. Although the action was properly filed at the Kwara State High Court in January, 1993, that court had no jurisdiction to entertain the matter as from 17th November, 1993 when Decree 107 came into effect. Accordingly, the Kwara State High Court had no jurisdiction to deliver the judgment which judgment was delivered some thirty months after it ceased to have jurisdiction to deal with the matter."

My Lord went further to say -

"The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose whereas the jurisdiction of the court to entertain an action is determined upon the state of the law conferring jurisdiction at the point in time the action was instituted and heard."

My learned brothers and I are torn between the two judgments of the Supreme Court. We are aware that *Olutola v. Unilorin* did not consider *OHMB v. Garba*, which earlier case considered section 6(1) of the Interpretation Act Cap,192 Laws of the Federation. We are however each at liberty to pick and choose which precedent to follow.

S.6(1) of the Interpretation Act states as follows –

"6. (1) The repeal of an enactment shall not -

(a) Revive anything not in force or existing at the time when the repeal takes effect;

(b) Affect the previous operation of the enactment or

anything duly done or suffered under the enactment;

(c) Affect any right, privilege, obligation or liability accrued or incurred under the enactment;

(d) Affect the penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment;

(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforce, and such penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed."

(underlining mine for emphasis)

The learned Justices of the Supreme Court in *OHMB v. Garba* were of the opinion that Decree 107 of 1993 a Constitutional amendment was not retroactive and could not affect existing vested rights before its promulgation, including the right of the plaintiffs to continue the action in the Court where it was initially filed. Justice Kalgo at page 160 of the SC report held thus:-

"The Court of Appeal was clearly wrong in its interpretation of the provisions of Section 230 of Decree No. 107 of 1993. i.e. the Constitution (Suspension and Modification) Decree, 1993 (hereinafter referred to as the Decree) as it applied to the instant appeal. This Decree came into effect on the 17th of November 1993 and this suit giving rise to this appeal was instituted in the Kano High Court on the 20th of November 1992, almost one year before the Decree came into operation. The Decree has no transitional provisions dealing with pending cases, or anything to show that it has retrospective effect of anything to that effect. Therefore, following the provisions of section 6 of the Interpretation Act (Cap. 192 of the Laws of the Federation 1990) the jurisdiction of the High Court of Kano State to entertain this suit, which was pending before, the Decree came into effect, was not ousted by the provisions of the said Decree. See University of Ibadan v. Adamolekun (1967) 5 NSCC 210; Colonial Sugar Refining Company Limited v. Irving (1905) A.C. 369. Therefore the case was entertained by the High Court Kano by the virtue of Section 236 of the 1979 Constitution, and the appeal to the Court of Appeal which was not heard, should now be heard on its own merit."

One is bound to follow the opinion of the learned Justices of the Supreme Court, as they have rightly held in *OHMB v. Garba*, that the vested rights of the parties cannot be affected by subsequent legislation. To my mind, the vested rights of the parties would be rights vested in them in law and equity when the cause of action arose. Thus in law, a man may not have retroactive rights and privileges and cannot be subject to retroactive sanctions. It is one of the tenets of jurisprudence.

It is humbly opined that the change in law contained in section 230(1)(q)(r) and (s) of the 1979 Constitution as amended by Decree 107 of 1993 even though has not affected the accrued or vested rights of the respondent but has only changed the venue of the trial to another court cannot be retroactive. I have pondered on the *dictum* of Niki Tobi JSC concurring with the lead judgment in *Olutola v. Unilorin* where he referred to the Supreme Court's earlier decision in *Adah v. NYSC* (2004) 13 NWLR (Pt. 891) P.639, he said *inter alia* at page 464 of Part 905 -

> *"On appeal to this court it was held (per Uwaifo) JSC, that the law which supports a cause of action is not necessarily co-extensive with the law which confers jurisdiction on the court which entertains the suit founded on that cause of action. The relevant law applicable in respect of a cause of action is the law in force at the time the cause of action arose whereas the jurisdiction of the court to entertain an action as determined upon the state of the law conferring jurisdiction at the point in time the action was instituted and heard."*
>
> *(underlining mine for emphasis)*

I am aware of the Supreme Court decision in *Alh. Karimu Adisa v. Emmanuel Oyinwola & Ors* (2000) 6 SCNJ 290 where it was held that it is essential that the court be conferred with jurisdiction from the time action is initiated up to the time when judgment is delivered. Jurisdiction could be attacked if it existed at the time judgment is delivered.

I am also aware of the decision of the Supreme Court in *NEPA v. Edegbero* and *Adah v. NYSC* (*supra*). A decision is authority for the law based on the facts it decides. In *Adah v. NYSC* and *NEPA v. Edegbero*, the suits were filed after the promulgation of Decree 107 of 1993.

I was initially enticed by the doctrine of implied repugnancy as espoused in *Olutola v. Unilorin*. However a rule of doctrine cannot override express provisions of the law. The Interpretation Act section 6(1) provides for the survival of pending proceedings where there are no specific provisions for abatement of such pending proceedings. It must be noted that the Interpretation Act is a Constitutional provision. Section 318(4) of the 1999 Constitution (section 277(4) of the 1979 Constitution is applicable to this case) provides that the Interpretation Act shall apply for the purposes of interpreting the provisions of the constitution. This issue had been settled long ago in the case of *University of Ibadan v. Adamolekun* (1967) 5 NSCC 210, where the case of *Colonial Sugar Refining Co. Ltd v. Irving* (1905) A.C 369 was referred to.

The learned Justices of the Supreme Court in *OHMB v. Garba* were of the opinion that Decree 107 of 1999 a constitutional amendment was not retroactive and could not affect existing vested rights before its promulgation. Suffice it to say that we prefer the former decision. The compelling reason for me being the fact that *Olutola*

v. Unilorin did not consider the implication of section 6(1) of the Interpretation Act. The rationale in *OHMB v. Garba* was that an abatement provision must not be implied unless expressly provided for. One of the canons of interpretation is that effect should be given to ordinary plain meaning of words when they are unambiguous and clear without resulting to external aid or importing words into the statute. See *Chief Okotie – Eboh v. Chief James Ebiowo & Ors* (2004) 12 SCNJ 139.

In *OHMB v. Garba* the learned Justices of the Supreme Court considered the fact that Decree No. 60 of 1991 contained abatement provisions. The absence of the abatement provision in the later Decree 107 of 1993 meant that it had been repealed by implication. It must be borne in mind that one of the tenets of interpretation of statutes is the need not to impute an intention to contravene the constitution to lawmakers and to adopt a construction which avoids inconsistency with the constitution See *Chief L. U. Okeahialam & Anor v. Nze J. U. Nwamara & Ors* (2003) 7 SCNJ 132.

The Interpretation Act is a provision of the Constitution. The Decree 107 of 1993 is also a Constitutional amendment, thus recourse must be had to the Constitution in interpreting same. Section 6(1) of the Interpretation Act cannot be ignored. The decision of Kawu, J. on this issue appears to be the right one. The 2nd issue is resolved in favour of the respondent in the circumstance.

Issue Three

The third issue for determination is whether or not the respondent was given fair hearing before his appointment was terminated by the appellant. Learned appellant's counsel argued that the procedure adopted by the University was in substantial compliance with the 1999 Constitution and section 15 of the Unilorin Act with regard to the relevant principles of fair hearing. He cited *Bamigboye v. Unilorin* (1991) 8 NWLR (Pt. 207) 1 at 10.

On this issue, the learned trial Judge was of the following view -

> *"First, comments of members of the council on the draft account submitted by the plaintiff were made while the plaintiff was sent out of the meeting. Just as you cannot shave a man's head in his absence, so also you cannot condemn him in his absence and equate that to fair hearing.*
>
> *I also observe that the plaintiff never apologized to the council for poor performance of assigned responsibilities as stated by DW2. Rather he apologized to council in case the council got the wrong impression that he, the plaintiff was out to either misinform or mislead the council.*
>
> *Again it will be observed in Exhibit D3 that the defendant never decided to*

terminate the appointment of the plaintiff as a result of his preparation of the defendant's account at the meetings of 24/25 January, 1985, or at any other meeting.

I am satisfied that the plaintiff was not afforded a hearing as envisaged by section 15(1) of Act No. 81 of 1979 before the defendant proceeded against him under section 15(3)(d) of the same Act.

The issue at stake here is whether or not the appellant took the appropriate statutory steps in terminating the appointment of the respondent. The learned trial Judge in my view was right in his decision that the appellant did not give the requisite notice of misconduct to the respondent to provide the legitimate foundation for the subsequent disciplinary decision to terminate his appointment. Section 15(1) provides for a mandatory procedure to be followed by the University. If a formal query is issued, the Senior Staff Disciplinary and Appeals Committee must be called into the issue to examine the defence of the respondent and make appropriate recommendation to the council. Section 15(1) of the Unilorin Act provide as follows -

"15(1) If it appears to the Council that there are reasons for believing that any person employed as a member of the academic or administrative or professional staff of the University, other than the vice-chancellor, should be removed from his office or employment on the ground of misconduct or of inability to perform the functions of his office or employment, the council shall -

(a) Give notice of those reasons to the person in question;
(b) Afford him an opportunity of making representations in person on the matter to the council; and
(c) if he or any three members of the council so request within the period of one month beginning with the date of the notice, make arrangements -
(i) for a joint committee of the council and the senate to investigate the matter and to report on it to the council, and
(ii) for the person in question to be afforded an opportunity of appearing before and being heard by the investigating committee with respect to the matter, and if the council, after considering the report of the investigating committee, is satisfied that the person in question should be removed as aforesaid, the council may so remove him by an instrument in writing signed on the directions of the council."

The peremptory termination of the respondent's appointment by the council, side stepping the full disciplinary procedure stipulated by section 15(1) of the Unilorin Act in my opinion amounts to lack of fair hearing. See *Iderima v. Rivers State CSC* (2005) 7SC (Pt. 111) 135 at 140-141; *FCSC v. Laoye* (1989) 2 NWLR (Pt. 106) P. 652 at 714; *Olaniyan v. Unilag* (1985) 2 NWLR (Pt. 9) 599.

The Hon. Justices of the Supreme Court in *Olaniyan v. Unilag* (1985) 2 NWLR (Pt. 9) 599 were unanimous in holding that where there was no imputation of misconduct, the University could terminate the employment of their senior staff after requisite notice. However whereas in this case there is allegation or imputation of misconduct – inability to efficiently perform the functions of his office, the provisions of section 17 of the Unilag Act (in this case section 15 of the Unilorin Act) must be meticulously followed. The third issue is also resolved in favour of the respondent.

As held earlier in this appeal, at the time the respondent instituted his action nearly six years after his appointment was terminated, the cause of action had ceased to exist.

It is also pertinent to note that it is doubtful in the circumstances taking into account the fact that he collected all his severance entitlements without any complaint if he could have succeeded in the 2nd leg of his claim that his appointment was still subsisting and he was entitled to his emoluments. In the circumstances the appeal is meritorious and it is hereby allowed. I will make no order as to costs since this appeal was not defended.

MUNTAKA-COOMASSIE, JCA: I have been fortunate to have received a draft copy of the lead judgment of my learned Lord Ogunwumiju, J.C.A. before today. The facts as set out by her Lordship are quite in order. I do not have to re-visit them in this judgment of mine. My Lord, Ogunwumiju, in her characteristic manner, left no stone unturned in treating the issues presented to us by the appellant. I am satisfied with the reasons and conclusions, though circuitous and serpentine, and I adopt same as mine. I am quite certain that her Lordship wants to be sure that each party in our court receives undiluted justice. That explains why she made indepth research before she reached her conclusion. I have no cause to disagree. I entirely agree with the conclusion reached which, in my respectful view, is correct in law.

The appeal is pregnant with a lot of merits and same is allowed. The respondent, wittingly or unwittingly, went into deep sleep. He shall be better left alone. The tree shall continue to lie where it falls. I abide by the "no costs order" contained in the lead judgment.

AGUBE, JCA: I had read the draft of the lead Ruling just delivered by my learned brother OGUNWUMIJU J.C.A. and I agree that the appeal be allowed.

This is an appeal against the judgment of Kawu J. sitting at the Ilorin High Court which judgment was delivered on the 30th day of July 2004. The plaintiff took out a writ of summons against the defendants seeking a declaration that the termination of his appointment by the defendants without giving him a hearing is illegal, unconstitutional, and null and void.

He also prayed for reinstatement and payment of his emoluments and appropriate gratuity and pensions as at when due.

Pleadings were exchanged and at the close of hearing after some interlocutory skirmishes written addresses were ordered, filed and adopted on the 2nd day of December 2003.

In a well-considered judgment, the learned trial Judge granted all the plaintiffs relief except that for reinstatement of the said plaintiff.

Dissatisfied with the above judgment the appellant through his counsel Shittu Arosanyin and Co. filed three original Grounds of Appeal and with leave of this Honourable court further filed two Additional Grounds.

The respondent did not file his respondent's brief and was not so represented at the hearing of the appeal. This appeal will accordingly be considered solely on the appellant's brief.

Arising from the Grounds of Appeal the appellant's counsel has formulated the following questions for determination as follows:-

(1) Whether the action of the respondent against the appellant in the trial court was statute barred having been filed six (6) years less two (2) days after the termination of his appoint (Additional Ground 1. Leave granted by this Honourable court on 22nd June, 2005".)

(2) "Whether the Kwara State High Court has jurisdiction to try the case in view of Decree 107 of 1993 which ousted the jurisdiction of the State High Court. (Additional Ground 2. Leave granted by this Honorable Court on 22nd June 2005".)

(3) "Whether the respondent was given fair hearing before he was terminated by the appellant (Grounds 2 & 3 of the Original Grounds of Apeal)"

My learned brother, Ogunwumiju J.C.A., has aptly and graciously stated the correct position of the law as far as the application of the Public Officers Protection Act (Order 30 of 1916 and Order 47 of 1951) which is in *pari materia* with the extant section 2(a) of the Public Officers Protection Act Cap. 379 Laws of the Federation

of Nigeria 1990 (a statute of national application) is concerned.

I am also well educated and properly guided by the authorities cited to arrive at the conclusion that the plaintiff was totally barred from proceeding with the claim against the defendant by reason of the act complained against being done in pursuance or execution of the defendant's duty or neglect or default in the execution of such duty or authority and that the proceeding ought to have been commenced "three months next after the act, neglect or default complained of." In the instant case the plaintiff, like Rip Van Winkle slept over his right for almost six (6) years only to wake up on the 26th day of February 1991 to institute this action.

I am however to add that this Act is meant to protect public officers who acted in good faith. See *Nwankere v. Adewunmi* (1966) 1 All NLR 129 at 133-134 per Brett J.S.C. who held thus:

> "The law is designed to protect the officer who acts in good faith and does not apply to acts done in abuse of office and with no semblance of legal justification". See *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR 297 at 299 per Ademola C.J.N. where he posited:-
>
> > "...the Act necessarily will not apply if it is established that the defendant had abused his position for purposes of acting maliciously. In that case he has not been acting within the terms of the statutory or other legal authority. He has not been *bona fide* endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing wrong and the protection of the Act, of course never could apply to such a case".

In view of the evidence of the plaintiff at pages 134-135 of the record of proceedings I wonder why he never filed his written brief so as to contest this issue of whether the defendant acted maliciously or not, so as to be/ or not to be protected by the Public Officers Protection Act.

As Nnamani J.SC., Obaseki, Uwais, Karibi-Whyte J.J.S.C. agreed with Nnaemeka-Agu J.S.C .

> "The issue of malice in connection with section 2(a) of the Public Officers Protection Law may arise in two circumstances. A public officer might have done an act in pursuance of or execution of a law or his public duty with ulterior motive, such as helping himself or his friend or injuring the plaintiff. Another public officer may, while a public officer and under cover of the office do an act contrary to, or not authorized by the law, or not in accord with his public duty. If both acts result in an injury to a plaintiff, it may be said that they acted maliciously." See *Egbe v. Adefarasin* (1985) 1 NWLR (Pt. 3) at 560.

However, in this appeal since there is no contention by the plaintiff/respondent that the defendant who is hiding under the cloak of this protective Act, acted maliciously, the presumption is that the defendant/appellant acted within the purview of the statute establishing her and regulations governing the terms and conditions of employment of the plaintiff/respondent. It is therefore not within the province of this court to pry into the intent and purposes of the act of the defendant in terminating the plaintiff's employment at this juncture. See the *dictum* of Karibi-Whyte J.S.C. in the same *locus classicus* of *Egbe v. Adefarasin* (*supra*) at 569 when he observed *inter alia:*

> "It is on the facts clear that the appellant has no cause of action against the 2nd respondent having not brought the action within the prescribed period of three months from the accrual of the cause of action
>
> Again where the defendant has raised an unanswerable plea of protection under the public officer's law on the uncontested facts, as the 2nd respondent has done in this case; there is absolutely no basis for prying into the conduct of such a defendant, which gave rise to the action. The Court of Appeal need not have gone into the question of whether malice was relevant consideration in determine liability of the 2nd respondent. The issue before the court was whether the action was maintainable it is not whether the said respondent was liable. " See *Egbe v. Alhaji* (1990) 1 NWLR (Pt. 128) 564; *Ekeogu v. Aliri* (1991) 3 NWLR (Pt. 179) 258; *Egbe v. Yusuf* (1992) 6 NWLR (Pt. 245) 1.

From the above authorities it is clear that the present plaintiff/respondent's position is akin to a man who in local parlance waited, out of indolence, for the rain to stop before bringing out his water pots or containers to fetch water. Of course he would have nobody to blame if he comes back to meet his containers empty.

From the foregoing, therefore, by the Public Officers Protection Act Cap 379 Laws of the Federation of Nigeria 1990 nay the Public Officers Protection Law as applicable to Kwara State, the plaintiff's action in the lower court was statute-barred having been instituted almost six (6) years after the accrual of the cause action.

I therefore agree with the lead decision of my learned brother that issue Number one(1) be and is hereby resolved in favour of the appellant. Ordinarily with the resolution of issue Number one in favour of the appellant the other two issues become merely academic and courts normally do not concern themselves with hypothetical or academic issues.

However since, as has been ably observed in the lead judgment a consideration and resolution of other issues will obviate a situation where the case is transmitted back to the High Court for rehearing should we be overruled on the issue of

jurisdiction (see *Katto v. CBN*) (1991) 9 NWLR (Pt. 214) 126 at 149 per Akpata J.S.C. cited by my Lord Ogunwumiju J.C.A. in his lead Judgment), it is only fit and proper to consider the other issues.

On issue Number 2, which is whether the High Court of Kwara State entertaining a suit before the coming into effect of Decree Number 107 of 1993 ceases to have such jurisdiction thereafter or whether the said Decree 107 of 1993 has retrospective effect so as to divest the Kwara State High Court of the jurisdiction to entertain and determine this suit.

Learned counsel for the appellants had canvassed the points that the jurisdiction of a court to entertain a suit is different from the law applicable at the time the suit was filed and that whereas the law applicable when the suit was filed is applicable throughout the pendency of the suit, statute can remove the suit from the court entertaining such suit.

He relied on the case of *Prof. Olutola v. Unilorin* (2005) All FWLR (Pt. 245) 1151 at 1174-1175 (paras. A-B per Ejinwumi JSC submitting that in the present case the writ of summons was filed on the 25/2/91 two years after Decree 107 of 1993 was promulgated.

Furthermore, the hearing of the case commenced on the 23/5/96 – over a year after the amendment and over three years after the suit had been filed.

He then argued that section 230(1)(q)(r) and (s) of the 1979 Constitution as amended by Decree No. 107 of 1993 provides and confer exclusive jurisdiction on the Federal High Court on the matters at the time the State High Court heard and determined the case. Citing *University of Abuja v. Ologe* (1967) 4 NWLR (Pt. 445) at 206, 709; *Ali v. C.B.N*. (1997) 4 NWLR (Pt. 528) 179 he maintained that it is not disputed that by the combined effect of sections 230(i)(q)(r) and (s) of the Decree 107 and 277 E and F of the 1999 Constitution, the University of Ilorin which is the defendant/appellant in this case is an "AGENCY" of the Federal Government.

It was his further submission that since the case in the trial court challenged the termination of his employment by the appellant, the plaintiff's claims fall within the ambit of sections 230(i)(q)(r) and (s) of Decree No. 107 of 1993 and therefore the court below had no jurisdiction on the authorities of *Madukolu v. Nkemdilim* (1962) All NLR 587 at 595. *Ojukwu v. Onyiabo* (1991) 7 NWLR (Pt. 203) 286 at 317; *Fawehinmi v. Akilu* (1998) 4 NWLR (Pt. 88) 370; *Ani v. Inland* (1996) 4 NWLR (Pt. 440) 101 and *Adigun v. A. G. Oyo State* (1987) NWLR (Pt. 53) 678 at 682.

He contended placing reliance again on *Uti v. Onnoyibve* (1991) 11 NWLR (Pt.166) at 175, *Ojo Kolobo v. Alamu* (1987) 3 NWLR (Pt. 67) 377 at 382 that in the construction of statutes the primary concern of the courts is the ascertainment of the intention of the lawmakers.

According to him the intention of the promulgators of Decree No. 107 is to ensure that as from 17th day of November, 1993 the proceeding of the trial court in this matter must shift to the Federal High Court.

Relying again on the case of *Fasakin v. Fasakin* (1994) 4 NWLR (Pt. 340) he argued that the words of the statute must be given their plain and ordinary meaning.

I think my Lord has stated the obvious that we are torn between the disparate views expressed by their Lordships of the apex court in *OHMB v. Garba* (2002) 14 NWLR (Pt. 788) P.538 and *Olutola v. Unilorin* (2004) 18 NWLR (Pt. 905) 416. For me, my only point of departure and disagreement is, with the greatest respect, the applicability of "the principle of implied repeal by plain repugnancy".

It is now elementary and a well established principle of interpretation in our jurisprudence that where the wordings of a statute are found to be clear, plain and unambiguous courts should not embark on a voyage of discovery to decipher the intention of the legislature beyond what it explicitly declares either expressly or by necessary implication. See *Nabhan v. Nabhan* (1967) All NLR 45 at 5849.

Incidentally my Lord Niki Tobi J,S.C. was the one who in his usual erudite candour admirably stated the current position of the law in the celebrated case of *Araka v. Egbue* (2003) FWLR (Pt.175); (2003) 7 S.C. 75 at 85 lines 15-25 thus:-

> *"The duty of the court is to interpret the words contained in the statute and not to go outside the words in search of an interpretation which is convenient to the court or to the parties or one of the parties. Even where the provisions of a statute are hard in the sense that they will do some inconvenience to the parties, the court is bound to interpret the provisions once they are clear and unambiguous. It is not the duty of the court to remove the chaff from the grain in the process of interpretation of statute to arrive at favourable terms for the parties outside the contemplation of the law maker. That will be tantamount to traveling outside the statute on a voyage of discovery ....."*
>
> *The primary function of the court is to search for the intention of the lawmaker in the interpretation of a statute. Where this is dear and unambiguous, as it is in this case, the court in the exercise of its interpretative jurisdiction must stop where the statute stops".*

The views expressed by His Lordship above accord with the decision in *Adeshina v. Lemonu* (1965) 1 All NLR 233; 248-249 where "Maxwell on Interpretation of Statutes" 10th Edition page 81 thereof, was quoted with approval *inter alia:-*

> "One of these presumptions is that the legislature does not intend to make

any substantial alteration in the law beyond what it explicitly declares, either expressly or by clear implication, or, in other words, beyond the immediate scope and object of the statute.

In all general matter outside those limits, the law remains undisturbed It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would thereto, when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended

"It would be perfectly monstrous to construe the general words of the Act so as to alter the previous policy of the law.

In construing the words of an Act of Parliament we are justified in assuming the legislature did not intend to go against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend".

Therein lies the efficacy of the decisions in *Adigun v. Ayinde* (1993) 8 NWLR (Pt. 313) 516; *A.G. Kwara State v. Olawale* (1993) 1 NWLR (Pt. 273) 643; *Alh. Abudu Akibu v. Oduntan* (2001) 7 SCNJ 189 and indeed *OHMB v. Garba* which followed the above cited cases, that the applicable law for determination of an action is the substantive law for all intents and purposes existing at the time the cause of action arose and hearing of the case commenced and that changes in law will not affect the rights and obligations unless the change is specifically made retroactive.

Their Lordship's in *Olutola v. Unilorin*, with the greatest respect, may not have adverted their minds to section 6 of the Interpretation Act which was an existing law as at the time Decree No. 107 was promulgated and indeed in 2004 when *Olutola v. Unilorin* was decided at the risk of repetition I hereunder reproduce the said section 6(1) of the Interpretation Act Cap. 192, Laws of the Federation 1990 thus:

"S6(1) The repeal of an enactment shall not -

(a) Revive anything not in force or existing at the time when the repeal takes effect;

(b) Affect previous operation of the enactment or anything duly done or suffered under the enactment;

(c) Affect any right, privilege; obligation or ability accrued or incurred under the enactment;

(d) Affect the penalty, forfeiture or punishment incurred in respect of any offence committed under the enactment,

(e) Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, ability, penalty forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and such penalty may be imposed, as if the enactment had not been repealed".

What emerges from the provisions of this section is that pending proceedings like the one now on appeal are automatically saved in spite of the promulgation of the Decree in question.

Again there in nothing in Decree 107 by section 230 thereof that expressly divested High courts of States of the jurisdiction to hear cases that hitherto were pending in such courts. If the promulgators of the Decree had so intended they would have expressly stated so as it appears that the provisions of the Interpretation Act by section 6(1) thereof is mandatory by the use of the words "shall not". In other words, there is the presumption against retroactive legislation by the above section of the Act .See *Ojokolobo v. Alamu 7 Ors.* (1987) 7 SCNJ 114 at 126 Held 7.

With the greatest respect the principle of implied repeal by plain repugnancy can not override specific provisions of the constitution.

Black's Law Dictionary 7th Edition by, Bryan Garner at page 1316 defines "retroactive law" as:-

> *"A legislative act that looks backward or contemplates the past, affecting acts, facts that existed before the act came into effect.*
>
> *A retroactive law is not unconstitutional unless it (1) is in the nature of an ex-post facto law or a bill of attainder, (2) impairs the obligation of contracts. (3) divests vested rights or (4) is constitutionally forbidden:- also termed 'retrospective law".*

Although in *Ibrahim v. Barde* (1996) 12 SCNJ 38 Uwais C.J.N. held that the legislature is competent to make retrospective legislation he quoted with approval the Supreme Court case of *Ahmed v. Kassim* (1958)1 NSCC 11, *Capper & Anor v. Baldwin* (1965) 2 QB 53 at 61 etc. to hold that a certain amount of common sense must be applied in construing statutes and that the object of the statute must be considered.

I also reiterate what I said earlier that the Supreme Court in their interpretation of Decree 107 of 1993 did not direct their minds to the provisions of section 275 (1) of the 1979 Constitution which states *inter alia:*

"275(1) Any office, court of law or authority which immediately before the date when this section comes into force was established and charged with any function by virtue of any other Constitution or law shall be deemed to have been duly established and shall continue to be charged with such function until other provisions are made, as if the office, court of law authority was established and charged with the function by virtue of this constitution or in accordance with the provisions of a law made there under".

Assuming but not conceding that Decree 107 which came into force divested the Kwara State High court of the jurisdiction to hear this case from 17th of November, 1993 even when the case was filed in 1991, then we shall again look at section 274(3)(iii) (b) which defines an "existing law" as any law and includes any rule of law or any encasement or instrument whatsoever in force immediately before the date when that section came into force or which having been passed or made before that date comes into force after that.

It is submitted that the Interpretation Act Cap.192 laws of Federation (then Interpretation Act 1964) was an existing law under the 1979 Constitution and the courts ought to have given effect to it and or judicially noticed same.

To further seal the efficacious nature of the decision in *OHMB v. Garba*, section 277 (4) of the 1979 Constitution specifically stipulates that the Interpretation Act 1964 shall apply for purposes of interpreting the Constitution.

It is therefore submitted that with the above stipulation, it is mandatory that in construing the Constitution of the Federal Republic of Nigeria 1979 nay Decree 107 the Supreme court with the greatest respect ought to have given effect to section 6(1) of the Interpretation Act since it would appear that the said Act has been expressly incorporated into the constitution.

Against this background, I hold that the reasoning of Hon. Justice Kawu in his ruling on the issue of jurisdiction is unassailable as it is in line with what the Honourable Justice Kalgo (J,S,C.) said at page 160 of *OHMB v. Garba* (*supra*):

I am of the considered view that the lower court was perfectly in order when he said at page 190 of the Record of proceedings that:

"The Present Notice was filed on the 1st July, 1991 while Decree 107 of 1993 Constitution Suspension and Modification Decree came into force on 17th November, 1993 while the present action has been pending in the High Court of Kwara State.

In view of the fact that Decree 107 of 1993 does not make any provision for pending cases, it seemed not to affect any pending case.

I am of the view that the present suit being a pending case before the commencement of Decree 107 of 1993 is not affected by the said Decree.

Since the plaintiff herein filed his writ on 25/2/91, a period of more than two years before Decree 107 of 1993 came into effect without being retrospective, I hold that this case is properly before the court and that the court has jurisdiction to entertain it."

Although no court is expected to hanker after jurisdiction courts do jealously guide and guard their jurisdictions. Therefore, to oust the jurisdiction of the Kwara State High court as the appellants had craved, relying on *Olutola v. Unilorin* there must be express provision in Decree 107 which made that Decree retroactive. There being no such provision this court can not import into it a construction which is at variance with its provisions, particularly in view of the mandatory provisions of the Constitution and the Interpretation Act.

Accordingly, not withstanding that the amendment of the processes took place on the 14/10/95 and hearing commenced on the 23/5/96 the amendments related back to when the writ of summons was filed on the 28th of February, 1991. Issue Number 2 (two) is therefore resolved against the appellant.

On the 3rd issue, I have been privileged to read in advance the reasoning of my Lord in the lead Judgment on the vexed issue of fair hearing and I agree with him completely that the purported hearing given to the plaintiff/respondent fell short of the provisions of section 15(1) of the Unilorin Act.

I was particularly enthralled by the analogy drawn in the judgment of Kawu J. on the procedure adopted by the council that heard allegations of malfeasance or non-feasance against plaintiff when he said:

"First, comments of members of the council on the draft account submitted by the plaintiff were made while the plaintiff was sent out of the meeting. Just as you cannot shave a man's head in his absence, so also you cannot condemn him in his absence and equate it to fair hearing."

Even going by the principle enunciated in *Isiyaku Mohammed v. Kano Native Authority* (1968) 1 All NLR 422 which is that: "the true test of fair hearing is the impression created on a reasonable man who was present at the trial whether from his observation justice has been done", it can not be said that the plaintiff who was tried and condemned in absentia has gotten a fair hearing.

In *Olatunbosun v. NISER* (1988) 6 SCNJ 38 at 53 Oputa J.S.C. delivering the lead judgment of the Supreme Court commented on the rule of fair hearing *inter alia:*

"The appellant's right to fair hearing before dismissal for misconduct is

founded mainly and solely on the rules of natural justice of which (as Lord Camp-bell would like to call them) "the principles of eternal justice." See Exparte Ramshay (1852) 18 W.B. 173; at page 190. The right to be heard is so important, radical and protective that the courts strain every nerve to uphold it and even imply it, where a statutory form of protection would be less effective if it did not carry with it the right to be heard: Malloch v. Aberdeen Corporation (1971) 7 All E. R. (HL) 1278 at pp. 1282/1283".

The question as to whether the plaintiff was given a fair hearing has been answered by the lower court in the negative.

The imputation of inefficiency and non-performance or call it professional in-competence for which the plaintiff's appointment was terminated peremptorily, carries with it some degree of infamy or stigma which is grave and grievous enough to warrant the adherence to the strict rules of natural justice before condemning him.

This being not the case, I also agree with the position taken by my lord in his lead judgment that section 15(1) of the Unilorin Act was breached and consequently the termination of the plaintiff's appointment ought to be illegal, unconstitutional, null and void.

However, having also earlier on held that the claim of the plaintiff was statute-barred the brilliantly delivered judgment of the lower court is an exercise in futility.

Furthermore; the plaintiff has only won a pyrrhic victory which would take him no where, the cause of action having abated six years before the commencement of the action.

I shall also allow the Appeal and abide by all the consequential orders of my learned brother.

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A.G. Kwara v. Olawale (1993) 1 NWLR (Pt. 272) 645
Adah v. NYSC (2004) 13 NWLR (Pt. 891) 639
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Adigun v. A. G. Oyo State (1987) NWLR (Pt. 53) 678
Adigun v. Ayinde (1993) 8 NWLR (Pt. 313) 516
Ahmed v. Kassim (1958)1 NSCC 11
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University of Abuja v. Ologe (1996) 4 NWLR (Pt. 455) 706
University of Ibadan v. Adamolekun (1967) 5 NSCC 210
Uti v. Onnoyibve (1991) 11 NWLR (Pt.166) 175

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Colonial Sugar Refining Co. Ltd v. Irving (1905) A.C 369

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History:

HIGH COURT
High Court of Kwara State (Ilorin Division)
Kawu J.

COURT OF APPEAL (ILORIN DIVISION)
Muhammad Saifullahi Muntaka-Coomassie, JCA *(Presided)*
Helen Moronkeji Ogunwumiju, JCA *(Read the Lead Judgment)*
Ignatius Igwe Agube, JCA

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