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Foreword

I feel highly honoured to be requested to write a foreword to this book.

Jurisdiction is fundamental and crucial to adjudication. It is the foundation, the prop, on which the competence of a court is built. If there is want of Jurisdiction, the proceedings thereafter will be affected by a fundamental vice and would become a nullity however well conducted they might otherwise be. It is therefore of immense benefit in adjudication to properly understand the concept and content of "jurisdiction".

It is for this reason that this book written by Samuel Adewale Adeniji on jurisdiction is well timed and will serve as another helpful addition to our legal literature.

Going through the book, one observes that it not only states the principles relating to jurisdiction it also illustrates how those principles have developed and operated with copious references to decided cases. In other words, "jurisdiction" has been treated not in the abstract, as often the case in some books, but as a real and living subject.

The range, depth and quality of the topics discussed are wide and several. They range from meanings and types of jurisdiction to objections to jurisdiction; Res judicata, Service of court processes, Locus standi, Juristic person, Abuse of court processes, Ouster Clauses etc.

Jurisdiction as a concept is not an easy subject to tackle even by accomplished writers. The author of this book, Mr. Samuel Adewale Adeniji started to write the book when he was in Diploma Law Class of Olabisi Onabanjo University. What baffled me was that within one year or so he completed the writing of the book. My interaction with Mr. Samuel

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Adewale Adeniji showed that he is a young man with very bright future.

It is said that not every man can soar up to the heights great men reached. But anyone can reach his own maximum, within his own field, and within his personal limitations, if he has enough gift and determination. Mr. Adeniji has all the qualities that make a young man great.

This book is a welcome addition to existing works on law. It will make the work of lawyers, both on the bench and at the bar easier. It is also a necessary and indispensable acquisition for law faculties in the Universities as it is a must for every law student.

I recommend the book wholeheartedly to all.

HON. JUSTICE L. O. ARASI (RTD.)
63, FAJUYI ROAD,
BODE FOAM BUILDING,
ADAMASINGBA, IBADAN.

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Preface

It gives me great pleasure, stupendous honour and privilege to have been requested by this new budding author to write the preface of this book titled **"Legal Armoury"**

The title is penetrating, inviting, précise, concise, unusual and draws you on to wanting to discover from the arsenal what is jurisdiction and locus standi operating in NIGERIA COURTS. The issues are recurring decimals in our courts, with challenge to lack of jurisdiction being a radical and crucial question of competence for if the court has no jurisdiction to hear the case, the proceedings are and remain a nullity no matter however well conducted and brilliantly decided they might otherwise have been as a defect in competence is intrinsic to but extrinsic to adjudication. Jurisdiction and Locus standi are the life blood and life wire of a competent action. The author must be praised for delving into the hydraheaded issues of jurisdiction and locus standi in Nigerian Courts.

All courts in Nigeria are set up in part II of the 1999 Constitution of the Federal Republic of Nigeria which indicates POWERS OF THE FEDERAL REPUBLIC OF NIGERIA in particular the judicial powers in SECTION 6 Sub-section 1-6. It also established the judicature in Chapter VII, its composition and jurisdiction also set out in PARTS I, II, III and IV in Sections 230 to 290 and the Sub-sections. The interpretation Section 318 of the aforesaid Constitution did not define jurisdiction of the Courts.

The Author in Chapters One and Two of this book explains what is jurisdiction, the composition and the types of Jurisdiction of the Supreme Courts, Court of Appeal, Federal High Courts, State High Court, Customary Court of Appeal of a state and Sharia Court of Appeal of a State.

CHAPTER THREE of the book discussed the procedure of objections to jurisdiction and grounds to challenge the jurisdiction of the courts through RES JUDICATA, ABUSE OF COURT PROCESS, LOCUS STANDI OF THE PARTIES, TERRITORIAL OR EXTRA TERRITORIAL JURISDICTION and on other grounds which I urge you to peruse and digest, as the taste of the pudding is in eating it.

Finally, CHAPTER FOUR sets out other grounds in its closing topic how the Applicants can raise objection against the jurisdiction of the Courts.

I heartily congratulate this budding author for his industry in writing this book, it behoves me therefore to unhesitatingly recommend this book to all Nigerians, Judges, Lawyers, Law Students, Scholars and all Persons interested in sustaining DEMOCRACY AND GOOD GOVERNANCE under the RULE OF LAW IN NIGERIA.

HON. JUSTICE M.O. ONALAJA, OFR, LL.D (Hons)
FNIALS, JCA, CHAIRMAN COUNCIL OF LEGAL EDUCATION.

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Comments on the Book

"Legal Armoury"

I have carefully read the manuscript **"Legal Armoury"** and subject to the few typing errors which others and myself have noted, I believe that the book is publishable in its present form.

The book has successfully covered all that a Lawyer would need to tackle in the subject matter of Jurisdiction in the law courts and provide yet another spring board for other scholars to continue to do further work more especially on the specific aspects of Jurisdiction.

To this extent this well researched book more than compliments the existing works that I have read on Jurisdiction. **'Legal Armoury'** deals with the subject matter of Jurisdiction in its broader forms. Thus while books like "The Jurisdiction of the Federal High Court" by the Hon. Justice A. G. Kariby-Whyte or "Jurisdiction in Administrative Law" by Mrs. T. O. Owoade could be regarded as micro-analysis of the subject matter; the book **"Legal Armoury"** to the best of my knowledge is the first attempt at macro analysis of the subject matter of jurisdiction.

Furthermore, I do agree with previous commentators on the book including the versatile Dean of the Faculty of Law (Olabisi Onabanjo University) Ago-Iwoye, the indefatigable Professor Justus A. Sokefun and my colleague, Hon. Justice L. O. Arasi (rtd) and Mr. Olusesan Oliyide, that the author of this book, Samuel Adewale Adeniji deserves not only our commendation but also our encouragement. For Samuel Adewale Adeniji's level of official exposure to the legal profession, the research efforts is almost incredible. **The author is definitely one of the budding meteoric stars in**

the legal profession.

Once again, I congratulate the author on a job well done and I can assure him that this magnificent piece of work he has produced will for long remain not just a standard work on issues related to Jurisdiction in our courts but also a source book which administrators of the law and forensic practitioners alike will find indispensable to their collections.

Finally, I congratulate the Faculty of Law, Olabisi Onabanjo University Ago-Iwoye for nurturing a robust mind as that of Samuel Adewale Adeniji.

HON. JUSTICE (PROFESSOR)
M. A. OWOADE
COURT OF APPEAL
NIGERIA

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* * * * * *

It is with great honour and pleasure that I write this comment. Jurisdiction is the foundation of any matter subjected to adjudication.

It determines the existence and continuity of any issue that has been brought before a court. It is determined by various factors, which may include the commencement of actions, parties, location, service, notice, composition of court and many other factors that cannot be easily fathomed.

It is for this reason that this book would be a requisite literature in the study of legal practice.

The author has discussed some of the factors above comprehensively. The beauty of this discussion is the reference to the dynamics of law on these matters.

The author, though a student, has achieved a feat, expected of only the qualified practitioners of law. This makes it imperative for me to congratulate and commend him, particularly in times like this when students are no longer committed to their studies. With this type of beginning, I am confident that Samuel Adewale Adeniji has a bright future and shall reach great heights. I hope this effort will ginger his colleagues and other into other positive endeavours.

This is a book that should be consumed by any person interested in the Law.

Professor Justus A. Sokefun
Dean of Law,
Olabisi Onabanjo University,
Ago-Iwoye.

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* * * * * *

When the manuscript of this book was made available to me by the author, **Mr. Adewale Adeniji** to read and comment upon, it was with distrust and apprehension that I decided to carry out the responsibility thrusted upon me.

My apprehension was heightened by the fact that the author was a law student who had not been professionally and practically involved in the subject matter of discuss in the law courts.

However, having gone through the first two chapters of the book, my apprehension turned to excitement and admiration. It was fascinating to read through.

The author has dealt concisely with the issues of jurisdiction and locus standi in the Nigerian Courts in such a way that Judges and legal Practitioners are additionally guided and guarded as regards the issues for consideration when determining jurisdiction and locus standi.

The author has done justice to this aspect of the law that procedurally legal practitioners can rarely commit any procedural blunders that will pre-maturely determine the fate of the cases they are to prosecute if the hints herein are heeded.

I salute the courage of the author for daring to delve into the area of the law at his level of professional academic education which issue is always a recurring area in our courts of law.

Conclusively, I have no hesitation in recommending this master-piece and well researched book on the subject matter treated to Judges, Lawyers, Law Students and Researchers of

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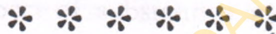
law, all of whom will immeasurably benefit therefrom.

Should the author maintain this studious approach to the profession he is desirous in pursuing, he will evidently become a literary legal giant.

Once again, I congratulate the author and wish him well.

N.O.O. OKE, SAN
OKE ADO,
IBADAN,
OYO STATE



This is, by every standard imaginable, one of the deepest and most profound legal literature on the all-important concept of "Jurisdiction." The book is manifestly robust both in substance and style. The language adopted in the book is also fluid and alluring.

It is heartening, particularly, because the book is written by a 200 Level Law Student. Mr. Samuel A. Adeniji, the author has done a profoundly superb job and he has my warm congratulations."

OLUSESAN OLIYIDE ESQ,
SENIOR LECTURER AND HEAD,
DEPARTMENT OF PRIVATE AND COMMERCIAL LAW,
OLABISI ONABANJO UNIVERSITY,
AGO-IWOYE.

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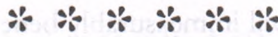

"….. A Prolific Writer of Inestimable value, he has written a book that Law Students and Legal Practitioners will always find inevitable…."

OLUWAGBEMIGA OLATUNJI ESQ,
EMMANUEL CHAMBERS,
RING ROAD,
IBADAN.

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Acknowledgement

Glory be to God Almighty who makes the difference in me. I am naturally in short of words because what I have done is by all standard beyond my level and hierarchy. But owing to the unquenchable passion to know more, I am priviledged to write this maiden book tagged **"LEGAL ARMOURY"** which contains details about Court hierarchies and not less than THIRTY-FIVE ways of striking out or dismissing an action on the platform of impeaching or impairing the jurisdiction of Court. This is not part of Petroleum Law or Law of Torts but purely a sensitive aspect of substantive and procedural law.

I owe unrefundable debt of gratitude to Hon. Justice L. O. Arasi (rtd.) for his inspirational words of encouragement and advice cum taken his time and efforts out of his crowded programmes to proof-read this book. Daddy, indeed, I am very grateful. Furthermore, I am equally grateful to Hon. Justice (Prof.) M. A. Owoade, Prof. J. A. Sokefun, Olusesan Oliyide Esq., and Oluwagbemiga Olatunji Esq., for their historical comment.

I also give kudos to my publisher who invested in my dream and bringing it to limelight. Sir, I am very grateful.

I fully appreciate the royal aroma I enjoyed from Oba Olatunde Falabi, Lambeloye III Akire of Ikire land, the unquantifiable efforts of my parents, Chief S. A. Adeniji , Mrs. A. B. Adeniji, Mrs. M. A. Adeniji, Mr. & Mrs. Fabunmi, Col. & Mrs. Falabi, Mr. & Mrs. Makinde, Mr. Victor Odewale, Mr. & Mrs. Sunday Adeniji and also my computer wizard Mr. & Mrs. Olufemi Taiwo and those who had directly or indirectly been a blessing to me.

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I cannot, eternally, forget our amiable and admirable empire "LEGAL MAGNATES & COMPANY" and the Magnates therein for their support and for our God-given vision to make a fundamental difference in the Legal World.

I also remain grateful to my Lecturers and many colleagues for their advice and encouragement, while reassuring everyone that all responsibility for the end product rests squarely with me.

SAMUEL ADEWALE ADENIJI
L. L. B. II,
OLABISI ONABANJO UNIVERSITY
AGO-IWOYE, OGUN STATE.

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Dedication

To these distinguished, rare, inestimable jewels and dignitaries and with their most gracious permission this book is respectively dedicated.

* HIS ROYAL HIGHNESS OBA OLATUNDE FALABI
  LAMBELOYE III,
  AKIRE OF IKIRE LAND,
  IKIRE, OSUN STATE.
* TPL (CHIEF) & MRS 'REMI MAKINDE
* COLONEL & MRS 'LAYI FALABI
* MR & MRS J.T. FABUNMI

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Abbreviations

AC	Appeal Cases.
All ER	All England Law Reports
All NLR	All Nigerian Law Reports.
Exch	Exchequer
FR	Federal Reporter.
IC Rob. Ad. Rep.	
KB	King's Bench
LJ(NS)	
LRICD	
NCLR	Nigerian Constitutional Law Report
NLR	Nigerian Law Report
NMLR	Nigerian Monthly Law Report
NSCC	Nigerian Supreme Court Cases
NSCQR	Nigerian Supreme Court Quarterly Reports
NWLR	Nigerian Weekly Law Report
QBD	Queen's Bench Division
SC	Supreme Court Judgement
SCNQR	Supreme Court Nigerian Quarterly Report
WACA	West African Court of Appeal
WLR	Weekly Law Report
WNLR	Western Nigerian Law Report
WRN	Weekly Report of Nigeria

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Chapter One

Jurisdiction

Meaning of Jurisdiction

Jurisdiction means dignity which a man has by a power to do justice in a cause of complaint made before him. In its narrow sense, it means the limits which are imposed upon the power of a validly constituted Court to hear and determine issues between persons seeking to avail themselves of its process by reference to: (i) the subject-matter of the issue or (ii) the persons between whom the issue is joined or (iii) the kind of relief sought.

In the wider sense, it means the way which the Court will exercise the power to hear and determine the issues which fall within its jurisdiction or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances[1].

Jurisdiction of the Court is neither defined under **Section 318 (1) 1999 Constitution** nor under **Section 277 (1) 1979 Constitution of Nigeria.** Its meaning shall be mirrored as follows: A term of comprehensive import embracing every

[1] See Onalaja JCA, A. G. Ogun State V. Coker (2003) 11FR pg 263 – 264.

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kind of judicial action. It is the power of the Court to decide a matter in controversy and presupposes the existence of a duly constituted Court with control over the subject matter and the parties.

Jurisdiction defines the powers of Courts to inquire into facts, apply the law, make a decision and declare judgement. The legal right by which judges exercise their authority. It exists when Court has cognizance of class of cases involved, proper parties are present and issues to be decided are within powers of the Court.

Similarly, it also means the power and authority of a Court to hear and determine a judicial proceedings and power to render a particular judgement in question. The right and power of a Court to adjudicate concerning the subject matter in a given case.

The term jurisdiction may have different meanings in different contexts, areas of authority, the geographical area in which a Court has power or types of cases it has to hear[2].

The Test of Jurisdiction

The test of jurisdiction of a Court is whether or not it had power to enter upon the inquiry, not whether the conclusion in the course of it was right or wrong. To constitute the right to adjudicate concerning the subject – matter in any given case, there are three essentials; first, the Court must have cognizance of the class of cases to which the one to be adjudicated belongs. Second, the proper parties must be present and third, the point decided upon must be in substance and effect within the issue[3]

[2] See Black's Law Dictionary Sixth Edition Centennial Edition (1891) at pages 853

[3] see Reynolds V. Stockton 140 US 254, 268 II Supreme Court 773 35L Edition 464.

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Legal effect of jurisdiction

The position of the Law is that if a Court lacks jurisdiction whatever it does amounts to a nullity. Indeed, jurisdiction is fundamental aspect of law and law is just a means to an end, justice is that end.

The law is elementary that a party cannot or has not the competency to waive lack of jurisdiction of the Court. Where a Court lacks jurisdiction, the entire proceedings however well conducted are a nullity and a party cannot in law resuscitate or revive a nullity by waiver. Jurisdiction is basic to the entire adjudication. It affects the power of the Court to adjudicate on a matter. Also where a Court lacks jurisdiction, no amount of indolent conduct on the part of any of the parties, particularly the defendant can ripen into the defence of waiver. It is my view that the jurisdiction of a Court where there is none, cannot be enlarged either by estoppel or waiver.

In the case of **Afro Continental Ltd V. Coop Association**[4] the plaintiff now respondent claimed jointly and severally against the defendant now appellant certain relief before the Owerri High Court, Imo State. The Defendants/Appellants brought an application challenging the jurisdiction of the Court seeking transfer of the suit from Ugoagwu J. to another Judge. The learned trial Judge refused the application brought by the Defendants/ Appellants and proceeded to enter judgement for the respondent on the undefended list, dismissing however, the claim for aggravated damages. The Defendants/Appellants were dissatisfied with the judgement and appealed to the Court of Appeal, which also dismissed the appeal. Hence, they appealed to the Supreme Court. The Supreme Court

[4] (2003) 13NSCQR pg 186

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unanimously allowed the appeal, His Lordship **U. A Kalgo JSC** said, "it is well settled that jurisdiction is the body and soul of every judicial proceeding before any Court or tribunal and without it all subsequent proceedings are fruitless, futile and a nullity because the issue of jurisdiction is fundamental to the proper hearing of a cause"

Also, **U. Mohammed JSC in Isaiah & 2ors V. Shell Petrol**[5] said "it is important to consider the issue of jurisdiction first because where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to a nullity**"**.

Principles guiding the Courts on issue of jurisdiction

One of the erudite Justices of the Court of Appeal; **Onalaja JCA** epitomize in the case of **A. G. Ogun State V. Coker**[6] and held as follows:

"…Courts guard their jurisdiction zealously and jealously."

The guide in its approach in dealing with the jurisdiction was stated by **Oputa JSC** in **African Newspaper of Nigeria & ors V. The Federal Republic of Nigeria**[7] while he considered the challenge to the Federal High Court as follows:

"The quarrel over the jurisdiction of Courts is by no means new, but these quarrels have left certain significant beacon light to guide the Court when dealing with jurisdiction or lack of it. For example, Judges ought not to encroach or enlarge their jurisdiction because by so doing the Courts will be usurping the functions of the legislature[8]. It shall be noted that nothing

[5] (2001) 6NSCQR pg 543, R. 2

[6] (2003) II FR pg 264 @ 265

[7] (1985) 2NWLR @ 122, (1985) IALLNLR (Pt1) pg 150 @ 71

[8] Per Holt C. J in Asby V. White (1703) Lord Rayin 938

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shall be intended to be out of the jurisdiction of the superior Court but that which specifically appears to be so, and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court but that which is so expressly alleged[9]. It is the law that although the Courts have great powers yet these powers are not unlimited. They are bound by some lines of demarcation[10], as Courts are creatures of statutes, jurisdiction of each Court is therefore confined, limited and circumscribed by the statute creating it. As often said, the Courts are not hungry after jurisdiction[11]. However, Judges have a duty to expound the jurisdiction of Court but it is not part of their duty to expand it [12]. It must be stated though that a Court cannot give itself jurisdiction by misconstruing a statute.[13]

These are the sacrosanct conditions and ingredients the Courts must inevitably put into cognizance when deciding whether or not they should assume jurisdiction in respect of any matter brought before them.

Sources of jurisdiction

It is absolutely not in doubt that the source of jurisdiction of all Courts created by the Constitution of the Federal Republic of Nigeria 1999 including the Court of Appeal is contained in the Constitution itself (being the statute that creates them). And various other statutes which are also relevant in this respect.

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[9] Peacock V. Bell and Kendall (1667) 1 sand 74

[10] Abbott C. J in the King V. Justices of Devon (1819) 1 chit Rep. 37

[11] Sir Williams Scott V. The two friends (1799) IC Rob. Ad. Rep . 280

[12] Kekewich J. In Re: Montagu (1897) I.R ICD (1897) pg 693

[13] Pollock, B, Queen V. Court of Londonshire and Dixon (1887) L. J (NS) 57 QBA 137.

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Categories of Courts

In Nigeria, our Courts are categorized into two different groups. viz;

1) The Superior Courts and
2) The Inferior Courts

(1) The Superior Courts

The foundation of Superior Court is traceable to the provisions of the Constitution. Undoubtedly, **S. 6 (1) 1999 Constitution** vests the judicial powers of the federation in the Courts to which this Section relates, being Courts established for the Federation. Subsection 5 of Sections 6 lists the Superior Courts which are namely:

* The Supreme Court of Nigeria
* The Court of Appeal
* The Federal High Court
* The High Court of the Federal Capital Territory, Abuja.
* The High Court of a State;
* The Sharia Court of Appeal of the Federal Capital Territory, Abuja
* The Sharia Court of Appeal of a State
* The Customary Court of Appeal of the Federal Capital Territory, Abuja.
* The Customary Court of Appeal of a State;
* Such other Courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws.

Without prejudice to the inferior Courts, there are some peculiarities about the Superior Courts.

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1) Superior Courts are Courts of unlimited jurisdiction i.e nothing shall be intended to be out of their jurisdiction but only those things that are specifically appear to be so[14]. The above mentioned Courts are preferentially referred to as "Superior Courts' of record". because they are Courts that are required to keep a record of its proceedings with the power of "general original jurisdiction in the first instance and which exercise a control or supervision over a system of lower Courts either by appeal, error or certiorari"[15].

In the case of **Accountants Disciplinary Tribunal V. Williams**[16] when upholding the unlimited jurisdiction of the Lagos State High Court, the Court stated: "that the Lagos High Court is Court of records, or a superior Court of record under the Constitution is not in doubt. Being such a superior Court of record its jurisdictional power is circumscribed by the law. Section 10 of the High Court Law of Lagos State provides that the High Court shall in addition to any other jurisdiction conferred by the Constitution possess and exercise all the jurisdiction, powers and authorities which are vested and capable of being exercised by the High Court of Justice in England".

[14] Egwuatu V. A. G. Anambra State (1983) 4 NCLR pg 472 R. 3, the limits of jurisdiction are prescribed by the statute under which the court is constituted and if no restriction is imposed on the authority of the court the jurisdiction is said to be unlimited. Also in State V. Eyitene (1983) 4NCLR pg 348, R. 6 the court held that the true meaning of section 236 of the constitution is not that High Court of a state has jurisdiction in all matters, it only has unlimited jurisdiction in matters triable by it.

[15] Black Law Dictionary 5th Edition pg 319.

[16] (2003) 2FR pg 217, R. 8, P. O. Aderemi JCA

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Invariably, all Superior Courts in Nigeria are also referred to as a Court of record i.e. that their existences are traceable to the Constitution or specific statute.

In addition, all Superior Courts exercise Supervisory jurisdiction over the inferior Courts. The supervisory jurisdiction is often exercised by way of prerogative orders the likes of the order of prohibition, certiorari, mandamus and injunctions.

In the case of **Accountants Disciplinary Tribunal V. Williams (supra),** the contention of the respondent was lack of proper procedure in the course of administration of justice, and that this has led to the miscarriage of justice. The respondent called on the Court to exercise its supervisory role over the tribunal. And the Court through his lordship, **P. O. Aderemi JCA** at page 231 said, "In Lagos State, the supervisory jurisdiction of the High Court over the inferior Courts is exercised by way of prerogative orders the likes of the order of prohibition. It is called judicial review, the basis of which is the doctrine of ultra vires".

Apparently necessary, the superior Courts have right/duty to punish contempt *in facie curiae* (in the face of the Court) and *ex facie curiae,* (committed outside the Court).

Section 133 of the Criminal Code explains vividly what would eventually tantamount to contempt of Court.

Contempt of Court simply means any conduct which tends to bring into disrepute or disrespect the authority and administration of law or which tends to interfere with or prejudice litigants and/or their witness in the course of litigation; even to scandalize the Court amounts to contempt of Court. The question is, how should the Courts (Superior Courts) use this power to punish the contemnor? The answer is whether the contempt is in the face of the Court or not in

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the face of the Court, it must always be borne in mind that the adjudicators should use the summary powers to punish for contempt sparingly, this is because the summary powers are created and retained for the sole purpose of preserving the honour and dignity of the Court and not for the personal aggrandizement of the adjudicator. While it is not in dispute that a judge, for the preservation of the dignity of a Court of law, can punish *brevi manu* a contempt in its face without prejudice to adherence to the principles of fair hearing, in cases of contempt not in the face of the Court, the judge must ensure that the hearing must be conducted in accordance with cardinal principles of fair process. The alleged contemnor must be put in the dock, the charge preferred against him must be distinctly and clearly stated and he must be called upon to show cause why he should not be punished for his contempt.[17].

It must however be remembered that the rule governing civil contempt like those of criminal contempt exist to uphold the effective administration of justice. Therefore a person who has committed a civil contempt by disobeying a Court order may be subject to the rule that a party that has acted in contempt of a judicial order ought not to be heard or take further proceedings in the same cause until he has purged himself of the contempt. As long as a Court order is clear and unambiguous, parties who are bound by them have a standing and compelling invitation and duty to implement them. The parties' view about legality or propriety of the order or judgement is immaterial.

It must be noted vigorously, that *mens rea* is not a necessary ingredient of the offence of the contempt of Court, **American**

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[17] Togbobo & ors V. Johnson Products Ltd (2003) II FR, R., 3.

International Security and Telecommunication systems (Nig.) V. Eugene Peterson & or[18].

Contempt of Court being a correcting panacea to prevent abuse of administration of justice is classified either as (i) Criminal contempt consisting of words or acts obstructing or tending to obstruct or interfere with, the administration of justice or (ii) Contempt in procedure otherwise known as civil contempt consisting of disobedience to the judgement, orders or other process of the Court, and involving a private injury which include viz;

i) Language or behaviour which is outrageous or scandalous or which is deliberately insulting to the Court is punishable as contempt in the face of the Court.

ii) Comments whether orally spoken or written, scandalizing the Court is contempt.

iii) Publication in a newspaper or an article containing scurrilous personal abuse of a judge in a judicial proceeding which has terminated is a contempt of Court.

iv) Allegation of partiality made against the judge which are probably the most common way in which the Court has been held to be scandalized, are treated very seriously as contempt because they tend to undermine confidence in the basic function of a judge.[19]

[18] Suit No. FRC/ L/ 10/77 of 27/10/78

[19] **Obiekwe Aniweta V. The State** FCA/E/47/78 of Friday 16/6/78 At Federal Court of Appeal Enugu

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At this juncture, there are some exceptions to the general principles of contempt of Courts. The exceptions are vehemently enumerated by the Court in **Lawal V. Emuyule**[20], the Court held that, it has been judicially held that where a party is in contempt of a Court order he may still be heard in a subsequent application by him in the following situations:

1) Where the party is seeking for leave to appeal against the order of which he is in contempt, or
2) Where the contemnor intends to show that, because of procedural irregularities in making the order, it ought not to be sustained, or
3) Where the party is challenging the order on the ground of lack of jurisdiction; or
4) Where all that the contemnor is asking for is to be heard in respect of matter of defence.

2) The Inferior Courts

Inferior Court is any Court that is subordinate to the Chief Appellate Court/ Tribunal within a judicial system. A Court of special, limited or statutory jurisdiction whose record must show the existence of jurisdiction in any given case to give its ruling presumptive validity. This is also termed **Lower Court** or Court not of record because it is an inferior Court that is not required to routinely make a record of each proceeding.[21]

The inferior Courts are as follows;

* Magistrate Court,
* Customary Court,

[20] (2003) 7FR pg 7, R. 6

[21] **Black's Law Dictionary – Deluxe Eighty Edition, Bryan A. Garner, Editor in Chief**

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* District Court,
* Júvenile Court,
* Coroner Inquest and
* Area Court,

The ample jurisdictions of the Courts are expressly stated in the various statutes that created them.

Furthermore, the inferior Courts have power to punish contempt committed only in the face of the Court *(i.e. Facie Curiae).*

As stated above, contempt could either be in the face of the Court *(in facie curiae)* or outside the Court *(ex facie curiae).* Contempt *in facie curiae* has no closed category and examples in such instance are many. But broadly speaking, it is word spoken or act done within the precincts of the Court which obstructs or interfere with due administration of justice or is calculated to do so.

Contempt *ex facie curiae* may be described as words spoken or otherwise published or acts done outside the Court which are intended or likely to interfere with or obstruct the fair administration of justice[22].

Contempt committed in the face of a Court while engaged in judicial proceedings were a nullity for want of jurisdiction, for the test is not whether the Court was hearing at the time of the contempt, valid proceedings[23].

When a contempt is not committed in the face of the Court, a judge who has been personally attacked should not as far as possible hear the case[24].

[22] In Re: Dr. Olu Onagoruwa FCA/E/117/78 delivered by the Federal Court of Appeal on Tuesday the 5th of February 1980.

[23] Agbigende V. Ilorin Native Authority (1968) NMLR 144.

[24] Awobokun v. Adeyemi (1968) N.M. L. R. 289.

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Also, an accused person in a case of contempt in the face of the Court should be given an opportunity of being heard before he is punished. **In Deduwa V. The State**[25] **,** the Court said if a trial Court wishes to deal with a case of contempt in the face of the Court summarily, he should put the accused, not in the witness box, but into the dock and ask him to show cause why he should not be convicted. He should not be compulsorily put into the witness box as that offends against Section 22(9) of the 1963 Constitution Section 33sub-Section II of the 1979 Constitution) (Also Section 36 (11) 1999 Constitution which reads: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial".

Hitherto, natural justice demands that before anyone is convicted for contempt, he must be informed of the details of the contempt and must be given an opportunity to make an answer and defence[26]

[25] (1975) IANLR pg 1-17
[26] See, "The Law of Contempt in Nigeria" by Chief Gani Fawehinmi SAN.

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Chapter Two

Types of Jurisdiction

There are essentially two types of jurisdiction in our superior courts and some of the inferior courts like Magistrate Court and Upper Area Court. They are:

(1) Original jurisdiction is the authority which vests in any Court to be the Alfa and Omega over a particular matter[27]

(2) Appellate jurisdiction is the authority the Court has over cases by way of appeal[28]

Meanwhile, there is reason to vividly examine the jurisdiction of those Courts mentioned in Section 6(5) of the 1999 Constitution (i.e the Superior Courts).

The Supreme Court

Establishment:

The Supreme Court derives its origin from Section 230 of the Constitution of the Federal Republic of Nigeria 1999. It consists of the Chief Justice of Nigeria and not more than 21 Justices of the Supreme Court as may be prescribed by an Act

[27] Section 232 , 239 and 251 of the 1999 constitution.

[28] Section233, 240 of the 1999 constitution.

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of the National Assembly (with unspecified number to be learned in Islamic and Customary Laws). The President appoints the Chief Justice at his discretion subject to approval, by the simple majority of the Senate. All other justices of the Supreme Court are to be appointed by the President on the advice of the National Judicial Council such appointments are also subject to confirmation by a simple majority of the Senate.

To be qualified for appointment as a justice of the Supreme Court or the Chief Justice, a person must have qualified to practice as a legal practitioner in Nigeria for a period not less than 15years.

Jurisdiction:

(a) Original Jurisdiction

i) The Supreme Court has exclusive original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of fact or law) on which the existence or extent of a legal right depends.

ii) It also has original jurisdiction in cases of contempt of itself.

iii) By virtue of Section 232(2) of the 1999 Constitution, the National Assembly (except criminal matters) is empowered to confer original jurisdiction on the Supreme Court.

The essential ingredients for the exercise of the original jurisdiction of the Supreme Court are eruditely examined by

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A. G. Karibe-Whyte, JSC in the case of **A. G. Federation V. A. G. States**[29] when said, accordingly that; there must be:

A justiciable dispute between the parties

The dispute must be between the Federation and a State or between States of the Federation.

The dispute must be that in which the existence or extent of a legal right of the Federal Republic of Nigeria or legal right of a State is involved.

The claim must relate to the establishment of such rights which have been violated or a threat to their violation.

(b) Appellate Jurisdiction

The Supreme Court has exclusive appellate jurisdiction over the decision of the Court of Appeal.

Appeals lie to the Supreme Court as a matter of right from the decision of the Court of Appeal in the following cases.

Decisions in any civil or criminal proceedings where the ground of appeal involves only questions of Law.

Decisions in any civil or criminal proceedings on question as to the interpretation or application of the Constitution.

Decisions in any civil criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court has affirmed sentence of death imposed by other Court.

Decisions on any question whether (a) any person has been validly elected to the office of the President or Vice President. (b) Whether the term of office of the President or Vice President has ceased.

[29] (2001) 7NSCQR pg 459, R. 7

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Whether the office of the President or Vice President has become vacant and such other cases as may be prescribed by Act of the National Assembly.

Constitution

The Supreme Court normally consists of five justices of the Supreme Court in the exercise of its jurisdiction under Section 233 (i.e. where appeals lie as of right to the Supreme Court). In the exercise of its original jurisdiction under Section 232, i.e. as to dispute between the State and the Federal Government or between the States, the Supreme Court shall be composed of seven Justices.

Finality of Determinations

Subject to the power of the President and State Governors to grant a prerogative of mercy, no appeal lies from determination of the Supreme Court to any other body.

From the decision in **Johnson V. Lawalson**[30] it now appears that the Supreme Court will be prepared to overrule any of its own decision as well as the decisions of the Privy Council (on appeal from Nigeria) in deserving cases

Who May Appeal

In the exercise of the appellate jurisdiction of the Supreme Court, appeals lie in civil cases, at the instance of the parties to the action, or with the leave of the Supreme Court or the Court of Appeal, at the instance of any other person having interest in the subject matter of the action.

[30] (1972) 2 U. I. L. R. 21

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In criminal cases appeal lies at the instance of the accused or the prosecutor. A complainant in a criminal prosecution has no right of appeal as he is not a party to the proceedings, neither can he be a 'person aggrieved.[31]

Powers of the Supreme Court

CIVIL APPEALS:

It could exercise full jurisdiction over the whole proceedings as if they had been instituted and prosecuted before it as a Court of first instance. It could make any order necessary for determining the real question in controversy including an order for a retrial. In the case of **Udengwu V. Uzuegbu and ors**[32], the Court (i.e. the Supreme Court) said that appellate Courts can order a retrial in a civil case when among other conditions: (1) there has been such an error in the substantive law or an irregularity in procedure by the trial Court which neither renders the trial a nullity nor makes it possible for the Court of Appeal to say there has been no miscarriage of justice[33]; or (2), the trial Court made a finding of fact on conflicting material evidence adduced on an issue by both parties to the action, the resolution of which is essential to the just determination of the case and the Appeal Court in the exercise of its appellate jurisdiction cannot resolve the conflict in issue of credibility in order to bring the litigation to an end.[34] or, (3) there has been a substantial misdirection by the Court or some other

[31] see I.G.P. V. Adegoke Adelabu In Re: Chief D.T. Akinbiyi 1955\56 W.N.N.L.R. 100.

[32] (2003) 15 NSCQR pg 262, R.3

[33] See Ezeoke V. Uwagbo (1988) NWLR (Pt72) 616 at 629

[34] see Atanda V. Ajani (1989) 3NWLR (pt 237),527 at556

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substantial error like wrong placing of burden of proof by the Court, such that cannot be corrected by the Appellate Court.[35] And the justice of the case, looked at in all its special circumstances, justifies an order of retrial.

Criminal Appeals

It may dismiss the appeal summarily after hearing counsel for the appellant or the appellant himself and without calling upon the respondent's counsel to reply;

It may dismiss the appeal notwithstanding the fact that the point raised in the appeal could be decided in favour of the appellant if it considers that no substantial miscarriage of justice has occurred;

In an appeal against conviction or against both conviction and sentence, the Court may do the following:

- ✶ Affirm the conviction and sentence;
- ✶ Quash the conviction and sentence, and acquit or discharge the appellant or order him to be retried by a Court of competent jurisdiction. To order a new trial, the Court must be satisfied as in the case of **Abodundu V. R.**[36], that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand, the trial was not rendered a nullity, on the other hand, the Court is unable to say that there is no miscarriage of justice.

[35] see Onobruchere V. Ezegine (1986) 1NWLR (pt19) 799; Onifade V. Olayiwola (1990) 7NWLR (pt 161) 130 at 161,167

[36] (1959)4FSC 73

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* That leaving aside the error or irregularity, the evidence taken as a whole, discloses a substantial case against the appellant.
* That there are no such special circumstances as would render it oppressive to put appellant on trial a second time.
* That the offence or offences of which the appellant was convicted or the consequence to the appellant or any other person of the conviction or an acquittal of the appellant, are not merely trivial; and
* That to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.

After the findings, affirm the sentence, or, with or without altering the finding reduce or increase the sentence. (Note, that to alter the findings means to substitute the conviction for another offence in place of that appealed against. ***Akule V. Queen***[37].

The Court may increase or reduce a sentence although there is no appeal against it. However, the sentence may not be increased beyond the maxim which the trial Court may impose.

With or without a reduction or increase of sentence and with or without the altering of the findings, alter the nature of the sentence. On an appeal against sentence only, the Court can affirm the sentence, or substitute other sentences whether more or less severe, subject to the same limitation that the Court may not increase the sentence beyond that which the trial Court can impose.

[37] (1963) NRNLR 105

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The following points should be noted that:

- Any judgement of the Supreme Court has full force and effect all over the federation and shall be enforceable by all Courts and authorities in any part of the federation by virtue of the doctrine of *stare decisis.*
- In the exercise of its original jurisdiction the Court can call in aid the assistance of the assessors who are specially qualified.
- A justice of the Supreme Court may issue a warrant to procure the presence of any one from prison where his evidence is necessary.
- Proceedings between the federation and a state or between the states *inter se* shall be instituted in the name of the relevant Attorney-General.
- No appeal shall lie to the Supreme Court from any order of the Court of Appeal made *ex-parte* or by consent of the parties or relating to cost.
- The Supreme Court shall not grant a new trial or reverse any judgement by reason that the stamp upon any judgement is insufficient or not required.
- Period to give notice of appeal or notice of application for leave to appeal are:
  - In civil cases, 14 days in respect of an interlocutory decision and three months in respect of a final decision.
  - In criminal cases 30 days.
- No sentence can be increased on appeal in consideration of any evidence that was not given before the trial Court.
- The Supreme Court may assign a counsel to an appellant in deserving cases.

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Mode of Commencement of Proceedings in the Original Jurisdiction of the Supreme Court

In the case of **A. G. Ondo State V. A. G. Federation**[38] where the plaintiff challenged the Constitutionality of the Independent Corrupt and other Related Offences Act (ICPC).

M. L. Uwais, the Chief Justice of Nigeria said, by Order 3, Rule 2(2) of the Supreme Court Act, 1985, Civil proceeding in the original jurisdiction of this Court may be commenced *inter-alia* by filing originating summons.

Order 3 Rule 6(1) of the Supreme Court Rules, 1985 as amended, also permits any party claiming any legal or equitable rights the determination of which depends on the construction of the Constitution or any enactment, to begin proceedings by causing an originating summons to issue.

Court of Appeal

Establishment:

The Court of Appeal was first established by the Constitution (Amendment) (No. 2) Decree (No. 42 of 1976) and also Section 237 1999 Constitution. The Court of Appeal consists of the President of the Court of Appeal and such other justices of the Court of Appeal not less than 49 as may be prescribed by Act of parliament. Not less than 3 Justices of this number shall be learned in Islamic personal law and also not less than 3 justices shall be learned in Customary law.

The President of Nigeria appoints the President of the Court of Appeal on the recommendation of National Judicial Council subject to confirment of such appointment by the

[38] (2002) IONSCQR pg. 1034, R. 1

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Senate. The same rule applies to the appointment of other justices.

To be qualified for appointment as a justice of the Court of Appeal a person must have been qualified to practice as legal practitioner in Nigeria for a period of 12 years.

Jurisdiction:

The Court of Appeal has exclusive jurisdiction by virtue of Section 240 of the 1999 Constitution to hear and determine appeals from:

- The Federal High Court
- State High Courts and High Court of FCT
- State Sharia Courts of Appeal and Sharia Court of Appeal of FCT.
- State Customary Court of Appeal and Customary Court of Appeal of FCT.
- Decision of a Court Martial or
- Other tribunals as may be prescribed by an Act of the National Assembly.[39]

Original jurisdiction of the Court includes matters as to whether:

(a) Any person has been validly elected to the office of the President or Vice-President;

(b) The term of office of the President or vice-President has ceased or

(c) The office of the President or vice-President has become vacant[40] .

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[39] Section 240 of the 1999 constitution.

[40] Section 239 of the 1999 constitution.

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Appeal from High Courts of States/Federal High Courts

Appeals lie from the decision of High Courts or Federal High Court to the Court of Appeal as of right in the following situations:

- Final decision in any civil and criminal proceedings before the High Court sitting at first instance.
- Decision in any civil or criminal proceedings where the ground of appeal involves questions of law alone.
- Decision in any civil or criminal proceedings as to the question of interpretation or application of the Constitution.
- Decision in any civil or criminal proceedings on the contravention of the fundamental rights provisions of the Constitution.
- Decision in any civil or criminal proceedings in which the High Court has imposed a sentence of death.
- Decisions on any questions whether any person has been validly elected to any office under the Constitution or to the membership of any legislative house or the term of office of any person has ceased or the seat of a person in the legislative house has become vacant.
- Decisions concerning the liberty of a person or the custody of any infant.
- Decisions in which an injunction or the appointment of a receiver has been granted or refused.
- Decisions to determine the liability of a creditor or any liability of a contributor or other officer under any enactment relating to company in respect of misfeasance or otherwise.

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* Decisions in the case of *decree nisi* in matrimonial causes or decision in any admiralty action.
* Such other cases as may be prescribed by law in force in Nigeria. There is no right of appeal from decision of the High Court in the following cases;
* Decisions granting an unconditional leave to defend an action.
* From an order absolute for the dissolution or nullity of a marriage in favour of any party who, notwithstanding the time and opportunity afforded him did not appeal from the *decree nisi.*
* Right of appeal in consent judgement can only be granted by leave of either the High Court or the Court of Appeal. In all other cases not specified above, appeals lie to the Court of Appeal only on leave of the High Court or the Court of Appeal.

Who May Appeal?

Persons entitled to appeal to the Court of Appeal are those in similar circumstance as for appeal to Supreme Court stated above.

Appeal from Sharia Court of Appeal

* Appeal lies as of right in any civil proceedings in relation to Islamic personal law at the instance of party thereto.
* In similar situation of (1) above appeal lies at the instances of any person having an interest in the matter only with the leave of either the sharia Court of Appeal or the federal Court of Appeal.

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Appeals from Code of Conduct Tribunal

* Appeal lies as of right to the Court of Appeal from the decision of the Code of Conduct Tribunal.
* Appeals from National Assembly Election Tribunal and Governorship and Legislative Houses Election Tribunal
* Appeals lie as of right to the Court of Appeal as to whether:
* A person has been validly elected to the National Assembly or to a House of Assembly.
* Any person has been validly elected to the office of Governor or Deputy Governor.
* The term of the office of any person has ceased or the seat of any such person has become vacant.
* The decision of the Court of Appeal arising from election petition shall be final as in the case of Chief Chidi Awuse V. Dr. Peter Odili & ors[41], the Court held on whether the decision of the Court of Appeal is final in respect of an appeal arising from an Election Petition. Under Section 246(i)(b)(ii) of the Constitution, an appeal would ordinarily lie to the Court of Appeal and the decision thereto, final. The Court held and struck out the applicant's petition. Also under Section 246(3) above, the decision of the Court of Appeal in respect of an appeal arising from an election petition as in this case, is final. I have not the slightest doubt that the Constitution has in clear and unambiguous language made the Court of Appeal a final Court in respect of appeals arising from election petitions as in the matter before us now.

[41] (2003) 16 NSCQR pg. 218.

Composition

In the exercise of its appellate jurisdiction the Court of Appeal normally consists of not less than three justices of the Court of Appeal but in hearing appeals from:

* Sharia Court of Appeal, the Court of Appeal consists of not less than 3 Justices of the Court learned in Islamic Personal Law.
* Customary Court of Appeal, the Court of Appeal shall consist of not less than 3 Justices of the Court of Appeal learned in Customary law.

Practice of procedure

Section 248 of the 1999 Constitution provides that subject to the provisions of any Act of the National Assembly, the President of the Court of Appeal may make rules for regulating the practice and procedure of the Court of Appeal.

Federal High Court

Establishment:

There shall be Federal High Court which shall consist of a Chief Judge of the Federal High Court and such number of Judges of the Federal High Court as may be prescribed by an Act of the National Assembly.

Appointment of Chief Judge and Judges

The appointment of a person to the office of Chief Judge of the Federal High Court shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate.

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The appointment of a person to the office of a Judge of the Federal High Court shall be made by the President on the recommendation of the National Judicial Council.

Honourably needed, a person shall not be qualified to hold the office of Chief Judge or a Judge of the Federal High Court unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.

If the office of the Chief Judge of the Federal High Court is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then, until a person has been appointed to and has assumed the functions of that office or until the person holding the office has resumed those functions the President, shall appoint the most senior Judge of the Federal High Court to perform those functions.

Except on the recommendations of the National Judicial Council, an appointment pursuant to the provisions of sub-Section 3 of the Section shall cease to have effect after the expiration of three months from the date of such appointment and the President shall not re-appoint a person whose appointment has lapsed.

Jurisdiction:

By virtue of **Section 251 of the 1999 Constitution**, notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes or matters.

* Relating to the revenue of the Government of the Federation in which the said Government or any organ

thereof or a person suing or being sued on behalf of the said Government is a party.

* Connected with or pertaining to taxation of company and other bodies established or carrying on business in Nigeria and all other person subject to Federal taxation;
* Connected with or pertaining to customs and excise duties and export duties, including any claim by or against thereof, arising from the performance of any duty imposed under any regulation relating to customs and excise duties and export duties.
* Connected with or pertaining to banking, banks, other financial institutions including any action between one bank and another, any action by or against the Central Bank of Nigeria arising from Banking, foreign exchange, carriage, legal tender, bills of exchange, letters of credit, promissory notes and other fiscal measures. Provided that this paragraph shall not apply to any dispute between an individual customer and the bank.
* Arising from the operation of the companies and Allied Matters Act or regulating the operation of companies incorporated under the Companies and Allied Matters Act;
* Any Federal enactment relating to copyright, patent, designs, trade marks and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards.
* Any admiralty jurisdiction, including shipping and navigation on the River Niger or River Benue and their affluents and on such other inland waterway as may be designated by any enactment to be an international

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waterway, all Federal Ports, (including the Constitution and powers of the ports authorities for Federal Ports) and carriage by sea.

* Diplomatic, consular and trade representation.
* Citizenship, naturalization and aliens, deportation of persons who are not citizens of Nigeria, extradition, immigration into and emigration from Nigeria, passports and visas.
* Bankruptcy and insolvency;
* Aviation and safety of aircraft
* Arms, ammunition and explosives;
* Drugs and poisons.
* Mines and minerals (including oil fields, oil mining, geological surveys and natural gas);
* Weights and measures;
* The administration or the management and control of the Federal Government or any of its agencies;
* Subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies.
* Any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies and;
* Such other jurisdiction, civil or criminal and whether to the exclusion of any other Court or not as may be conferred upon it by an Act of the National Assembly. Provided that nothing in the provisions of paragraph (p) (q) and (r) of this subSection shall prevent a person from

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seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance whether the action is based on any enactment, law or equity.

Also the Federal High Court shall have and exercise jurisdiction and powers in respect of criminal causes and matters in respect of which jurisdiction is conferred by subSection 1 of Section 251 of the 1999 Constitution.

Powers: Section 252 of the 1999 Constitution says for the purpose of exercising any jurisdiction conferred upon it by this Constitution or as maybe conferred by an Act of the National Assembly, the Federal High Court shall have all the powers of the High Court of a state.

Notwithstanding subSection (1) of this Section, the National Assembly may by law make provisions conferring upon the Federal High Court powers additional to those conferred by this Section as may appear necessary or desirable for enabling the Court more effectively to exercise its jurisdiction.

Composition:

The Federal High Court shall be duly constituted if it consists of at least one Judge of that Court.

Practice and Procedure

Section 254 of the 1999 Constitution opines, subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court.

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The High Court of the Federal Capital Territory, Abuja

Establishment:

There shall be a High Court of the Federal Capital Territory, Abuja which shall consist of:

* A Chief Judge of the High Court of the Federal Capital Territory, Abuja; and
* Such members of judges of the High Court as may be prescribed by an Act of the National Assembly.

Appointment of Chief Judge and Judges

The appointment of a person to the office of Chief Judge of the High Court of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate.

The appointment of a person to the office of a judge of the High Court of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council.

A person shall not be qualified to hold the office of a Chief Judge or a Judge of the High Court of the Federal Capital Territory, Abuja unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than 10 years.

If the office of the Chief Judge of the High Court of the Federal Capital Territory, Abuja is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office or until the

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person holding the office has resumed those functions, the President shall appoint the most Senior Judge of the High Court of the Federal Capital Territory, Abuja to perform those functions.

Except on the recommendation of the National Judicial Council, an appointment pursuant to the provisions of subsection (4) of Section 256, 1999 Constitution shall cease to have effect after the expiration of three months from the date of such appointment and the President shall not re-appoint a person whose appointment has lapsed.

Jurisdiction:

Section 257 says subject to the provisions of Section 251 and any other provisions of this Constitution and in addition to such other jurisdiction as may be conferred upon it by law, the High Court of the Federal Capital Territory, Abuja shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, priviledge, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The reference to civil or criminal proceedings in this Section includes a reference to the proceedings which originate in the High Court of the Federal Capital Territory, Abuja and those which are brought before the High Court of the Federal Capital Territory, Abuja to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction.

Composition

The High Court of the Federal Capital Territory, Abuja shall

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be duly constituted if it consists of at least one judge of that Court.

Practice and Procedure

Subject to the provisions of any Act of the National Assembly, the Chief Judge of the High Court of the Federal Capital Territory, Abuja may make rules for regulating the practice and procedure of the High Court of the Federal Capital Territory.[42]

The Sharia Court of Appeal of the FCT Abuja

Establishment:

There shall be a Sharia Court of Appeal of the Federal Capital Territory, Abuja which shall consist of:

A Grand Kadi of the Sharia Court of Appeal and

Such member of Kadis of the Sharia Court of Appeal as may be prescribed by an Act of the National Assembly.

Appointment of Grand Kadi and Kadis

The appointment of a person to the office of the Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the Senate.

The appointment of a person to the office of a Kadi of the Sharia Court of Appeal shall be made by the President on the recommendation of the National Judicial Council.

[42] See section 259, 1999 constitution.

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A person shall not be qualified to hold office as Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja unless:

- He is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council; or
- He has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than twelve years and
- He either has considerable experience in the practice of Islamic law or
- He is a distinguished scholar of Islamic law.

Jurisdiction

The Sharia Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Islamic personal law.

For the purpose of the above statement the Sharia Court of Appeal shall be competent to decide:

- any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship of the guardianship of an infant;
- where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage

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including the validity or dissolution of that marriage or regarding family relationship, a finding or the guardianship of an infant;

- any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance of the guardianship of a Muslim who is physically or mentally infirm; or
- any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim.
- where all the parties to the proceedings, being Muslims, have requested the Court that hears the case in the first instance to determine that case in accordance with Islamic personal law.

Composition

For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any Act of the National Assembly, the Sharia Court of Appeal shall be duly constituted if it consists of at least three Kadis of that Court.

Practice and Procedure

Section 264 of the 1999 Constitution provides that subject to the provisions of any Act of the National Assembly, the Grand Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja may make rules for regulating the practice and procedure of the Sharia Court of Appeal of the Federal Capital Territory, Abuja.

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The Customary Court of Appeal of the Federal Capital Territory, Abuja

Establishment:

There shall be a Customary Court of Appeal of the Federal Capital Territory, Abuja, which shall consist of:

- a President of the Customary Court of Appeal; and
- such number of judges of the Customary Court of Appeal as may be prescribed by an Act of the National Assembly.

Appointment of President and Judges

The appointment of a person to the office of the President of the Customary Court of Appeal of the Federal Capital Territory, Abuja shall be made by the President on the recommendation of the National Judicial Council, subject to the confirmation of such appointment by the Senate.

The appointment of a person to the office of a Judge of the Customary Court of Appeal shall be made by the President on the recommendation of the National Judicial Council.

Apart from such other qualification as may be prescribed by an Act of the National Assembly, a person shall not be qualified to hold the office of President or a Judge of the Customary Court of Appeal of the Federal Capital Territory, Abuja unless:

- he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and, in the opinion of the National Judicial Council he has considerable knowledge and experience in the practice of Customary law.

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If the office of the President of the Customary Court of Appeal is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then, until a person has been appointed to and assumed the functions of that office, or until the person holding the office has resumed those functions the President shall appoint the next most senior Judge of the Customary Court of Appeal to perform those functions.

However, except on the recommendation of the National Judicial Council, an appointment pursuant to the provisions of subsection (4) of Section 266 1999 Constitution shall cease to have effect after expiration of three months from the date of such appointment and the President shall not re – appoint a person whose appointment has lapsed.

Jurisdiction

The Customary Court of Appeal of the Federal Capital Territory, Abuja shall in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law.

Composition

For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any Act of the National Assembly, the Customary Court of Appeal shall be duly constituted if it consists of at least three Judges of that Court.

Practice and Procedure

Subject to the provisions of any Act of the National Assembly,

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the President of the Customary Court of Appeal of the Federal Capital Territory, Abuja may make rules for regulating the practice and procedure of the Customary Court of Appeal of the Federal Capital Territory, Abuja.

High Court of a state

Establishment:

There shall be a High Court for each state of the Federation which shall consist of a Chief Judge of the state; and such number of judges of the High Court as may be prescribed by a law of the House of Assembly of the state.

Appointment of Chief Judge and Judges

The appointment of a person to the office of Chief Judge of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council subject to confirmation of the appointment by the House of Assembly of the State.

The appointment of a person to the office of a judge of the High Court of a State shall be made by the Governor of the State acting on the recommendation of the National Judicial Council.

A person shall not be qualified to hold office of a Judge of the High Court of a State unless he is qualified to practice as a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years.

Moreover, if the office of the Chief Judge of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions

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of that office, or until the person holding the office has resumed those functions, the Governor of the State shall appoint the most senior Judge of the High Court to perform those functions.

Except on the recommendation of the National Judicial Council an appointment pursuant to sub-Section (4) of Section 271 of the 1999 Constitution shall cease to have effect after expiration of three months from the date of such appointment and the Governor shall not re – appoint a person whose appointment has lapsed.

General Jurisdiction

Subject to the provisions of Section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceeding in which the existence or extent of a legal right, power, duty, liability, priviledge, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

The reference to civil or criminal proceedings in this Section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the Court in the exercise of its appellate or supervisory jurisdiction.

Composition

Meanwhile, for the purpose of exercising any jurisdiction conferred upon it under the Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that Court.

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Practice and Procedure

Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State.

Sharia Court of Appeal of a State

Establishment:

There shall be for any state that requires it a Sharia Court of Appeal for that State which shall consist of a Grand Kadi of the Sharia Court of Appeal; and such number of Kadis of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State.

Appointment of Grand Kadi and Kadis

The appointment of a person to the office of the Grand Kadi of the Sharia Court of Appeal of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State.

The appointment of a person to the office of the Kadi of the Sharia Court of Appeal of a State shall be made by the Governor of the State on the recommendation of the National Judicial Council.

A person shall not be qualified to hold office as a Kadi of the Sharia Court of Appeal of a State unless:

(a) he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic Law from an institution acceptable to the National Judicial Council or.

(b) he has attended and has obtained a recognized qualification in Islamic Law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than ten years; and
   i) he either has considerable experience in the practice of Islamic law, or.
   ii) he is a distinguished scholar of Islamic law.

If the office of Grand Kadi of the Sharia Court of Appeal of a State is vacant or if a person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office, or until the person holding the office has resumed those functions, the governor of the State shall appoint the most senior Kadi of the Sharia Court of Appeal of the State to perform those functions.

Moreso, except on the recommendation of the National Judicial Council, an appointment pursuant to subSection (4) of this Section shall cease to have effect after the expiration of three months from the date of such appointment, and the Governor shall not re – appoint a person whose appointment has lapsed.

Jurisdiction

The Sharia Court of Appeal of a State shall, in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal Law which the Court is competent to decide in accordance with the provisions of subsection (2) of Section 277, 1999 Constitution.

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For the purposes of subsection (1) of Section 277 of the 1999 Constitution, the Sharia Court of Appeal shall be competent to decide:

- any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
- where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, regarding family relationship, a foundling or the guardianship of an infant;
- any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim.
- Any question of Islamic Personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or
- Where all the parties to the proceedings, being Muslims, have requested the Court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

Composition

For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any law, Sharia Court of Appeal of a State shall be duly constituted if it consists of at least three Kadis of that Court.

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Practice and Procedure

Subject to provisions of any law made by the House of Assembly of the State, the Grand Kadi of the Sharia Court of Appeal of the State may make rules regulating the practice and procedure of the Sharia Court of Appeal.

Customary Court of Appeal of a State

Establishment:

There shall be for any State that requires it a Customary Court of Appeal for that State which shall consist of:

- a President of the Customary Court of Appeal of the State; and.
- such number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.

Appointment of President and Judges

The appointment of a person to the office of President of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council, subject to confirmation of such appointment by the House of Assembly of the State.

The appointment of a person to the office of Judge of a Customary Court of Appeal shall be made by the Governor of the State on the recommendation of the National Judicial Council.

Apart from such other qualification as may be prescribed by a law of the House of Assembly of the State, a person shall not be qualified to hold office of a President or of a Judge of

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a Customary Court of Appeal of a State unless:

- he is a legal practitioner in Nigeria and he has been so qualified for a period of not less than ten years and
- in the opinion of the National Judicial Council he has considerable knowledge of and experience in the practice of customary law.

In addition, if the office of the President of Customary Court of Appeal of a State is vacant or if the person holding the office is for any reason unable to perform the functions of the office, then until a person has been appointed to and has assumed functions of that office, or until the person holding the office has resumed the functions that office, or until the person holding the office has resumed those functions, the Governor of the State shall appoint the most senior judge of the Customary Court of Appeal of the State to perform those functions.

Except on the recommendation of the National Judicial Council, an appointment pursuant to subsection (4) of Section 281 shall cease to have effect after the expiration of three months from the date of such appointment, and the Governor shall nor re–appoint a person whose appointment has lapsed.

Jurisdiction

A Customary Court of Appeal of a State shall exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law.

For the purpose of this Section, a Customary Court of Appeal of a State shall exercise such questions as may be prescribed by the House of Assembly of the State for which it is established.

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Composition

For the purpose of exercising any jurisdiction conferred upon it by the Constitution or any law, a Customary Court of Appeal of a State shall be duly constituted if it consists of at least three Judges of that Court.

Practice and Procedure

Subject to the provisions of any law made by the House of Assembly of the State, the President of the Customary Court of Appeal of the State may make rules for regulating the practice and procedure of the Customary Court of Appeal of the State.

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Chapter Three

Objections to Jurisdiction: grounds for:

Objection to Jurisdiction is a preliminary matter which the court must deal with one way or another in other to determine whether it has jurisdiction or not over the substantive matter. The word preliminary is derived from the lating verb "pracivdico ane" meaning, to decide before hand; to give a preliminary judgement.

Preliminary objection, by its very nature, deals strictly with law and there is no need for a supporting affidavit. In a preliminary objection, the applicant deals with law and the ground is that the Court lacks jurisdiction. If the preliminary objection is successful the Court will not hear the merit of the matter as it will be struck out. However, if a preliminary objection leaves the exclusive domain of law and flirts with the fact of the case, then the burden rests on the applicant to justify the objection by adducing facts in an affidavit.

It is my belief that Rules of Procedure for each Court has made separate provisions for raising a preliminary objection or a Motion on Notice. Our case law is replete with authorities that where a preliminary objection is raised on a point and the relevant facts upon which the objection is based are before

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the Court (such as the issuance of a writ of summons), there is no need for an additional affidavit evidence to be adduced. Where however, there are conflicting assertions as to any fact relating to the objection, or the facts are not before the Court, such objection ought to be commenced by way of Motion on Notice which would ensure that all relevant materials are annexed to the affidavit in support of the motion and placed before the Court.[43]

It is also a known law that an objection to the jurisdiction of the Court can be raised at any time, even when there are no pleadings filed and that a party raising such an objection need not bring the application under any rule of Court and that it can be brought under the inherent jurisdiction of the Court. Thus, for this reason, once the objection to the jurisdiction of the Court is raised, the Court has inherent power to consider the application even if the only process of Court that has been filed is the writ of summons and affidavit in support of an interlocutory application.[44]

The question is, when can an applicant file a Motion on Notice with an affidavit in a preliminary objection attacking the hearing of an appeal as a whole or part of an appeal?. The answer seems to be where a preliminary objection is attacking the hearing of the appeal as a whole, especially when it affects the jurisdiction of the lower Court, then the person objecting must file a Motion on Notice with an affidavit in support in order to state and clarify the grounds for so objecting. The effect of such exercise if successful is to have the whole appeal struck out.

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[43] See Bello V. National Bank of Nigeria Ltd. (1992) 6NWLR (Pt. 246) 206 @ 213 para F-H: Fawehinmi V. Abacha & ors (1996) 9 NWLR (pt. 475) 710 @ 765.

[44] See Arjay Ltd. V. Airline Management Ltd. (2003) 14NSCQR (Pt. 1) pg. 29, R. 1.

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Similarly, where the objection raised only concerns with some of the grounds then there is no need for the objection or to file Motion on Notice or Notice of Motion with an affidavit in support. It is quite unnecessary. It can be filed and treated in the *brief* of the respondent; provided; it is not challenging the jurisdiction of the lower Court. The objection is raised within the ambit of the law.[45]

Please note that where disputes as to facts appear on the pleading of the parties, it is only open to a defendant to raise a preliminary objection on the fact of the plaintiff's writ of summons if the said defendant accepts the plaintiff's averments of fact either on the writ of summons or on his statement of claim but submits that even in those circumstances no cause of action would appear to have been disclosed or the Court has no jurisdiction to entertain the suit or that the action is statute-barred by virtue of some Limitation Law. But, if facts exist, which must be first adduced in or established by evidence to enable a point of law to be sustained, the preliminary objection may not properly be taken.

Similarly, if the facts to sustain the preliminary point are obscure at large, a preliminary objection may not properly be taken. A matter, therefore, which is raised by way of a preliminary point but which may be answered if evidence is adduced cannot be properly raised as a preliminary objection. Such a matter is more properly answered by evidence during the trial and shall constitute an issue for determination at the trial.

The Court in any situation should not be left in doubt as to speculate to the true situations of matters, so that the party raising the objection would not fail where he fails to

[45] See SCOA V. Danbata (2003) 3 FR pg. 44, R. 2.

satisfactorily convince the Court, of the state of affairs of the trial.

It is legally apposite here, to examine the various grounds for raising objection *in limine* against the jurisdiction of any Court be it superior or inferior Courts or tribunals.

Res judicata

It is now beyond per adventure that once a dispute has been finally and judicially determined by a Court of competent jurisdiction neither the parties thereto nor their privies can subsequently be allowed to relitigate such matter in Court. This is a matter predicated on public policy that there must be an end to litigation.

In a bid to raise objection against the jurisdiction of a particular Court, the principle of law is well settled that the plea of estoppel *per rem judicatum* is a shield rather than a sword. Accordingly, the plea is not available to a plaintiff in his statement of claim as he would thereby be impugning the jurisdiction of the Court to which he has brought this action, since its successful plea would, in effect, oust the jurisdiction of the Court before which it is raised. A plaintiff cannot bring an action and at the same time plead estoppel *per rem judicata* in the case. This is because that would suggest ignominiously that the action he has brought is an abuse of the process of the Court, the cause having been previously adjudicated upon by a Court of competent jurisdiction and pronounced upon. Such a situation will necessarily oust the jurisdiction of the trial Court to entertain the suit all over again.

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Per Babalakin JSC explained the position of *res judicata* in **Sylvester Ukaegbu & ors V. Idunu Ugoji & ors**[46], when he said,

> *"in my view when a party pleads a judgement as estoppel, what he is telling the Court is that the Court should take that judgement into consideration in considering the totality of the present case before the Court. Whereas when he pleads res judicata, he is saying that although he already got judgement on the piece or parcel of land, he wants the Court to adjudicate on the matter that has already been adjudicated upon in its favour. This is contradiction in terms – he is asking the Court to judge what has already been judged hence in Yoye's case above it was said that res judicata oust the jurisdiction of the Court.*
>
> *In objecting to the jurisdiction of the Court, it cannot be over-emphasized that the plea of estoppel, to be effective must be specifically pleaded as going to be relied on per rem judicatum and not merely pleaded in a casual manner.*[47]

That the doctrine of *res judicata* will not apply where the causes of action are quite distinct from the earlier one referred to.

In the case of **Oshodi & 2ors V. Eyifunmi**[48] the appellants claimed against the 1st respondents forfeiture of its customary tenancy, possession of land, N100,000 damages and injunction. The action accordingly proceeded against the

[46] (1991) 6 NWLR (Pt. 196) 124 @ 144

[47] See Achiakpa V. Nduka (2001) 7NSCQR pg. 341, R. 4.

[48] (2000) 3NSCQR pg. 320, R. 4.

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four remaining defendants. Pleadings were ordered in the suit and were duly settled, filed and exchanged, with same amended by various orders of Court. At the subsequent trial, the parties testified on their own behalf. The defendants pleaded estoppel *per rem judicatum* which was founded on the judgement of the Ikeja High Court. The learned trial judge after a review of the evidence on the 7th day of July, 1988 found for the plaintiffs and held that although the parties and the issues in the previous suit and the present case were the same. The defence of estoppel *per rem judicata* was accordingly rejected. As regards the 2nd defendant, the learned trial judge found him liable in trespass. Being dissatisfied with this judgement of the trial Court, all the three defendants lodged an appeal to the Court of Appeal, Lagos Division, which Court in a unanimous decision affirmed the decision of the trial Court and dismissed their appeals. Aggrieved by this decision of the Court of Appeal, the defendants further appealed to the Supreme Court. The Court held that *"the plea of res judicata operates not only against the parties but also against the jurisdiction of the Court itself and robs the Court of its jurisdiction to entertain the same cause of action on the same issues previously determined by a Court of competent jurisdiction between the same parties. The parties affected are estopped per rem judicatum from bringing a fresh action before any Court on the same cause and on the same issues already pronounced upon by the Court in a previous action".*

Now, what are the conditions precedent to the invocation of estoppel *per rem judicata* in an attempt to castrate the Court from exercising its jurisdiction either original or appellate. In **Okukuje V. Akwido**[49] the Court said "it is long established

[49] (2001) 5NSCQR pg. 204, R. 6.

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by a long line of authorities that for the plea of estoppel *per rem judicata* to succeed, the party relying on it must establish that:

The parties or their privies are the same, namely that the parties involved in both the previous and the present proceedings are the same.

The claim or the issue in dispute in both proceedings are the same.

The *res* (or the subject-matter) of the litigation in the two cases are the same.

The decision relied upon to establish the plea of estoppel *per rem judicata* must be valid, subsisting and final and

The Court that gave the previous decision relied upon to sustain the plea must be a Court of competent jurisdiction.

The burden is on the party who sets up the defence of *res judicata* to establish the above pre-conditions conclusively. Once they are established, such previous judgement is conclusive and estops the plaintiff from making any claim contrary to the decision in the previous judgement.

In the same vein, the jurisdiction of a Court was ousted through the plea of estoppel *per rem judicata* in the case of **Egesimba V. Onuzuruike**[50] where the plaintiff sued the defendant in the Imo State High Court for declaration of title to land, damages for trespass and injunction. The plaintiff claimed that the land in dispute devolved on him by inheritance through his ancestors while the defendant also claimed title by inheritance having descended to him from one Okorie, through his father, one Onuzuruike. The defendant also claimed that the plaintiff forebears were tribute paying customary tenants on the land in dispute which has reverted to him after the

[50] (2002) 11NSCQR pg. 588, R. 18.

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happening of an event and the defendant took possession in 1938. The defendant also relied on a customary arbitration which went in his favour. Pleadings were filed and exchanged. After the trial, the trial judge gave judgement in favour of the plaintiff and against the defendant. The defendant appealed to the Court of Appeal which set aside the trial Court's judgements and allowed the appeal. Hence the appeal to the Supreme Court. In an attempt by the Court to distinguish between estoppel and *res judicata,* the Court held, "estoppel and *res judicata* do not mean the same thing. In **Ukaegbu V. Ugoji**[51], the Supreme Court held that when a party pleads a judgement as estoppel what he is telling the Court is that the Court should take that judgement into consideration in considering the totality of his present case before the Court. Whereas when he pleads *res judicata* he is saying that although he has already got judgement on say a piece or parcel of land he wants the Court to adjudicate on the matter that has already been adjudicated in his favour. This the Court held, is contradiction in terms because he is asking the Court to judge what has already been judged, hence it is said that *res judicata* ousts the jurisdiction of the Court. The plea of *res judicata*, the Court held, will arise where the plaintiff in the said previous judgement or his privy in title was the plaintiff in the previous judgement relied upon. On the other hand, the plaintiff will be estoppel where plaintiff or his privy in title was defendant in the case pleaded as estoppel.

Estoppel is an admission or something which the law views as equivalent to an admission. By its very nature, it is so important, so conclusive that the party whom it affects is not allowed to plead against it or adduce evidence to contradict it.

[51] (1991) 6NWLR (Pt. 196) 127

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Res judicata on the other hand, operates not only against the party whom it affects but also against the jurisdiction of the Court itself. The party affected is estopped per rem judicatum from bringing a fresh claim before the Court and at the same time the jurisdiction of the Court to hear such claim is ousted."

So also **Per Edozie JCA** (as he then was) **in Ishie V. Mowanso**[52] said, "the effect of a successful plea of *res judicata* is to oust the jurisdiction of the Court as it prohibits the Court from inquiring into a matter already adjucated upon. Thus, once the plea of *res judicata* is made out by a party seeking to rely on it, the claim filed by the other party would be dismissed on the ground that the Court lacks jurisdiction to allow parties to relitigate the same issues again."[53]

On how the Court would determine whether the issue of estoppel per *rem judicata* exists in a matter.

This cannot be over-emphasized that in the determination of whether the plea of estoppel *per rem judicata* or whether the parties, the issues and the subject-matter in both the previous and the present actions are the same, the Court is permitted to study the pleadings, the proceedings and the judgement in the previous suit. The Court may also examine the reasons for the judgement and other relevant facts to discover what in fact was in issue in the previous proceeding".[54]

Service of Court Processes

Generally speaking, it is well settled law that service of Court process is a condition precedent to the exercise of jurisdiction by the Court out of whose registry the writ or process was

[52] (2000) 13NWLR (Pt. 684) 292, para C.

[53] See Yoye V. Olubode (1974) 10SC 209, Odadhe V. Okuyemi (1973) 11SC 343.

[54] See Okukuje V. Akwido 2001) 5NSCQR pg. 204, R. 7.

issued. Under our adversary system of jurisprudence, to hear a case without one of the parties having been served with the necessary process except in a proper *ex-parte* proceedings would render the trial a nullity as service of the Court's processes are basic and indispensable to any effective adjudication. Where service of a process is required, failure to serve it is a fundamental vice and the person affected by the order but was not served with the process, is entitled *ex debito justitiae* (as a matter of right) to have the order set aside as a nullity. Accordingly, service of a process in proceedings other than in *ex-parte* proceedings is fundamental to the assumption of jurisdiction. Failure to serve a process where service is required goes to the root of proper conceptions of recognized procedure of litigation. It is a fundamental irregularity which renders null and void an order made against the party who should have been served. As the idea that an order can validly be made against a party who has no notification of the action against him is one that is clearly undesirable and indeed, unacceptable in our judicial system.

It is also not an overstatement that failure to serve Court process is a breach of fair hearing (i.e. *audi alteram partem* meaning nobody must be condemned unheard).

It is hereby pertinent and germane for the Court to ensure that the rules governing the service of Court processes are substantially complied with *stricto sensu* because rules of Courts are meant to be obeyed.

The laws in this country recognize two modes of serving Court processes, that is *personal service* and *substituted service,* either of which must be employed expeditiously for proper administration of justice. That is why it is very fundamental and necessary for the Court to have before it, the evidence of

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the service of the process. The appearance in Court of the party as ordered in the process or on the return date as stated in it or on the hearing notice attached thereto is the strongest evidence of service. Rules of Court provide the modes of proof of service e.g. by a certificate or affidavit of the bailiff or any officer of the Court. This is because of the fundamental requirement of the proof of service of a process on a party.

It should be noted essentially that the object of all types of service of processes, whether personal or substituted, is to give notice to the other party on whom service is to be effected so that he might be aware of, and able to resist, if he may, that which is sought against him. Therefore, since the primary consideration in an application for substituted service is as to how the matter can be best brought to the attention of the other party concerned, the Court must be satisfied that the mode of service proposed would probably, after all practicable means of effecting personal service have proved abortive, give him notice of the process concerned.[55]

Let us visit some case laws in respect of the above *res.*

In the case of **Kalu Mark V. Eke**[56], one of the legal issues in this case is whether a bailiff's affidavit of service is a conclusive proof of service, under the law. The plaintiff claimed before the High Court of Abia state in the Aba Judicial Division holden at Aba the sum of N1,992,225.16k (one million nine hundred and ninety two thousand, two hundred and twenty-five naira and sixteen kobo) being money had and received by the defendants for a consideration which has failed. The claim is against the defendants jointly and severally.

The plaintiff filed a counter-affidavit in opposition to the motion wherein by paragraph 5 of the said counter-affidavit

[55] See United Nigeria Press Ltd. & Anor V. T. O. Adebanjo (1969) ANLR 422.
[56] (2004) 17 NSCQR pg. 60, R. 4 – 7.

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he showed that the defendants were served with the originating summons by pasting the same on the door of their office at No. 102 School Road Aba and a copy of the affidavit of service sworn to by the bailiff was attached to the counter-affidavit. After the hearing of the application in his ruling delivered on the 20/1/1990, the learned trial judge refused the application.

The Court held as follows:

when an order is made or judgement is entered against a defendant who claimed not to have been served with the originating process, such an order or judgement becomes a nullity if the defendant proves non service of the originating process. It is a nullity because the service of the originating process is a condition *sine qua non* to the exercise of any jurisdiction on the defendant. If there is no service the fundamental rule of natural justice: *audi alteram partem* will be breached.

It is now settled law that the failure to serve process, where the service of process is required such as in this case, is a failure which goes to the root of the case. It is the service of the process of the Court on the defendant that confers on the Court the competence and the jurisdiction to adjudicate on the matter. It is clear that due service of the process of the Court is a condition precedent to the hearing of the suit. Therefore if there is a failure to serve the process, where the service of the process is required the person affected by the order, but not served with process, is, as mentioned above entitled *ex debito justitiae* to have the order set aside as a nullity.

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Where a process has been served, it is necessary for the Court to have before it evidence of that fact. Service of the process especially the originating process is an essential *condition for the Court to have the competence or the* jurisdiction to entertain the matter. Further, failure to comply with this condition would render the whole proceedings including the judgement entered, and all subsequent proceedings based thereon, wholly irregular, null and void. That is why the proof of service of the process on a defendant is very fundamental to the issue of the jurisdiction and competence of the Court to adjudicate.

The need for substituted service arose because personal service cannot be effected and since personal service can only be effected on natural or juristic persons, the procedure for substituted service cannot be made to a corporation like the 2nd appellant herein. With reference to the 1st appellant, a natural and juristic person, an order of substituted service of the process could be ordered where it was found necessary to adopt the procedure. The procedure for substituted service is invoked where the defendant is untraceable or is evading service. But the rules provide that the Court must be satisfied, that personal service cannot be conveniently effected. Where it is necessary to adopt the procedure of substituted service, the plaintiff makes an application to the Court by an *Ex-parte* Motion. The affidavit in support should state the grounds on which the application is based. The abortive efforts at personal service must also be recounted. The recording of the proceedings in the instant appeal does not include the application for the order.

Similarly, in the case of **Auto Import Export V. Adebayo**[57] one of the legal issues is whether, as contended by the appellant, this appeal was filed within the time prescribed by law and therefore competent. The appeal came up for hearing before the Supreme Court on the 7th day of October, 2002. The respondents raised a vital issue in their respondents' brief which boils down to the issue of jurisdiction. The respondents contended that the appeal was filed out of time and no leave was sought to appeal out of time.

The appellant in his argument contended that he filed a motion on notice seeking for various reliefs including leave to appeal, extension of time within which to seek leave to appeal, extension of time within which to appeal and an order deeming as properly filed and served the notice of appeal dated the 4th October, 1996. The above reliefs were granted on the 17th day of November, 1998. The respondents however contended that the said motion was not served on them and whatever order of Court granted thereupon was a nullity as it was granted without jurisdiction. The Supreme Court found for the respondents and ruled that there was no valid appeal before it. The Court held *inter alia* as follows:

> "Rules of Court provide for the period or time within which a Court process should be filed and the rules expect parties to file the process within the period or time stipulated. Because of human failings, exigencies and contingencies, there could be situations where a Court process is not filed within the period or time stipulated by the rules. Rules of Court anticipate such situations and make provisions for extension of time within which a Court process could be filed. The rules allow a party in default to file a Court process out of time if he seeks leave."

[57] (2002) 12NSCQR pg. 357, R. 8 & 9.

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Rules of Court are meant to be obeyed. They are not made for the fun of rules qua regulations. Failure to obtain leave for extension of time to appeal within the specified time or period is a substantial irregularity which affects the props and foundations of the appeal. It is beyond mere technicality which this Court cannot forgive.

Again, in **Eimskip Ltd. V. Exquisite Ltd.**[58] In this case the learned trial judge ordered that delivery of original process on Brawal who is not an agent and with whom the appellant has no business relationship is sufficient service on the appellant. The appellant motion to set aside the service and dismiss the claim for want of jurisdiction was dismissed by the trial judge. An appeal to the Court of Appeal was dismissed. Dissatisfied with the judgement, the appellant appealed to the Supreme Court. The Court held *inter alia*; that

"In **Craig V. Kansen (1943) KB 256 at page 262 – 263**; (1943) 1 AER 108 at page 113 Lord Greene MR observed: "The question therefore, which we have to decide is whether the admitted failure to serve on the defendant the summons on which the order of January 18, 1940, was based was a mere irregularity, or whether it gives the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex-parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it has never been adopted in this country. It cannot be maintained that an

[58] (2003) 13NSCQR pg. 489, R. 7.

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order which has been made in those circumstances is to be treated as a mere irregularity and not as something which is affected by a fundamental vice. The affidavit of service in the present case was on the fact of it insufficient, and no order should have been completed on the strength of it. This case as followed by this Court in **Sken-Consult V. Ukey (1981) 1 SC 6** at page 26 where Nnamani JSC observed, "the service of process on the defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions/precedent required before the Court can have competence and jurisdiction. This very well accords with the principles of natural justice".

It is not in dispute that the appellant resided, and still resides in Iceland out of the jurisdiction of the Federal High Court. It is equally not in dispute that she had no place of business in this country. It follows that if the service of Court process had to be served on her, the rules governing service out of jurisdiction must be complied with; that is, there must be compliance with rules 13 and 14. It is futile arguing that the plaintff's motion dated 22nd December 1992 and filed on 23/12/92 seeking to serve the appellant with Court processes through the second defendant complied with rules 13 and 14. The affidavit in support of the motion failed to show "in what place or country such defendant is or probably may be found. The motion itself was not for leave to serve processes out of jurisdiction. It is apparent on the face of the motion papers that the plaintiff was more concerned with her prayer for joinder that she paid little or no attention to the

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requirements of the rules as to service out of jurisdiction … As there was non-compliance by the plaintiff with those rules, her prayer (2) for service of Court processes ought to have been refused by the learned trial judge and he should have set the same aside on the application of the appellant. The Court below too ought not to have affirmed the order for service made by the learned trial judge but should have set it aside following the refusal of the latter to do so.

Service is a pre-condition to the exercise of jurisdiction by the Court. Where there is no service or there is a procedural fault in service, the subsequent proceedings are a nullity *ab initio*. This is based on the principle of law that a party should know or be aware that there is a suit against him so that he can prepare a defence. If after service he does not put up a defence, the law will assume and rightly too for that matter, that he had no defence. But where a defendant is not aware of a pending litigation because he was not served, the proceedings held outside him will be null and void.

In the case of **A. G. Anambra & ors V. Okeke & ors**[59], the plaintiffs therein on the 16th of December 1993 obtained an interim injunction against the defendants. The plaintiffs later brought an application for committal of the defendants for their disobedience of the order. On 20th December plaintiff's counsel withdrew the application against the 2nd and 5th defendants who had not been served. Those defendants were accordingly struck out from the application. At the time the application came up for hearing, there were two applications

[59] **(2002) 10NSCQR (part II) pg. 792, R. 2.**

before the trial Court i.e. an application for committal and another by the defendants to strike out plaintiffs suit for want of locus standi. The defendants further filed a notice of objection to the committal application on the ground of non-compliance with the provisions of Order 1 Rule 14 of the judgement (Enforcement) Rules. The trial Court after hearing submissions from counsel upheld the objection and struck out the application for committal.

The plaintiffs appealed against the judgement. The Court of Appeal held that there was full compliance with Order 9 rule 13(6) of the judgement (Enforcement) Rules. The Court of Appeal then acted under Section 16 of the Court of Appeal Act, 1976 by rehearing the case and holding that the case for committal had been proved thereby committing the 2nd, 3rd, 4th, 5th and 6th defendants to prison with options of fine. The defendants have severally appealed to the Supreme Court in three different appeals. The Court held *inter alia*; "where service of a Court process is in dispute a bailiff can discharge the burden by swearing to an affidavit of service. I add that where a certificate of service in terms of Order 7 Rule 16 of the High Court Rules of Anambra state is produced, its production also serves the purpose of proof of service, but that does not mean that it is an exclusive means of proof of service".

In **Societe Generale Bank (Nig) Ltd. V. John Adebayo Adewumi**[60], the legal issues in this case are as follows:

Whether it was proper for the Court of Appeal to have *suo motu* raised the issue of validity of the service of the Writ of Summons on the appellant contrary to the 2 grounds of appeal alleging non-service of the Writ of Summons and other Court processes on the appellant on which issues were joined

[60] (2003) 14NSCQR (pt. 1) pg. 119, R. 1, 2, 3, 4, 5, 10, 11 & 12.

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and canvassed upon by the parties.

Whether the question raised *suo motu* and relied upon in determining the appeal without hearing from the parties amount to an error in law which has occasioned substantial miscarriage of justice.

Whether the conclusion or findings by the Court below that there was no credible proof that the appellant was served with the writ of summons and other Court processes etc is sustainable from the facts and evidences before it. The Court held inter alia as follows:

> *'The issue of the validity of the writ of summons and other Court processes revolves around the issue of whether the defendant was properly served or not especially in the light of documents produced by the plaintiff in proof of service but which document were not produced at the hearing in the Court of trial. In law an invalid service is no service. Under the rules two conditions are prescribed. The first is that there must be an affidavit of service. The second condition is that such affidavit shall be produced at the trial. Both conditions, I dare say, must be satisfied. It is to be recognized that the purpose of an affidavit of service is to convince the Court that the person on whom the processes are to be served, has been duly served, it must be produced before the learned trial judge as prima facie evidence of service. It is not to be kept away, where it has been sworn to, to be produced at a later stage on appeal. Failure to serve process where service of process is required is a fundamental vice. It deprives the trial Court of the necessary competence and jurisdiction to hear the suit. In other words the condition precedent to the exercise*

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of jurisdiction was not fulfilled. That being so, the trial Court, in my view, had no jurisdiction to hear the case before it on 14/2/94, and to enter judgement for the plaintiff. The proceedings of 14th February 1994 were a nullity. In the instant case the learned trial judge was clearly in error to have accepted at its face value the statement of the respondents' counsel especially in a situation such as this, when personal service could not be effected and the Court had to order substituted service. I also agree with the decision of the Court below, that considering the circumstances of this case the credibility of the exhibits tendered in that Court proving due service is clearly questionable."

In **Ahmed & Anor V. Crown Bank Ltd.**[61] the issue is whether the proceedings conducted on 10/1/2001 resulting in the winding-up of Crown Merchant Bank is a nullity.

The appeal here is against the decision of the Court below i.e. Federal High Court sitting in Lagos (Coram Gumel J) delivered on 10th January, 2001 making an order for the winding-up of the respondent without any hearing notice issued and served on the appellant to that effect. The Court held *inter alia* as follows:

"Service of process on parties in a case so as to enable them appear to prosecute and defend the case respectively and of course ensuring their due appearance and that of their respective counsel in Court are fundamental condition to be seen to have been fulfilled before a Court can have competence and exercise jurisdiction over the case. This

[61] (2004) 1FR pg. 138, R. 3 & 4.

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accords with the principle of natural justice. It is a requirement of principles of fair hearing. Indeed, one of the essential elements of natural justice is that both sides to a case shall not only be heard but they shall be seen in the true eyes of the law to be heard. The principles of natural justice are part of the pillars that sustain the concept of rule of law. They are unavoidable part of the process of adjudication in any civilized society; Nigeria is not an exception. When proceedings are conducted with a flagrant violation of the principle of natural justice, a Court lacks the jurisdiction to entertain the suit and if it did on the face of the aforementioned violation, all proceedings before the Court are nullity."

In **Kraus. Thompson V. UNICAL**[62]. The Court of Appeal held that *"in view of the finding which the lower Court made and which has not been challenged on appeal, this appeal therefore succeeds". It further made an order striking out the suit by the plaintiff. The plaintiff has further appealed to the Supreme Court. The Court held inter alia "... A corporate body in this context, either a company registered under the Companies and Allied Matters Act, 1990 or a statutory corporation such as the respondent in this case, can only be served under the relevant rules of Court, by giving the writ of summons or document to any director, trustee, secretary, or other principal officer of the corporate body to be served, or by leaving the same at its registered or head office. It is bad or ineffective to serve the documents at any branch office".*

[62] (2004) (pt. 1) 18NSCQR pg. 262, R. 6.

In **Kenfrank Nig. Ltd. V. Union Bank Plc**[63] , one of the legal issues is whether the lower Court was correct in its conclusion that there was proper service of the Writ of Summons on 1st and 3rd defendants the Court held *inter alia* as follows that:

"in the case the of ***Panache Communications Ltd $20rs V. Mrs. Rebecca Aikhomu*** [64a] *cited and relied on by Mr Duru thus: "In this particular case, the bailiff served the writ of summons on the 1st respondent by giving the writs to the lady who ultimately delivered the processes to those who were directly concerned, which action, in my view, means that the people who were directly concerned, have been served personally. What has not been effected is the fact that the bailiff has not served the process by himself in person to the people to be served. The requirement of the law here is that the parties to be sued must be served personally, meaning that the processes must be given to them. The law does not require that a person to give it to them must give it to them by himself. That leaving the processes at the registered office of the company, would seem to have been better served by giving the processes to someone, even though not among the principal officers stipulated in the rules, but whose duty would make it obligatory for him or her to deliver the processes to the person rightly concerned. It went on to hold that leaving the processes with the receptionist, would have achieved the desired aim than throwing the processes on the floor of the corridor of the registered office. The rule of the Court prescribes as one mode of service on a company, service on the secretary. See Order 12, Rule 8 of the Imo State High Court (Civil Procedure) Rules, 1998, applicable in Abia State. In this case the secretary immediately passed the writ to M.D/C.E.O. of the Company, who is in fact its alter ego. They took immediate action by passing the writs on their Lawyers. In my view, it would be undue technicality to*

[63] (2003) 2 FR pg. 25, R. 1 – 3.

[64a] (1994) 2NWLR (pt 327) 420 @431,C-D

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insist that service on the defendants had not been proved. For these reasons, I must agree with the learned judge that proper service on the 1st defendant was proved.."

Also in **Ajidahun v. Ajidahum**[64b]**,** the respondent was the petitioner in the trial Court. On 31/10/95, she filed a petition against the appellant for decree of dissolution of marriage celebrated on 26/10/91,on the sole ground that the marriage had broken down irretrievably by reasons of parties to the marriage having lived apart for a continuous period of at least three years immediately preceding the presentation of the petition. After all relevant processes had been served on the appellant and he failed to file any process to challenge the petition, the trial Court set down the petition for trial as undefended. The judgement was given in favour of the respondent .Dissatisfied with the judgement, the appellant appealed to the Court of Appeal contending that he was denied fair hearing. The Court held among others. "*That the issue of service of processes is fundamental to the jurisdiction of the Court. If there is no proper service it follows that the action is improperly constituted and the Court is without jurisdiction. The defendant must be served with the process so as to enable him appear in Court to defend the relief being sought against him. Due appearance by the party or his counsel are the fundamental conditions precedent required before the Court can have competence and jurisdiction for this very well accords with the principle of natural justice. That the appellant was duly served with all the relevant petition papers. The fact of service on him stands unchallenged and it is not contradicted. The appellant having been properly and duly served, the lower Court was competent and had jurisdiction to hear the respondent's petition."*

[64b] (2002)ISMC pg 24, R.1

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Moreover, in **Skenconsult V, Ukey**[65] where the Supreme Court said: *"this Court was of the view that failure to serve process was a fundamental vice and the person affected is entitled to have the order set-aside. It also decided that service on the legal practitioner was insufficient and the High Court had inherent jurisdiction to grant plaintiff's application."*

Finally, in **Akeredolu & ors V. Aminu & ors**[66]. The Court held *inter alia* as follows:

> *"It is trite that a case which is lacking in proof of service of process on the other party will gravely affect jurisdiction as such a case would not have been initiated by due process of law. It is also of moment to state that the issue of service is intrinsic as non service of a Court process will affect the competence of the Court to adjudicate in the matter. A close study of the record of proceedings and in particular the ruling of the lower Court delivered on the 31st July, 1989 showed that the necessary papers and processes, that is to say the amended Writ of Summons and Statement of Claims and Hearing Notices were served on the respondents as was patently opined by the learned trial Judge. Such proof of service conferred sufficient jurisdiction on the lower Court and cannot be faulted."*

[65] (2001) 6 NSCQR (pt I1) pg 1108 at 1126

[66] (2004) IFR pg 161, R. 4 & 7 .

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Locus Standi

By and large, locus standi is defined as a legal capacity to institute, initiate or commence an action in a competent Court of law or tribunal without inhibition, obstruction or hindrance from any person or body whatsoever including the provision of any existing law. The locus standi raises the question whether the person whose standing is in issue is the proper person to seek an adjudication of the issue. It is not whether the issue itself is justifiable or whether the case was likely to succeed. The issue is whether the plaintiff has sufficient legal interest; that, is whether there is a breach of the civil rights and obligations of the plaintiff.

Now what are the Principles Relating to the Application of Locus Standi

1) In ascertaining whether a plaintiff in an action has locus standi, the pleadings, and the Statement of Claim must disclose a cause of action vested in the plaintiff. The averment in the pleadings will disclose the rights and obligations or interests of the plaintiff which have been violated.

2) The issue of locus standi can be raised at any time in the course of trial or on appeal because it is an indirect questioning of the jurisdiction of the Court.

3) Locus standi means a place of standing to interfere. A right of appearance in a Court of Justice or before a legislative body on a given question. A right to be heard.

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4) In determining whether a person has locus standi or not, the following factors are guide lines:
   (a) For a person to have locus Standi in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed.
   (b) The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue.
   (c) Whether a person's civil rights and obligations have been affected depends on the particular facts of the case.
   (d) the Court shall not give an unduly restrictive interpretation to the expression of locus standi.

5) There are two tests used in determining the locus standi of a person namely:
   (a) The action must be justifiable; and
   (b) There must be a dispute between the parties

6) The law is that when a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper person to request an adjudication of an issue and not whether the issue itself is justifiable. The question whether or not a claimant has sufficient justifiable interest or sufferance of injury or damage depends on the facts and circumstances of each case. **See Ajagungbade III V. Adeyelu II**[67]

[67] (2003) 9 W. R. N. pg 92, R. 3; Lawrence Elendu & ors V. Felix Ekwoba & 4 ors (1995) 3 NWLR (pt 386) pg 704 @ 737 – 744 CA.

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How relevant is locus standi with Section 6(6) (b) of the 1999 Constitution.

In Nigeria. It is a Constitutional requirement to enable a person to maintain an action in a Court of law to show an infringement of his civil right. This power is limited to the prosecution of matters relating to the civil rights and obligations of the plaintiffs, be that plaintiff a person or persons, government or authority or any other juristic person vide Section (6) (6) (b) which provides as follows: "The judicial powers vested in accordance with the foregoing provisions of this Section shall extend to government or authority, and to all actions and proceedings, relating thereto, for the determination of any question as to the civil rights and obligations of that person".

Now, by virtue of the above Constitutional provision, to entitle a person to invoke judicial power he must show that either his personal interest will immediately be or has been adversely affected by the action or that he has sustained an injury to himself or is in immediate danger of sustaining an injury to himself and which interest or injury is over and above that of the general public. What constitutes a legal right, sufficient special interest or interest adversely affected, will of course, depend on the facts of each case. Whether an interest is worthy of protection is a matter of judicial discretion which might vary according to the remedy asked for .**see Edozie JCA (as he then was) in Elendu & ors V. Ekwoaba & ors (Supra)**[68].

[68] Adewumi & ors V. A. G Ekiti & ors (2002) 9NSCQR pg 66, R. 10; Fawehinmi V. I. G. P (2002) 10 NSCQR (pt 2) pg 825, R. 18.

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How Fundamental is Locus Standi

It is trite law that the locus standi of the plaintiff is a crucial matter touching on the competence of the jurisdiction of the Court to adjudicate on the suit or application before it. It is a fundamental jurisdictional question that can be raised at any time during the trial as a preliminary issue or even raised for the first time on appeal. That is, where a jurisdictional issue is raised, the Court is obliged to determine or disposed it off before going into the merits of the case.

Distinction between Legal Personality and Locus Standi

It is only a legal person i.e. a person or body capable of suing or being sued that can possibly lack locus standi to bring or pursue particular actions. One may have legal capacity to sue but may not have the right or standing to institute the action. And neither is the failure to disclose a cause of action in the statement of claim, a case of locus standi. **See Bank of Baroda V. Iyalabani (2002) IINSCQR pg 498, R. 4& 12.**

What are the Legal Implications of Locus Standi on Jurisdiction of a Court

The issue of locus standi leads to competence of proper person(s) being before the Court and which is extrinsic to jurisdiction as no matter how the proceedings is well conducted if the action is incompetent, the whole trial is a nullity. In **Madukolu V. Nkemdilim (2001) 46 W. R. N. I; (1992) 2SCNLR 341 @348** it was held that a Court is competent when:

> *it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another and, the*

subject-matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction and, the case comes before the Court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. Furthermore, any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication. It is trite law that once the locus standi of a party is challenged, it has to be resolved first before any other consideration of the matter." ***See Ajagungbade III V. Adeyelu II (2002) 9W. R. N pg 92 R. 2.***

In **Niger Insurance V. Chase Ins. Brokers Ltd (2004) 34 W. R. N pg 154, R. 1&2.** the plaintiff is a registered company carrying on businesses as insurance brokers and pension consultants. The defendant is a registered Insurance Company carrying on insurance business in Abuja and other parts of the Country. The Federal Government of Nigeria authorized Federal Civil Service to arrange and constitute unified pension schemes for parastatals and agencies under each Federal Ministry, and in furtherance of which each ministry approved appointment of insurance brokers to the said scheme. The plaintiff was appointed brokers to the unified scheme for the Federal Ministry of Science and Technology. The Nigerian Export Promotion Council not being in any unified scheme, appointed the plaintiff as brokers to its pension scheme.

The defendant owes the plaintiff certain amount of money for the assignments and duties carried out. The plaintiff sued on that platform and the defendant denied the allegations. After

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hearing has commenced, the defendant Counsel filed a motion challenging the *locus standi* of the plaintiff to commence and prosecute the suit. In his ruling on the application, the learned trial chief Judge dismissed the application. Dissatisfied with the dismissal, the defendant appealed to this Court. The Court held inter alia as follows:

> *"it must be made clear that the issue of competence of a plaintiff to institute a suit is so vital and important that it touches on the jurisdiction of a trial Court. Where a party lacks competence, the trial Court lacks jurisdiction to entertain the suit. If, in spite of lack of jurisdiction, the trial Court goes ahead to treat the suit, its treatment of the suit is a worthless exercise which must ultimately be set aside however well conducted as it is a nullity."*[69]

In **Unuigbe V. Lawson (2003) 12FR pg 223, R.2.** Per Ibiyeye JCA said "in dealing with the issue of locus standi, it is instructive to add that once the issue of locus standi of the plaintiff is challenged by the defendant, the issue must be considered and taken first as locus standi goes to jurisdiction and competence of the proceedings ..."

Also in **Wema Bank V. Alhaji Anisere**[70], Per Omage JCA held that, "it has long been established by several legal authorities that the capacity, if you like, the ability to sue a defendant or adversary is the plank on which the claim may remain in the Court or be struck out. That ability is in law called the locus standi. Without its presence in the plaintiff ...

[69] See Baba V. Habib (Nig.) Bank Ltd (2001) 15WRN 145; (2001) 7NWLR (pt712) 496.

[70] (2003) 3FR pg 98

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the so-called plaintiff labours in vain, in a Court of Law whatever his grouse is however grievous, the lack of locus standi disrobes the Court of a jurisdiction and it goes to the competency of the Court to adjudicate on the complaints of the plaintiff the Court will have no jurisdiction.

What kind of order should the Court make in this situation? The appropriate order should be one striking out the plaintiff's action. **See Okegbe & ors V. Chikere & ors (2000) 3NSCQR pg 218, R.10.**

Juristic Person

A person who is made a party to an action either as a plaintiff or as a defendant must be a legal person or, if not, a body vested by law with power to sue or, be sued.

As a general rule, only juristic persons have inherent right and/or power to sue and be sued in their names. Non legal persons or entities, again as a general proposition of law, may neither sue nor be sued except, where such right to sue or be sued is created and/or vested by or under a statute.

Moreover, for a company or any association to be known to law, such company or association must be duly incorporated. The single most important consequence of incorporation is the separate legal personality which the company acquires upon incorporation under an appropriate law.

Juristic persons who may sue or be sued *eo nomine* have been recognized to include;

i) Natural persons, that is to say, human beings;
ii) Companies incorporated under the Companies Act
iii) Corporations aggregate and corporations sole with perpetual succession;

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iv) Certain unincorporated Associations granted the status of legal personae by law as;

(a) Registered Trade Unions;

(b) Partnerships and

(c) Friendly, societies or sole proprietorships

In the case of partnerships, companies, trade unions, sole proprietorships or corporation sole or aggregate, the best evidence in the event of a dispute as to their juristic personalities or their right to sue or be sued *eo nomine* is the production of their certificates of registration or incorporation under the relevant laws.

The right to sue or be sued *eo nomine* apart from the fact that it can be created by or under a statute may also be established pursuant to some enabling statutory provisions. Such a right may therefore be vested by the rules of Court appropriately made pursuant to and under powers conferred by the relevant law or statute establishing the Court. **See Knight and Searle V. Dove**[71].

Accordingly, where the rules of Court vest the right to be sued eo nomine on an individual doing business within jurisdiction in a name other than his own, such right to all intents and purposes, must be recognized as validly vested. **See Iyke Med. Merchandise V. Pfizer Inc. (2001) (pt 1) 6 NSCQR pg. 997 R. 11.**

Having recognized and take cognizance of the above facts, what is the legal implication of naming or making a non-juristic person a party in a suit? Making a non-juristic person as a party in a lawsuit is a monumental and fundamental mistake

[71] (1964) 2 ALL E. R. 307 @ 309; Fawehinmi V. N.B.A. (No. 2) (1989) 2 NWLR 558.

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that cannot be cured by amendment. Any amendment aimed at changing the name of such party (non-juristic person) will not be allowed by the Court save where it is a misnomer.

The *ratio decidendi* in **Emecheta V. Ogueri**[72] are profitable in this regard. They are as follows:

> *"naming a non-juristic person as a defendant is not a misnomer and cannot be amended to substitute a juristic person. The Law is settled that generally, a non-juristic person cannot sue or be sued. Once it is established that there is no proper defendant before the Court, it is not necessary to examine whether there is a proper cause of action, because the nexus between a cause of action and the parties is not there. Thus, if a person who is not a juristic person is sued the action would be struck out".*

Similarly, in the case of **MAERSK LINE V. Addide & or**[73] the 1st plaintiff (the 1st respondent in this appeal) filed an action against the defendants (now appellants) in the Federal High Court. On the application of the 1st plaintiff, the 2nd plaintiff, Abex Trading Ltd was joined. The claim concerns goods carried on board a vessel MV CHRISTIAN MAERSK 9506 under combined Transport Bills of Lading that were alleged to have been delivered in a damaged state.

Subsequently, there were series of interlocutory applications on the part of the defendants: First, that the order joining the 2nd plaintiff be set aside for it was joined in the absence of the defendants and his counsel and that the order

[72] (1996) 5 NWLR (pt 447) 227

[73] (2002) 10 NSCQR (pt 1) pg 579

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for joinder was made in chambers. Secondly, that the name of the 1st defendant be struck out on the grounds that MAERSK LINE not being a juristic entity lacked capacity to sue or be sued. There was a third motion whereby the plaintiff sought to join more parties as defendants and to amend the statement of claim. The motions were taken and the learned trial judge refused the application to join fresh defendants on the part of the plaintiffs but allowed the amendment of the name of the 1st defendant to reflect the true name of the 1st defendant. He also refused an application to set aside the order joining the 2nd plaintiff. The defendants appealed to the Court of Appeal and their appeal was dismissed. Hence, this further, appeals to the Supreme Court. The Court held, "the case of the defendants which the plaintiffs seemed to agree with, is that MAERSK LINE is a trade mark. Of course if it is a trade mark, it cannot sue or be sued as it is not a juristic person. It is its proprietor that can sue or be sued.

Also in **The Board of Governors Olofin Anglican Grammar School, Idanre V. Aina & ors**[74], the plaintiff claimed N1,748.00 against the defendants jointly and severally as damages for a breach by the first defendant of an agreement between the plaintiff and the defendants. The first defendant was a student sponsored by the plaintiff for Bachelors of Science Degree Course at the University of Ibadan between 1964 and 1967. Under the agreement, the first defendant was obliged to serve the plaintiff for a period of two years upon the completion of his course. In pursuance of the said agreement the plaintiff spent a sum of N1,748 on the first defendant during the course in June 1967. The first defendant refused to serve the plaintiff and the defendants refused jointly

[74] (1976) 6. U.I.L.R (pt 1) pg 26

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and severally to pay the said sum of N1,748 when demanded by the plaintiff. In his statement of defence the first defendant stated that the Plaintiff was not a legal body capable of suing the defendants. The Court held as follows:

> *"that a party to an action must be a person known to law; or an entity with his own legal personality. That if it is shown that a party to an action is not a legal person, that person must be struck out of the suit; and if such a person is the plaintiff, the action should be struck out. That an unincorporated association is not a legal person and therefore can not sue or be sued unless it is authorized by express or implied statutory provisions. That the Board of Governors of a school is not a natural person, it can only sue if it is authorized by statute either expressly or impliedly."*

Also in, **A. G. Federation V. ANPP & ors**[75] where there was a dispute whether the office of the Attorney-General is a person known to law. The Supreme Court held that

> *"In view of the fact that the office is created in the Constitution, and unless or until the office is abrogated, it will continue in perpetuity. And any suit by or against the Attorney-General will in law be absorbed by the office, which never dies unless the Constitution abrogates it, at the time the appellant, the Attorney-General, filed the appeal, the office was and in existence. It is very much alive and not dead as contended by Chief Olanipekun. The Law recognizes two categories of person and who*

[75] (2003) 16NSCQR pg 535, R. 2.

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> *can sue and be sued: they are natural person with life, mind and brain, and other bodies or institutions having juristic personality. In* ***Alhaji Afra Trading and Transport Company Ltd V. Veritas Ins. Comp. Ltd (1986) 4 NWLR (pt 38) 802****, the Court held that a party who instituted an action in Court must be a person known to law, that is a legal person. The office of the Attorney-General, being a creation of the Constitution, is a legal person known to law".*

Limitation of Action

It is unoriginal that where the law provides for the bringing of an action within a prescribed period in respect of a cause of action accruing to the plaintiff, proceedings shall not be brought after the time prescribed by such a statute. Now it is a basic principle of law that a Limitation Law or Act removes the right of action, the right of enforcement and the right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce if such a cause of action is statute barred.

The aim of this concept of law, is designed to stem or avoid situations where a plaintiff can commence action anytime he feels like doing so, even when human memory would have normally faded and therefore failed. Putting it in another language, by the statute of limitation, a plaintiff has not the freedom of the air to sleepover or slumber and wake up at his own time to commence an action against a defendant. The different statutes of limitation which are essentially founded on the principle of equity and fairness will not avail such sleeping or slumbering plaintiff.

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He will be estopped from commencing the action and that is a just and fair situation. A plaintiff who suddenly wakes up from a very deep sleep only to remember that the defendant has wronged him, can, I think, be rightly "greeted" by the defendant with appropriate limitation statute, waving same at him as basis for redress.[76].

A defence founded on the statute of limitations is a defence that the plaintiff has no cause of action. It is a defence of law which can be raised *in limine,* and without any evidence in support. It is sufficient if prima facie the dates taking the cause of action outside the prescribed period is disclosed on the Writ of Summons and statement of claim[77]

However, issue of limitation must be specifically pleaded for it to be raised in defence. Once it is successfully raised, its effect is to put any right of the plaintiff in abeyance. He cannot enforce it by process of litigation. In the case of **Anumudu V. Achike & ors (2003)**[78] where the Court said; "I have looked at the whole gamut of the records, nowhere was limitation Law pleaded. The law is now well settled and that for the provisions of the Limitation Law to be relied upon it must be specifically pleaded".

How to Determine the Period of Limitation of an Action

It is settled that in order to determine the period of limitation one has to look at the writ of summons and the statement of claim alleging when the wrong was committed which gave the plaintiff a cause of action and by comparing that date with

[76] See Merchanttile Bank (Nig.) Ltd vs Feteco Nig. Ltd (1998) 3NWLR (pt 540) 147 @ 156

[77] Udoh V. Abere & anor (2001) 6NSCQR (pt 1) pg 579, R.5

[78] II FR pg 101 R.5

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that on which the Writ of summons was filed. This can be done without taking oral evidence from witnesses. If the time on the Writ of Summons is beyond the period allowed by the limitation law then the action is statute barred.[79]

Example of Limitation Law is Limitation Law Cap. 647. the Laws of Oyo State of Nigeria 1978 with particular reference to Section 4 (1) (a) which reads: "4(1) the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:

(a) action founded on simple contract or tort"

Specifically, in the application of limitation law or statute of limitation, time begins to run when there is in existence a person who can sue and another person who can be sued and when all the facts have happened, which are material to be proved to entitle the plaintiff to succeed.

But generally, the operation of the Limitation Act or law does not extinguish the cause of action but merely bars the remedy of bringing the action after the lapse of the specified time from the date when the cause of action arose. There are, however, instances where the operation of legislation is not only to bar the remedy but operate to extinguish the right or title to the property or claim in question.[80]

On whether a statute of limitation can be waived. The Court has said, that where limitation of action is related to torts and contract, it is accepted principle that the statute of limitation is a defence which can be waived. To that extent, it cannot strictly be said that an action brought outside the limitation period is incompetent for lack of jurisdiction of the

[79] Coop Bank V. Lawal (2003) 10FR pg. 99, R. 3.

[80] Udoh v. Abere & anor (2001) 6NSCQR (pt I) pg 579, R. 8.

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Court. However after the plea of limitation has been raised and established, the Court lacks the jurisdiction to proceed further to determine other issues of merit in the case. **See Araka V. Ejeagwu (2000) 4NSCQR pg 308, R. 5.**

The effect of this legal concept on jurisdiction is fatal to the extent that it disrobes the Court of its jurisdiction to entertain that suit. There are plethora of authorities in buttressing this subject – matter;

In **Araka V. Ejeagwu** *(Supra)*, the applicant, Hon. E. O. Araka by an originating summons commenced an action for the recognition and enforcement of an award. The award was made pursuant to the Deed of Lease dated 9th Oct., 1975. sequel to the inability of the parties to agree upon an arbitrator, as provided for under the Lease Agreement, Olike, J. of the High Court, Onitcha on the 24th of January, 1994, appointed an Arbitrator. Dr. Damian Okolo, to look into the dispute and fix the rent payable. This he did. The respondent refused to pay the rent and the applicant applied to the High Court for the enforcement of the award. The respondent filed a counter – affidavit opposing the enforcement on the ground that the arbitrator acted outside his jurisdiction. He also filed another application praying that the award be set aside or in the alternative be remitted to the arbitrator or another arbitrator. After hearing the counsel for the parties the learned trial judge remitted the matter to the arbitrator for reconsideration. The appellant's appeal to the Court of Appeal was dismissed. This appeal is against the decision of the Court of Appeal. The Supreme Court held in this case that a complaint that an action is statute – barred is unarguably a complaint against the competency of the action.

Also in **Coop Bank V. Lawal (2003) 10FR pg 99 R. 6**, the Court held that, "the issue of whether or not an action is

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statute – barred is one touching on jurisdiction of the Court. No Court has jurisdiction to entertain an action which is statute barred. The statute of limitation does not admit of any liberalism. It has to be applied peremptorily where the situation permits.[81]

Admittedly, legal principles are not always inflexible sometime they admit to certain exceptions. The law of limitation of action recognizes some exceptions. Thus, where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused. For example, if the owner of mines works there and cause damage to the surface more than six years before action, and within six years of action a fresh subsidence causing damage occurs without any fresh working by the owner, an action in respect of the fresh damage is not barred as the fresh subsidence resulting in enquiry gives a fresh cause of action.[82]

Legal Consequences of Statute-barred action

When an action is statute-barred, the following legal consequences follow:-

(a) The appellants have lost their right of action;
(b) They have lost the right of enforcement;
(c) The appellants have irretrievably lost the right to Judicial reliefs; and
(d) The appellants only have an empty cause of action which no Court, with respect, will assist them to enforce [83]

[81] See Lasisi Fadare V. A. G. Oyo State (1982) 4 SC 4.

[82] See Aremo II V. Adekanye (2004) 19NSCQR pg 271, R. 9.

[83] See Daudu V. University of Agric, Markurdi (2003) F.W.L.R pg. 687; Egbe V. Adefarasin (1987) INWLR (pt 47) 1.

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Territorial or Extra-Territorial Jurisdiction

The jurisdiction of Court as to venue in which a suit may be heard and determined could be territorial; for instance, where a suit ought to have been brought in one state was brought in another state. In that case, the jurisdiction of Court in the wrong state is non – existent and it cannot be conferred even by agreement or consent of the parties, as it is a fundamental vice.

However, territorial jurisdiction means authority the Court has to adjudicate on a matter within its region, area, terrain and province. While extra – territorial jurisdiction could simply means a supplementary or additional authority of Court to administer justice over a particular matter.

In Nigeria, what most of our Courts have is territorial jurisdiction. It is not the rules of Court that vest jurisdiction in the Court but rather the statute creating that Court. So it is only in those areas of authority vests by the statute that the Court(s) must dwell. Any attempt to go beyond these is an invitation to impugn whether such Court has extra – territorial jurisdiction.

Now, what determines territorial jurisdiction of a Court? It is the statute creating that Court. And in this country, the statute creating our superior Courts of record is the 1999 Constitution while the inferior Courts are by – products of various Laws of House of Assembly in their respective states. Territorial jurisdiction is the same thing as appropriate venue. The venue in which a suit may be heard and determined is an aspect of jurisdiction of the Court. It could be geographical or administrative jurisdiction within a state, which by the Rules of Courts may be compromised in case of a suit filed in the wrong venue or such a suit could be transferred to the

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appropriate venue. There is only one High Court of state and judicial divisions are created for convenience only.

Virtually, all Rules of Courts in this Country concur that all suits for specific performance, or upon the breach of contract, shall be commenced and determined in the judicial division which such contract ought to have been performed or in which the defendant resides or carries on business. Under these Rules of Courts, territorial jurisdiction or venue depends on three alternatives. It could be where:

1) the contract ought to have been performed;
2) the defendant resides;
3) the defendant carries on business.

A plaintiff is obviously entitled to rely on any of the alternatives.

Let's see the credence the Courts had lent to this proposition of law, (case law) in the years back.

In **Dalhatu V. Turaki & ors**[84] one of the legal issue in this case is: whether, in view of the provisions of Order 10, Rule 4 of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules) 1991, the Court below was right in striking out plaintiff's claim on the ground that the trial Court lacked territorial jurisdiction to entertain the action. The Court held inter alia that;

> *"it cannot be denied that the subject matter of the Appellants' case relates to the governorship of Jigawa State, a territory that is distinct and separate from Federal Capital Territory. If any Court must have jurisdiction over such a subject matter,*

[84] (2003) 15NSCQR pg 229, R. 4.

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it has to be the Court in Jigawa State. For the purpose of exercising jurisdiction each State of the Federation is independent of the other and the jurisdiction of its Court is limited to matters arising in its territory".

Also in **Arjay Ltd V. Airtime Management Ltd.**[85] , the issue is: whether there was material upon which the Court of Appeal could determine the issue of jurisdiction.

Facts: By a motion *ex-parte* dated 21st March 1997 the respondent asked for and were granted an order for interim injunction restraining the appellant from removing the aircraft out of the Mallam Aminu Kano International Airport Kano. On the 25th March, 1997, the respondent got leave to issue and serve the Writ of Summons and other processes on the Appellants outside the jurisdiction of the Court by substituted means. Four days after the order of interim injunction was obtained, the respondent also on the same 25th of March, 1997 brought a motion on notice for an order of interlocutory injunction. Upon the service of these processes on the Appellants, they appear by counsel and objected to the action on the grounds of want of jurisdiction on the premise that the contract, subject matter of the suit, was entered into in the United Kingdom and to be performed in the Equitorial Guinea and all the Appellants were resident outside the jurisdiction of the Court. Arguments were proferred and the learned trial judge dismissed the objection to jurisdiction. Dissatisfied with the ruling, the appellant appealed to the Court of Appeal which was dismissed. Also on appeal to the Supreme Court, the Court

[85] (2003) 14NSCQR pg 29, R. 2.

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held inter alia:

> *"Territorial jurisdiction of a Court can be determined by the following:*
> *(a) where the contract in question is made;*
> *(b) where the contract is to be performed;*
> *(c) where the defendant resides".*

Similarly, in **Mclaren & ors V. Lloyd Jermings**[86] , Nicon – Noga Hilton Hotels Ltd awarded on 11th April, 1995, a contract of supply of hotel equipment to a company, Sotra Nigeria Ltd. Respondent is the managing director of the company which received an advanced payment of N1,628,428,27. Due to some reasons the company could not supply those goods within the agreed time. The appellant demanded the refund of the deposit. It was in pursuance of this demand that the respondent was arrested in Kano and brought for remand in Nicon-Noga Hilton Hotel, Abuja until the said sum of money was refunded. The plaintiff, per a writ of summons dated 2nd August, 1996 taken out of Kano State High Court of Justice, is claiming against the defendants, jointly and severally, the sum N5 Million damages for wrongful arrest and unlawful detention in Kano and Abuja. Parties duly filed and exchanged pleadings. The defendants filed a motion on notice challenging the competence of the Court below to hear the action on ground of territorial jurisdiction. Learned trial judge after hearing both parties, in a reserved and considered ruling refused the application and held that Kano State High Court was seised of the matter. The defendants were unhappy with the decision and appealed to the Court of Appeal which held as follows: "I agree with the submission of the learned

[86] (2003) 5FR pg 107, R. 4.

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Counsel for appellants that territorial jurisdiction or area of authority of the Kano State High Court of Justice is restricted and confined to the area in the second column of the Part 1 of the First schedule to the Constitution of the Federal Republic of Nigeria 1979. Consequently, the competence of the Court to adjudicate does not extend beyond the territorial boundaries of the state and therefore, does not cover defendants residing outside the state in respect of causes of action arising outside the State".

In the same vein, **Federal Govt. of Nig. V. Oshiomole**[87] is also a relevant authority in this realm. This is an interlocutory appeal against the ruling of Gunmi C. J. of the Abuja Capital Territory High Court of Justice delivered on 16th January, 2004 refusing the appellants' prayer for an order of interlocutory injunction. In the application, the applicants asked for the following order: "an order of interlocutory injunction restraining the defendants/respondents by themselves, their agents, servants and/or privies or otherwise howsoever from embarking on any mass protest and/or strike or any other form or manner of protest on the 21st of January, 2004 or at any time thereafter pending the determination of the substantive suit". The application was supported with affidavit to which one document was attached. The respondent gave a reply to the affidavit in support of the motion by deposing into a counter – affidavit. Learned counsel to both parties were heard *viva voce* and the learned Chief Judge in his ruling refused the application and dismissed it. The applicant being dissatisfied and thoroughly aggrieved appealed to the Court of Appeal, on eight grounds of appeal. The respondents were also not fully happy with the decision of the learned trial Chief Judge and

[87] (2004) 2FR pg 181, R. 7.

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being aggrieved with the portion of the decision asserting the competence of the Court filed a notice of appeal containing only one ground of appeal. The Court of Appeal, Abuja division held among others: "The cross – appeal succeeds and it is allowed. The trial Court has no jurisdiction to hear and determine the suit. Having found that the Court has no jurisdiction to entertain the suit, it cannot hear the application arising therefrom. What then does it profit the appellants / cross respondents if the order had efficacy only in the Abuja Federal Capital Territory and of no consequence in the rest of the country? It follows that the order does not avail them or is not enforceable. In the circumstance, the Court should not make an order which is not enforceable contrary to the established principle of practice that Courts should not make an order or orders which are of no avail. See **Alhaji Agbaje & ors Vs Chief Salami Agboluaje** an unreported decision of the Supreme Court in suit No.SC/236/67 which was cited with approval in **Abubakari & ors V. Ahmadu Smith & ors (1973) 3ECSL536,543**. The reliefs sought in the instant matter is wider than the territorial jurisdiction of the Court approached and for that reason is incapable of enforcement".

Finally in this angle, the Court held in **Onyema V. Oputa**[88] that

> *"for the purpose of determining the right venue or forum in which a suit may be heard and determined, rules of Court and the general law have provided several principles which include the following:*
>
> *(a) where the contract was made or entered into – lex loci contractus;*

[88] (1997) 3NWLR (pt 60) 259.

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(b) where the contact ought to have been preformed – lex loci;
(c) where the defendant resides – lex loci domicili;
(d) where payment ought to be made – lex loci solutions;
(e) where in land matters, the land is situate – lex loci rei sitae / lex situs.

The venue can also be territorial or administrative, in this case, from the nature of the transaction between the parties, and the provision of Order 10, rules (1) and (3) of the High Court of Kano State that has jurisdiction to entertain the matter. **T. K. Martins (Nig.) Ltd. V. U. P. L. (1992) INWLR (pt 217) 322; Ndaeyo V. Ogunaya (1997) ISC 11@25."**

Abuse of Court Process

The legal concept of the abuse of the judicial process or the abuse of the procedure of the Court is very wide. The scope and content of the circumstances of the material facts and conducts, which will result in such abuse, are infinite in variety. It does not appear that the category can be closed. New unforseen conduct(s) from the stratagem of plaintiffs can give rise to the abuse. An abuse may be constituted through an improper and illegitimate conduct in bringing action even in the exercise of an established right in the manner or time of instituting actions. It may also be constituted by the irregularities in pursuit of actions. In every and all cases the general principle is that an abuse of the process of the Court is constituted when more than one suit is instituted by a plaintiff against a defendant in respect of the subject – matter to the harassment, irritation and annoyance of the defendant, and in such a manner as to interfere with the administration of

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justice. The abuse does not lie in the exercise of the right of action *per se* which is Constitutionally guaranteed. It is in the improper, irregular and unconscionable manner of the exercise of the right, which is oppressive, reckless and vindictive. In essence, it seems to me the overriding consideration is the complete absence of a right and the inconveniences, inequities involved in the aims and purposes for the institution of the action which constitutes the abuse. An abuse of process always involves some bias, malice, some deliberateness, some desire to misuse or pervert the system. A litigant has no right to pursue *pari passu* two processes which will have the same effect in two Courts at the same time with a view to obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks. Circumstances giving rise to such an abuse are itemized in **Mogaji V. NEPA**[89], they include, among others:

(a) instituting multiplicity of actions on the subject matter against the same opponent on the same issue or a multiplicity of actions on the same matter between the same parties, event where there exists a right to begin the action.

(b) instituting different actions between the same parties simultaneously in different Courts even though on different grounds.

(c) where two different processes are used in respect of the exercise of the same right for example a cross – appeal and a respondent's notice.

[89] (2003) 6FR pg 60, R. 4.

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(d) where an application is sought by a party to an action to bring an application to Court for leave to raise issues of fact already decided by Courts below.

(e) where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

On whether exercise of Constitutional rights can amount to abuse of Court process. A party cannot be said to be abusing the process of Court by exercising a Constitutional right(s) **see Saraki V. Kotoye**[90].

It is settled law in a line of decided cases that before there can be an abuse of Court process, the parties, subject – matter and the issues in the previous and later suit must be the same – **Per Oduyemi J. C. A. in U. B. N. Plc Ltd. V. Edamkue**[91].

Not in all cases is abuse of Court process conclusive, that is, there are some occasions when an abuse is not conclusive. For example, institution of multiplicity of suits against the same defendants in respect of the same subject matter, though *prima facie* an abuse of judicial process is not conclusive of the fact. Hence, if before the writ of summons of any of the processes in respect of the suit is served and before hearing of the second suit a notice of withdrawal of the earlier suit is filed, it is clearly indicative of lack of intention to irritate, annoy and harass the defendant by instituting a multiplicity of actions. This is the position in this case as exemplified by the valid notice of discontinuance filed in **Scheep & anor V. Araz &ors (2000) 4NSCQR pg 112, R. 9.**

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[90] (1992) 9NWLR (pt (264) 156.

[91] (2004) 34 W.R.N pg 50, R. 4.

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Now, it must be known that whether a trial judge thinks that a motion is an abuse of Court process or not, he is under a legal duty to allow the applicant move the motion. It is after moving the motion that the trial judge can rule that it is an abuse of the Court process. A judge has no right to come to conclusion that a motion is an abuse of the Court process without hearing it. Any Court process however unmeritorious and an abuse of the Court process that it may be, the Court must hear it before coming to the conclusion of its unmeritorious content or that it is an abuse of the Court process. **See Mobil V. Chief Monokpo & HRH Akanowo & ors (2003) 16NSCQR pg 448 R. 17.**

We must be fully intimated that complying with Court order for example order for conditional stay of execution ordered by the Court cannot estop the applicant from appealing against that order, if he so desires. It cannot be an abuse of process of Court to exercise, *bona fide*, ones' undoubted right to appeal conferred by the Constitution. **See C.B.N. V. Ahmed & ors**[92].

If it is blatantly obvious that a matter is an abuse of Court process what kind of order should the Court make? This is the bone of contention in **Onyeabuchi V. INEC & ors**[93]. The fact is that the appellant and the 5th respondent were two out of three candidates in a bye – election in ward 6 and 7B of Obio / Akpor Federal Constituency for the House of Representatives. At the conclusion of the bye – election on 22nd May, 1999, the returning officer issued a declaration of result of election stating inter alia that the appellant having complied with requirements of the law and scored the majority

[92] (2001) 6NSCQR (pt 11) pg 859, R. 10.
[93] (2002) 10NSCQR (pt 1) pg 58, R. 6, 7.

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of votes, is hereby returned elected. It so happened that in respect of the same bye – election there was another declaration of Result of Election issued by the same returning officer and bearing the same date as the one held by the appellant, declaring that the 5th respondent scored the majority of votes and was returned elected. There are thus two apparently contradictory declarations and returns.

The third respondent who was the secretary of the 1st respondent INEC, then wrote a letter to the 2nd respondent, reaffirming the restoration and / or election of the 5th respondent. The letter caused the appellant to institute the action in the Federal High Court claiming a declaration that the letter dated 3rd day of June, 1999 and purportedly made by the 4th defendant is invalid, illegal, unconstitutional and of no legal effect.

The appellant counsel raised a preliminary objection to the jurisdiction of the Court on election matters, the issue of res judicata and abuse of Court process. The trial Court declared that it had no jurisdiction and that it is an abuse of Court for appellant to relitigate the matter by instituting the suit at the Federal High Court. The appellant appealed to the Court of Appeal which confirmed the judgement of the trial court. Hence, the appeal to the Supreme Court. The Supreme Court held *inter alia* as follows:

> *"Where the twin pleas of res judicata and abuse of process are raised as in this case, failure of the former does not necessarily lead to failure of the latter. It follows that even if the appellant had succeeded on the grounds on which the finding of estoppel had been challenged, the appeal would still have been dismissed as there was no challenge to the finding that the suit was an abuse of*

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process. In ***Arubo V. Aiyeleru (1993) 24 NSCC (pt 1) 225,*** this Court, per Nnaemeka – Agu JSC, citing **Wills V. Earl of Beauchamp (1886) 11 P59**, 53 said: "Once a Court is satisfied that any proceedings before it is an abuse of process it has the power, indeed the duty, to dismiss it" Further it was repeated at pg 268: "Once a Court is satisfied that any proceedings before it amount to an abuse of process, it has the right, in fact the duty, to invoke its coercive power to punish the party which is in abuse of its process. Quite often, that power is exercisable by a dismissal of the action which constitutes the abuse. The power of the Court to stay or dismiss proceedings which is an abuse of its process derives from the inherent jurisdiction of the Court. Although the jurisdiction is often, and should be, sparingly exercised and in only exceptional cases. It is jurisdictional which exists. The exercise of the power is discretionary."

There are avalanche of authorities in support of this powerful concept of law. These are some of them.

In the case of **Abacha V. State**[94] , the appellant in this appeal was charged along with three others now respondents before the High Court of Lagos State in the Ikeja Judicial Division upon an information filed by the Director of Public Prosecution on behalf of the Hon. Attorney-General of Lagos State for conspiracy to murder and murder. The appellant was also charged solely in counts 3 & 4 for accessory after the fact

[94] (2002) 11NSCQR pg 345, R. 3.

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of murder committed by two other persons differently. Those two other persons were not charged at all before the Court. Before the filing of the information, the Attorney General had applied to the Chief Judge of Lagos State for his consent to prosecute the accused person upon reaching the proof of evidence which was attached to the application, the Chief Judge granted his consent and so the appellant and the respondents were arraigned to face trial.

But before then, the appellant had brought an application under Section 167 and 340 (3) Criminal Procedure Law Cap. 33 Lagos State 1994 and under the inherent jurisdiction of the Court that the information be quashed.

The trial Court considered the application and refused to quash all the 4 counts. The appellant appealed to the Court of Appeal which upheld the decision of the trial Court. Hence the appeal to the Supreme Court. The Supreme Court made a notable pronouncement on abuse of Court's process when it held:

> *"With the greatest respect, in a democratic setting, as we now are, with no legislative ouster of Courts' jurisdiction, all perceived abuses should be tested if confidence is to be preserved for Courts as final arbiter in people's rights. The Courts have inherent power, to prevent abuse of their process by any of the parties, whether plaintiff or defendant, prosecution or defence, so that as long as democratic process exists nobody will have his rights curtailed. All powers to settle issues between parties is vested in Courts and Court must be vigilant that genuine issues and controversies are settled so that no accused person*

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will be oppressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution. It is for this reason that an accused person, despite the power to file indictment on an information, should not be indicted to face trial that from the outset it was clear he should not face".

Also in **Mobil V. Chief Monokpo & HRH Akanowo & ors**[95] ,the first set of plaintiffs who are respondents in this appeal claimed from the defendants who are the appellants jointly and severally for ecological damage and injurious affection as follows special damages of N3,698,524,655.00 being the sum assessed by the plaintiffs' expert chartered valuers in the valuation report and general damages of N301,475,340.00 for shock, inconveniences, loss of amenities, cost of the survey and expert reports.

The second set of plaintiffs who are also respondents in this appeal claimed from the defendant who are also appellants jointly and severally for ecological damage and injurious affection as follows: special damages of N938,200,464.00 being the sum assessed by the plaintiff's expert chartered valuers in the valuation report and general damages of N61,799,536.00 for shock, inconveniences, loss of amenities of cost of the surveys and expert reports. As the two suits had the same cause of action although the amounts claimed are different, they were consolidated by an order of the learned trial judge.

After some preliminary issues, the learned trial judge took evidence. The plaintiff gave evidence. They called four witnesses. They closed their case on 16th June, 2000. The 1st

[95] (2003) 16NSCQR pg 448, R. 16.

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defendant/appellant sought and obtained the order of Court to amend their statement of defence. The 1st defendant called one witness on the day the Court granted the application for amendment of their statement of defence. Thereafter the case was adjourned for continuation. In the interval, the 2nd defendant/appellant brought a motion for dismissal of the plaintiff's case against the 2nd defendant on the ground that the plaintiffs on the pleadings and the evidence led, disclosed no cause of action against the 2nd defendant. That was on 29th June, 2001. The plaintiffs in turn asked for the dismissal of the 2nd defendants motion and judgement against the 2nd defendant. The motion for judgement was moved by counsel for the plaintiff. Counsel for the 2nd defendant sought an adjournment to reply to the motion for judgement. The matter was adjourned to 7th July, 2000. Before 7th July, 2000, the 2nd defendant filed a memorandum of appearance and statement of defence. The 2nd defendant also sought for extension of time within which to file the statement of defence and deem the statement already filed as properly filed.

Counsel for the 2nd defendant proferred oral submission in opposition to the motion for judgement already moved by counsel for the plaintiffs. Ruling was adjourned to 11th July, 2000. On that date, the learned trial judge dismissed the 2nd defendant's motion for dismissal of the plaintiff's case against the 2nd defendant and granted the cross motion for judgement. Dissatisfied with the judgement, the defendants appealed to the Court of Appeal. That Court dismissed their appeal. Hence, they further appeal to the Supreme Court. The Supreme Court held as follows: "Certainly, the two motions ask for two different reliefs and so the question of abuse of Court process does not arise. Abuse of Court process, in the context in which

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the learned trial judge used the expression can only arise when an applicant who has already filed a motion, brings another motion of similar or like contents as the first one. In other words, the applicant is seeking for the same prayers or almost the same prayers that, disposing of the first one will mean disposing of the second one. In that respect, the second motion is an abuse of the Court process, There cannot be abuse of the Court process in respect of the two motions referred to by the learned trial judge because the motions asked for different reliefs."

In **C. B. N. V. Ahmed & ors**[96] the applicant was defendant in suit No. FHC/L/CS/1306/95 wherein the respondents, as plaintiffs, had claimed, as per their amended Statement of Claim "SPECIAL AND GENERAL DAMAGES." Pleadings were ordered, filed and exchanged and with leave of Court amended. The action proceeded to trial and the trial Court gave judgement largely in favour of the plaintiffs in terms of their claims. The applicant was dissatisfied with the judgement of the trial Court and then appealed to the Court of Appeal. The applicant also applied for an order of stay of execution of the judgement, a similar application having being struck out by the trial High Court for non-prosecution. The Court of Appeal granted to the applicant a conditional stay of execution by making an order that the judgement debt be deposited with the Deputy Chief Registrar of the Court below within 21days from the date of the order. The Deputy Chief Registrar is in turn ordered to deposit same in an interest yielding account. The applicant not satisfied with the order granting him conditional stay by the Court of Appeal has

[96] (2003) 16NSCQR pg. 859, R. 2

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further appealed to the Supreme Court against the conditional stay and also *inter alia,* an order extending the time within which it could seek leave to appeal and file its Notice of Appeal against the decision of the Court. The Court held as follows:

> *"There is no doubt that all Courts take a firm stand against the abuse of the processes of Court. But before a party is admonished, it must be established that the erring party had abused the process of Court by improper use of the processes of the Court. Action which amounts to an abuse of the process of Court may vary but it ought to fall generally within the kind identified in the case of* ***Okafor V. A. G. Anambra state (1991) 6NWLR (pt. 200) 659 @ 681.***
>
> *Now inherent jurisdiction or power is a necessary adjunct of the powers conferred by the rules and is invoked by a Court of law to ensure that the machinery of justice is duly applied and properly lubricated and not abused. One most important head of such inherent powers is abuse of process, which simply means that the process of the Courts must be used bona fide and properly and must not be abused. Once a Court is satisfied that any proceeding before it is an abuse of process it has the power, indeed the duty, to dismiss it. It has been held in numerous cases that it is an abuse of process of the Court for a suitor to litigate again over an identical question which has already been decided against him even if the matter is not strictly res judicata. The authorities on abuse of Court process envisaged a situation where the erring party*

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was reopening issues already closed by the decision of the Court, and/or generally pursuing the other party with multifarious actions in respect of the same subject matter to the annoyance of the other party."

In **Nigeria Intercontinental Merchant Bank Ltd. V. Union Bank**[97] the appellant had instituted an action against the West African Marine Products Ltd., the 2nd Respondent at the Lagos High Court for the recovery of a sum N101,598,144.08 or realize the security which consisted of assorted frozen fish imported with an overdraft facility granted by the Appellant's Bank. The fish was stored in the cold room belonging to the defendant/ 2nd Respondent. On 31st July, 1998, the Lagos High Court granted leave to the Appellant sequel to its ex-parte application, to take possession of, remove and sell the entire stock of fish stored in the room of the 2nd Respondent. It further made orders restraining the 2nd Respondent, its agents and others from disturbing or preventing the Appellant from taking possession and disposing of the entire stock and in any way from interfering or intermeddling with the appellant's possession or sale of the entire frozen fish. However, on the 10th August, 1998 after the order above was made, the 1st Respondent in this appeal filed an action in the Federal High Court which incidentally gave rise to this present appeal against the appellant in this case in respect of the same fish for which an earlier order had been obtained in the Lagos High Court. The 1st respondent thereafter filed a motion at the Federal High Court asking for various injunctive reliefs against the appellant. It is apparent that two Courts of different jurisdictions are on a collision course and they might give

[97] (2004) 18NSCQR (pt 1) pg 134, R. 6.

conflicting decisions in this case. The trial judge at the Federal High Court declined to make the order of injunction sought, but the order it made more or less achieved the same purpose. The appellant appealed to the Court of Appeal. The appeal was dismissed. Hence this appeal to the Supreme Court. The Supreme Court held as follows: where a Court was clearly aware that another Court of coordinate jurisdiction is seised of a case with the same parties and the same subject matter before it as it is found in this appeal, it is an abuse of process for that Court to continue with the hearing of the case and proceed to make orders as was done in this case. It is my humble view that in the instant case, the Court is not to blame, but the legal practitioner who instituted the actions that had brought about this unfortunate situation. I think it is desirable that our legal practitioners should counsel themselves not to institute actions and persist in pursuing such proceedings that would result in the granting of conflicting orders by Courts of coordinate jurisdiction as had occurred in this case.

Ouster Clause

Ouster Clause literarily mean a proviso which temporarily or permanently deprive the Court or tribunal from exercising their jurisdiction over a particular matter. Ouster is French word with its derivation adopted in 1588 as oust to mean to take away, remove, force out, to eject, dispossess to derive a thing out in a democratic setting as contained in the great Magna Carta of 19th June, 1215 confirmed the English liberties by its clause 29 thus: "No free man shall be taken or imprisoned or disseised from his freehold or liberties or immunities nor outlawed, nor exiled, nor in any manner destroyed, nor we will come upon him or send against except by legal judgement of

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his peers or the law of the land. We will sell or deny justice to none nor put off right or justice."

Constitutionally put, that the citizens shall have free access to the Court. To ensure non-denial of free access to the Court is fundamental. **See A. G. Ogun State V. Coker (2003) 11FR pg 240, R. 7, 8.**

Ouster clause *stricto sensu* ousts the jurisdiction of our Courts and leave the citizen with empty right of access to the Court of law guaranteed under Section 17(2)(e) 1999 Constitution which says; "In furtherance of the social order, the independence, impartiality and integrity of Courts of law, and easy accessibility thereto shall be secured and maintained. Similarly, Section 4(8) of the 1999 Constitution asserts, "save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of Courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a Court of law or of a judicial tribunal established by law."

But despite the above giant provisions of fundamental law of the land, there are still some provisions therein that deprive any aggrieved party in such incident(s) from approaching the Court for remed(ies) in pursuance of their grievances. Those provisions are: viz;

1) Section 6(6)(c) which says, "The judicial powers vested in accordance with the foregoing provisions of this Section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in

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conformity with the fundamental objectives and directive principles of state policy set out in chapter II of this Constitution." This provision of the Constitution makes the whole provisions under Chapter II of the 1999 Constitution non-justiciable. As to the non-justiciability of the Fundamental Objectives and Directive Principles of state policy in Chapter II of our Constitution under Section 6(6)(c), while they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of state organs if they acted in clear disregard of them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.[98]

2) Section 6(6)(d)[99] says: "The judicial powers vested in accordance with the foregoing provisions of this Section shall not, as from the date when this Section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 from determining any issue or question as to the competence of any authority or person to make any such law." What this Section meant to do or to achieve is to oust the jurisdiction of the Courts in determining any issue or question as to the legislative competence of any authority or person to promulgate any law. The Section has not the effect of prohibiting any Court from determining any issue

[98] See A. G. Ondo State V. A. G. Federation (2002) 10 NSCQR (pt 2) pg 1036 @1155
[99] of the 1999 constitution

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or question as to the validity of any such law. Indeed, nowhere in Section 6(6)(d)[100] was the prohibition extended to the question or determining the validity of any law. The prohibition was only as to the issue or question of the competence of the law-maker to make the law in question[101] .

3) Section 143(10) of the 1999 Constitution says, "No proceedings or determination of the panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in any Court."
The sermon of this unwarranted provision is that if Mr. President has committed any act or omission which warrants impeachment by the legislators, after the procedure of his impeachment has been duly complied with. Mr. President cannot go to Court for redress on any inhumane or injurious act that might be inflicted on him during, or for the sake of his impeachment. This provision ousts the jurisdiction of Court to entertain such matter.

4) A related provision to the above Section is Section 188(10) 1999 Constitution says; "No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any Court." This ousts the jurisdiction of Court to entertain any matter that relates to the impeachment of the Governor of any state in Nigeria. If we should briefly

[100] supra
[101] see Nangibo V. Okafor (2003) 14 NSCQR (pt 11) pg 1194, R. 1; Fawehinmi & ors V. Babangida & ors (2003) 13 NSCQR pg 592, R. 1

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flash back to what happened in Osun State during the Chief Adebisi Akande led government when his deputy in person of Otunba Iyiola Omisore was impeached. He the Deputy-Governor) instituted an action at the Federal High Court Osogbo for the enforcement of his fundamental human rights. The Court, with due respect granted the application for leave to enforce his fundamental rights and that the leave granted shall operate as a stay but shall not affect matters before Courts of coordinate jurisdiction per incuriam. Eventually, the leave/order granted was vacated when the Court was aware of provision of Section 188(10) of the 1999 Constitution. The matter took place in the Federal High Court holding at Osogbo in Nigeria in suit No: FHC/OS/CP/3/2002.

Absolutely known that Courts are not frightened of an ouster clause. They respect it but when an ouster clause seeks to make it impossible for the Court to protect the common man, or make laws which cannot stand the test of reason or that is an affront to decency and intelligence, then Court should be careful not to lend weight to a law that would make it an enemy of the common man and not the last hope of the common man[102]

On the power of the Court to inquire into the applicability of decree or edict ousting its jurisdiction. The principle has crystallized that where a legislation oust the jurisdiction of the Court, such Court reserves to it the right to examine whether the provisions of the ouster clause apply to the particular case

[102] See Okoroafor V. The Misc. Offences Tribunal (1995) 4NWLR (pt 387) 45.

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in hand. The Court held in **The Misc. Offence Tribunal V. Okoroafor & anr**[103] where **Ejiwunmi JSC** said, *"I think, it can be said that a Court would be obliged to respect and uphold the ouster provisions of a Decree or Statute. But the Court reserves to it the right to consider whether the ouster clause ought to be obeyed, having regard to other surrounding facts and the law relevant to the provision ousting its jurisdiction. It seems to me that where as in this case questions are raised as to whether the proceedings before the tribunal have been properly initiated in accordance with the law that set up the trial before the tribunal, the ouster of the jurisdiction of the Court should not preclude it from exercising jurisdiction to interprete the ouster clause or to determine or not, the proceedings in question which comes within the scope or power of authority conferred by the enabling statute. I would therefore uphold the view held by the Court below that though the jurisdiction of the Court of appeal ousted by virtue of provisions of Decree No. 9 of 1991, the Court is not precluded from considering whether in the circumstances the ouster jurisdiction comes within the scope of power of authority conferred by the enabling statute."*

To oust the jurisdiction of the Court, the attitude of the Court is to interprete the decree critically, strictly and narrowly based on the legal maxim *fortissime contra preferentics,* that is strictly against the provision of ouster clause but sympathetically in favour of the citizen. Where the interpretation is capable of two interpretations one ousting the jurisdiction of the Court and the other preserving the jurisdiction of the Court, the attitude of the Court is to

[103] (2001) 8NSCQR pg. 139, R. 9, 10

interprete the ouster clause to preserve the jurisdiction of the Court. **See A. G. Ogun State V. Coker (Supra).**

At this juncture, let us consider the effect of ouster clause on Court's jurisdiction. In the case of **Miscellaneous Offences Tribunal V. Okoroafor & ors (Supra)** the respondents in this appeal who were pharmacists, were arrested on the 29th June, 1989 and detained upon an allegation that they were involved in the manufacture of fake and adulterated drugs. On the 15th Sept. 1989, they were brought before the Miscellaneous Offence Tribunal where they were charged with possession of adulterated drugs and subsequently remanded in prison custody from that date, the 15th Sept. 1989 till the 15th Nov., 1990 when bail was granted to them. The respondent upon the advice of their counsel and upon the belief that appellants and the Tribunal have not proceeded with the trial of the allegation leveled against them in accordance with the law that set up the offences and the Tribunal decided to move the High Court to invoke its supervisory jurisdiction to prohibit the tribunal from further trying the charges against the respondent. When the application came before the High Court of Lagos State, questions were thereafter referred to the Court of Appeal with regard to whether the Lagos High Court has supervisory jurisdiction over the inferior tribunal, such as the Miscellaneous Offences Tribunal set up under and by virtue of Decree No. 20 of 1984 (as amended).

Later when the case came up for hearing before the Court of Appeal, the applicant decided to limit for the consideration of that Court only one question on whether the ouster clause contained in Decree No. 9 of 1991 has not taken away the supervisory jurisdiction of the High Court of Lagos state to review proceedings in the Miscellaneous Offences Tribunal.

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The question so posed was resolved in favour of the present respondents. Hence the instant appeal to the Supreme Court. The Supreme Court held, "in the case in hand, it is manifest from the provisions of the ouster clause in Decree 9 of 1991, that the jurisdiction of the High Court was limited by virtue of the provisions therein. On whether the jurisdiction of the Court was ousted by virtue of the provisions in Decree 9 of 1991. It is necessary to observe that this Court had in several cases dealing with the question taking the position that where the jurisdiction of the Court has been clearly ousted by a Decree or a Statute, the Courts are obliged to uphold the ouster of its jurisdiction. But, though the Courts have in essence upheld the ouster clause in a Decree or Legislation. It would appear from the decided cases that the Courts have always been striven to guard jealously the sovereignty of the Courts in the determination of the civil rights and obligations of the people of this country."

Another example of ouster clause can also be found in **Section 215(5), 1999 Constitution.**

Justiciable Dispute

The word "justiciable" means "proper to be examined" in Court of justice. Dispute on the other hand and in the Constitutional sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a dispute of a hypothetical or abstract character from one that is academic or moot. The controversy must be definite and concrete, touching on legal relations of parties having adverse legal interests. However, a matter is justiciable when it is capable of being enforced in law. For where there is right, there is remedy (ubi jus, ibi remedium). Therefore, as a general rule,

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where there is no right, there is no legal or equitable remedy because the matter concerned is not justiciable as there is breach of right, legal or equitable based on which the Court can do justice. A matter must first be justiciable, before Court having jurisdiction over such kinds of matter. **Obaseki JSC (rtd)** in **Akinyemi & or V. Onwumechili & 2 ors**[104] said "if a matter is justiciable in Nigeria the domestic nature of the dispute does not, under the 1979 Constitution oust the jurisdiction of the Court. It can only mean that until the remedies available in the domestic forum are exhausted, any resort to Court would be premature."

So, it must also be noted that justiciability also means justice ability which is a concept of jurisdiction for the reason that where a matter is not justiciable, the Court cannot exercise judicial powers. Consequently, the concept of justiciability as a touchstone serves legally protected rights thereof. In the 1999 Constitution, where an action is not justiciable, the Court will lack jurisdiction to entertain such matter. This has been the decision of Supreme Court, recently, in the case of **Dikko Yusuf V. Obasanjo**[105] there was a dispute whether election petition founded on breaches of the Constitution may be brought under Section 139 of the 1999 Constitution and under Section 131 of the Electoral Act, 2002 or whether the violation of other legislations such as Companies and Allied Matters Act can be a basis for questioning an election or return. **Uthman Mohammed JSC**, said

> *'The original jurisdiction of the Court of Appeal under Section 239(1) of 1999 Constitution is very clear. All other grievances outside that provision can only be*

[104] 1985 1ANLR pg. 85
[105] (2004) 18NSCQR (pt 11) pg 477 R. 22

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justiciable in other Courts recognized for such jurisdiction in the Constitution. I therefore agree that the Court of Appeal has no jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution and the Companies and Allied Matters Act, Laws of the Federation, 1990 in an Election Petition, based, founded and rooted in the Constitution."

However, where objection is taken that the action is not justiciable, the Court has to examine the statement of claim alone to see if the objection is sustainable. The Court must restrict itself to the facts in the statement of claim without having any recourse to the facts in the opponent's pleadings. In line with this is the decision of the Court in **Adamu V. A. G. Borno State**[106] on duty of the Court to determine a preliminary objection that an action is not justiciable." **Oguntade JCA** opined that

"... *At the stage when the preliminary objection was raised that the plaintiff's suit was not justiciable the lower Court ought to keep an open mind. It ought also to view the averments in plaintiffs' statement of claim most liberally and give them the widest interpretation which the averment could sustain. It seems to me that this is the only way that justice could be done. The implication of an application that the plaintiff's case be struck out upon a preliminary objection is grave and a judge called upon*

[106] (1996) 8NWLR (pt 465) 203

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to do so must be cautious as he may in the process unwarily shut out a plaintiff without a hearing. When the averments in plaintiffs statement of claim are closely perused and appropriately weighted, it is easy to see that the plaintiffs suit could be sustained as an action brought to enforce the provision of Section 39 of the 1999 Constitution of Nigeria.

It seems to me that the plaintiffs have amply demonstrated that their complaint was that their children and/ or wards were being denied certain rights on account of their religion. They may or may not be able to make out a case at the trial under Section 39 of the 1979 Constitution. But it seems to me that it was premature at the stage the suit was dismissed for the lower Court to conclude that plaintiffs suit was not justiciable, I think that the lower Court had viewed the matter too narrowly."

It also must be noted essentially that a declaration will not be granted where there is no existing justiciable controversy between the parties. In **A. G. Fed. V. A. G. States**[107] on whether mere disagreement *per se* confers justiciable jurisdiction on the Court, the Supreme Court said: founded on analysis of the claim of the plaintiff and the averments in the statement of claim there are no facts disclosing a justiciable dispute. There is undoubtedly a disagreement between the parties on the issue of the seaward boundary of the limit of littoral states, whether this disagreement between the parties *per se* does not confer a

[107] (2001) 7 NSCQR pg 458, @ 537

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justiciable jurisdiction on the Court. The plaintiff is required to establish a legal right in himself which has been violated or an injury or threat to such injury to that right by the defendant, plaintiff having failed to establish any of these essential requisites has not shown the existence of a dispute."

Let us see what the Supreme Court has to say in **Aremo II V. Adekanya**[108] .. The Supreme Court held *inter alia* that "it is clear that the appellant's action in respect of the cause of action that accrued before 1979 when the jurisdiction of the Court to entertain it was ousted, could not be justiciable in 1988. But learned counsel for the Appellant has forcefully argued that the Government White Paper Exhibit I made in 1982 rejecting the Ajayi Commission of Inquiry occasioned a fresh cause of action redressible in the law Court. In my humble view, the reliefs claimed in paragraphs 72(4), 72 (5) and 72(6) of the statement of claim based on the rejection of the recommendation of the judicial commission of inquiry could not have given the appellant a cause of action, that is redressible in a Court of law. This is so because commission of enquiry was at liberty to reject the recommendation of the commission and the appellant has no legal right to compel it not to do so."

In addition **Badejo V. Fed. Ministry of Education**[109] , the Court decided on whether a party whose action is not justiciable is entitled to be heard on the merit. The Court said that although an applicant who complains that his fundamental right has been contravened is entitled to have his complaint investigated and determined by the Court, however the applicant is entitled to be heard only if its action at the time of the proceedings was justiciable.

[108] (2004) 19NSCQR pg 271, R. 5
[109] (1996) NWLR (pt 464) 15

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In addition the Court in the case of **Abraham Adesanya V. President of the Federal Republic of Nigeria**[110] the court puts it thus: "judicial power is therefore invested in the Courts for the purpose of determining cases, and controversies before it: the cases or controversies, however, must be justiciable."

Recently, the bid by 18 aggrieved members of the Oyo State House of Assembly to remove Governor Rashidi Ladoja which was challenged at the High Court of Oyo State by the 14 loyalist Legislators to the Governor to stop the removal of the Governor. **Justice Olagoke Ige** who delivered a terse ruling after listing to the argument of counsels in the case, said that impeachment and related proceedings of the assembly were purely political matters over which the court could not intervene. His Lordship said that the jurisdiction of the court had been ousted, adding that the action of the 14 legislators was not justiciable. He said further that the issue of impeachment is a matter that comes within the internal affairs of the House of Assembly. The court will therefore decline jurisdiction in this matter. **(reported in 'The Punch' Thursday, December 29, 2005, pp. 1, 2, & 7).**

Non-Payment of Filing Fees

It is a known fact that every aggrieved citizen can approach the Court for redress in respect of any matter which that Court has jurisdiction to entertain. It is also not hidden that our various rules of Court provide for payments of certain amount of money to Court's coffer in respect of any document filed during the course of litigation. Such money is mandatory and not discretionary for any prospective litigant.

[110] (1981) ALL NLR 1 at 43, Idigbe JSC

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Payment of filing fees is a condition precedent to vesting of the jurisdiction of the Court and when the same seems not to have been paid such claim is incompetent. The jurisdiction of Court is clearly ousted when such has not been complied with.

In the case of **Fada & ors V. Maman Naomi**[111], the legal issue in this case is: What is the effect of the failure of the respondents to pay for each and every item of their claims? The Court held *inter alia* as follows that: *"The test for determining commencement of an action both according to the English Rules and Local Rules of Court is whether a plaintiff has done all that is required of him by law to commence his action. In England all he has to do is to buy the writ and endorse it. In Nigeria, he has to make application to the Registrar and pay the necessary fees. From then on, his responsibility ceases and what is left to be done is a domestic affair of the Court and its staff. From the time the plaintiff in Nigeria delivers his application to the Registrar, provided it is not an action in which the consent of the Court is necessary before the writ is issued, and he pays the necessary fees, it will be correct to say that an action or a suit has been commenced. Therefore, it certainly would be a matter of grave injustice to a plaintiff who delivers his application for a writ and pays the necessary fees if he is deemed not to have commenced his action merely because for some reasons, it has not possible for the Court or the judge to sign the writ after the application. The assessment of filing fees is done when writ of summons is submitted for filing. Consequently, where the reliefs claimed in the writ of summon are substituted in the statement of claim, the statement of claim must be presented for further assessment and payment of appropriate filing fees for the new relief sought. In the instant case, the respondents endorsed on their writ of summons two declaratory reliefs and the relevant filing fees were accordingly assessed and paid for.*

[111] (2002) 4NWLR (pt 757) 318, 337.

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But when the claims were substituted with the claims for special and general damages, it was incumbent on the respondents to present the statement of claim for further assessment and payment of appropriate filing fees for the new reliefs.Payment of filing fees is not only a primary responsibility for the party filing a document but also a statutory prescription. Thus, the payment of filing fees is mandatory notwithstanding whether the Court expressly said so or not. In the instant case, the argument that the omission to pay filing fees was an error on argument that the omission to pay filing fees was an error on the part of a Court Registry is adroit but not candid[112] *Payment of filing fees is mandatory and not discretionary. It cannot be waived.*[113] *Payment of the prescribed filing fees is a condition precedent to the filing of a valid claim. It is the primary responsibility of the plaintiff to pay the appropriate or adequate filing fees prescribed in the rules as a condition precedent for the exercise of jurisdiction. Where such a condition is not satisfied, the jurisdiction of the Court does not vest or is ousted. Failure to comply can be fatal because any suit brought in contravention of or without compliance with the rules of Court on payment of filing fees is incompetent and the Court is equally incompetent to entertain or hear the same. It is therefore not a mere irregularity which is curable by a mere amendment. Neglect to pay filing fees in respect of each relief sought in a trial Court vitiates the claim in respect of which no filing fees had been paid. It is not every time a Court delivers a judgement, ruling or makes an order that it becomes* **functus officio** *and resort ought to be had to the appeal process. The Court or another Court of coordinate jurisdiction is competent to set aside the decision if the judgement or order was made without jurisdiction or is authorized by statute to set aside its own decision.*

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[112] Onwugbufor V. Okoye (1996) 1NWLR (pt 424) 252.

[113] Onwugbufor V. Okoye (Supra).

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In the instant case, having regard to the provisions of Order 26, Rule 4 & 10 of the High Court of Kaduna State (Civil Procedure) Rules, 1991, the trial Court ought not to have declined jurisdiction to investigate the appellant's application, that the judgement was a nullity on the ground that it was functus officio.[114]

Also in the case of **Okolo V. UBN**[115], **Niki Tobi JSC** said, "payment of filing fees is a precondition to or condition precedent to the Court's assumption of jurisdiction, where filing fees are not paid, a Court of law will have no jurisdiction to entertain the matter before it. This is because the rules of Court make it mandatory for a party to pay filing fees. In this case, the respondent has clearly made out a case that the appellant did not pay filing fees for the additional reliefs 21(d) and (e)."

In ***Onwugbufor V. Okoye***[116] *where the appellants failed to pay the appropriate fees for an additional claim for forfeiture, the Supreme Court held that the claim was incompetent. Delivering the lead judgement,* ***Igub, JSC****, held at page 292 of the report that: "Quite apart from the fact that Courts' orders must be obeyed as directed, it cannot be overemphasized that for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and the rules made thereunder and governing the claims made such as the High Court Law and the Rules of Anambra State. It is the responsibility of the plaintiff inter alia to pay the requisite fees in respect of each and every relief claimed as*

[114] Yakubu V. Gov. of Kogi State (1991) 7NWLR (pt 511) 66.
[115] (2004) 17NSCQR 105, R. 10.
[116] (1996) 1NWLR (p 424) 252.

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prescribed by the rules to enable the Court's judicial functions to commence. A Court shall not entertain a relief claimed without payment of the prescribed requisite fees unless such fees have been waived or remitted by the Court or such fees are payable by any Government Ministry or Non-Ministerial Government Department or Local Government pursuant to the provisions of the said High Court Rules of Anambra State. If the default in payment is that of the plaintiff, the claim in respect of such prescribed fees which have not been paid cannot be said to be properly constituted before the Court and should be struck out in the absence of an appropriate remedial action or application to regularize such anomaly. In the present case, no payment whatsoever was made by the appellants in respect of their new claim for forfeiture. Payment of the prescribed fees being a condition precedent to the filing of a valid claim before the Court, it seems to me clear that the claim for forfeiture in the present suit is incompetent, improperly constituted before the Court and ought to be struck out. In the circumstance, it becomes entirely idle and academic to examine the various reasons given by both Courts below in refusing the appellants' claim for forfeiture which must be and is hereby struck out."

But does it mean that when an appeal is incompetent on the ground that the Court has no jurisdiction to entertain it, the appeal must be dismissed? It appears to me to be the law that when a Court lacks jurisdiction the proper order to make is striking out of the action. In **Okoye V. Nigerian Construction and Furniture & Co. Ltd. (1991) 6 NWLR (pt 199) 501**, the Supreme Court held that the proper order to make where a Court has no jurisdiction to entertain an action is that of striking out the action and not dismissing same.[117]

[117] See also Dim V. A. G. Fed. (1986) 1NWLR (pt 17) 471; Akibobola V. Plisson Fisko (Nig) Ltd. (1988) 4NWLR (pt 88) 335; Chief Okafor V. Alhaji Hashim (2001) 1NWLR (pt 711) 88; Gombe V. P. W. (Nigeria) Ltd. (1995) 6NWLR (pt 402) 402.

It must be emphasized unflinchingly that where the statute and subsidiary legislation prescribe the mode of initiating a process, filing of documents, or proceedings before the Court and it is not followed, or is spurned, the only reasonable conclusion is that the party affected which fails to comply with the requirements cannot be taken seriously.

Political Question

In our political system in Nigeria, citizens have the Constitutional right to participate in the government. Every citizen can willingly and intentionally join any political party for the protection of his own interest in accordance with the rule of law. Therefore, if any person has freely joined a political party that means such person has freely given his consent to be bound by the rules and regulations of a political party, such a persons should be left to be governed by such rules and regulations.

By and large, if he contested for any political office under the umbrella of that party and he is disqualified or failed in the process he cannot sue that political party in which he has freely mortgaged his conscience and therefore the Court of law is debarred from interfering in such issues.

We should not be unmindful of the fact that, some issues are political in nature that is, they are matters to be decided within the political party. Such issues are not justiciable in our Courts of law. The apex Court has held in different decisions that when any questions to be decided in the Court of law is political, the Court will lack jurisdiction to entertain such.

Let us browse through some authorities to buttress this proposition of law.

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In the case of **A. G. Abia & 35 ors V. A. G. Fed.**[118]. The grouse of the plaintiffs is the statutory instrument No. 9 of 2002 wherein the President of the Federal Republic of Nigeria, Chief Olusegun Obasanjo, made an order modifying the *Allocation of Revenue (Federation Account etc.) Act 1990* as amended by *Allocation of Revenue (Federation Account, etc.) Decree (No. 106) of 1992.* By the 1992 Decree (No. 106) Sections 1, 2, 3 and 4 of the principal Act were amended. It is principal Act as amended by Decree 106 of 1992 that has now been modified. This order is now challenged. The Court held inter alia that "the main condition which the modification to an existing law should satisfy, in my opinion, is that it should bring it into conformity with the Constitution in regard to the subject matter of the existing law[119]. In respect of the distribution of the amount standing to the credit of the Federation Account all that Section 162(3) of the 1999 Constitution demands compliance with by any law on Allocation of Revenue is that only the three tiers of government shall be the first line beneficiaries, namely the Federal Government, the State Government and the Local Government Councils. This is what in effect the modification order made by the President has achieved. The question of what percentage each tier gets is a political one which is not justiciable as a direct legal issue.

Also in **Dalhatu V. Turaki & ors**[120] the legal issues are as follows:

1) Whether the principles of the Supreme Court decision in **Onuoha V. Okafor & others (1983) 14NSCC 494** a case based purely on selection rather than that election of

[118] (2003) 13NSCQR pg 373, R. 17.

[119] See Attorney-General Ogun State & ors V. A. G. Fed. (1982) 3NWLR 166

[120] (2003) 15NSCQR pg 229

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candidate and which was decided under a different Constitution with different provisions governing the two different cases, can oust the jurisdiction of a Court of law from entertaining this action?

2) Whether, in view of the provisions of Order 10, Rule 4 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 1991, the Court below was right is striking out the plaintiff's claim on the ground that the trial Court lacked territorial jurisdiction to entertain the action.

3) Whether, having regard to the subsisting order of the Court of Appeal to the effect that the Appellants' (now respondents) Brief of Argument must be based upon settled records of appeal, the judgement now appealed against, based upon the brief, which was not based upon the said settled record is not a nullity.

The Supreme Court unanimously dismissed the appeal and held *inter alia:*

> *"By the authority of* **Onuoha V. Okafor** *the trial High Court has no jurisdiction to entertain the matter. The issue of who should be a candidate of a given political party at any election is clearly a political one to be determined by the rules and Constitution of the said party. In other words, it is a domestic issue and not such as should be justiciable in a Court of law. This is so because the power and the right to nominate and sponsor a candidate to an election are vested in a political party and the exercise of this right is the domestic affair of the party as, in this case of the ANPP." "From the decision*

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> *of this Court in* **Onuoha,** *it is clear that the right to sponsor a candidate by a party is not a legal right but a domestic right of the party which cannot be of law. The political party qua political organization has a discretion in the matter, a discretion which is unfettered: in the sense that a Court of law has not jurisdiction to question its exercise one way or the other. The moment a Court goes into such a domestic affairs of the party, it has involved itself in nominating a particular candidate, a jurisdiction which a Court cannot exercise. While a Court of law has the jurisdiction to declare a particular candidate as the winner of an election, a Court of law cannot be involved in the domestic affair of nomination of a candidate or candidates in primaries."*

On the remedy available to a candidate whose nomination was withdrawn for an elective office having been nominated by his political party, It is improper of a political party having sponsored one of its members for an elective office to later withdraw that sponsorship in breach of its Constitution. But the apparent injustice is not without a remedy. Just as a servant cannot generally sue for re-instatement but can maintain an action for damages for unlawful termination of his employment by his master, so too, a candidate whose political party has withdrawn its earlier nomination for election has remedy in an action for damages and not an action to compel the political party to sponsor him. In this regard, the dictum of **Nnamani JSC** in the **Onuoha's case** is apposite. At page 511 of the

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report, His Lordship said:

> *"In my view, in the interest of the healthy growth of our democratic process, in appropriate case (and I do not here decide that on the facts of this case this was necessarily one) political party must, by used of the remedy for damages be dissuaded from swapping one sponsored candidate for another without due regard to their Constitution and/ or the rules of natural justice."*

In any event, even if the remedy of a candidate whose sponsorship for an election is withdrawn is not redressible in the Court of law, that is no justification for the refusal of a lower Court to follow the decision of a higher Court.

In addendum, the Supreme Court experienced the same issue in the case between **Alhaji Balarabe Musa (Gov. of Kaduna State) V. People Redemption Party (1981) 2NCLR pg 763, Facts**: The applicant, a state Governor is a member of the People's Redemption Party. He and other eight Governors have been attending joint meetings in various parts of the country to discuss common problems. His party objected to this meetings and passed a resolution forbidding the applicant from attending. The applicant applied under Section 42 of the Constitution for an order to quash the resolution as constituting an infringement of his fundamental rights under Section 32, 36, 37 and 38 of the Constitution. The Court made an interim order against the respondent but it dismissed the entire application in a subsequent ruling saying in effect that it has no jurisdiction to entertain the application

at all. [The Court held as follows, viz;

No political party has any Constitutional right to restrict the fundamental rights of its members as enshrined in the Constitution.

Mere words unaccompanied by anything else are not sufficient to invoke Section 42 of the Constitution.]

A political party being a voluntary association is supreme over its own affairs.

A political party in the conduct of its affairs is not subject to the jurisdiction of the Court of law.

The Supreme Court **Per Ogwuegbu JSC** in **A. G. Fed. V. A. G. States (2001) 7NSCQR pg 458, R. 20** said: "*... The claim is not academic, political or premature and the plaintiff is not seeking an advisory opinion from this Court which opinion this Court is not competent to give and this is not the case in this suit.*"

Also in the case of **A. G. Abia & 35 ors V. A. G. Fed. (2003) 13NSCQR pg 373, R. 17**, the Court said, *the question of what percentage each tier of government gets is a political one which is not justiciable as a direct legal issue.*

Finally, in **Okotie-Eboh V. Ebiowo Manager (2004) 20NSCQR pg 214, R. 1 & 3**, the issue is whether the question as to the eligibility of the 1st Respondent to contest election as a senatorial candidate under the 2nd Respondent's Electoral Guidelines and Section 66(1)(h) of the 1999 Constitution is a political question which is within the domestic affairs of the 2nd Respondent or a Constitutional question which only the Court can entertain. The Supreme Court **Per Edozie JSC**

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further decided, relying on the authority of **Onuoha V. Okafor (1983) SCNLR 244 @ 267** that the Appellant's action which raises the question of the candidate that a political party will sponsor in an election was a political question over which it has no jurisdiction to decide. Accordingly, the Appellant's claims were struck out and the suit dismissed. His lordship went further when he said that, the Appellant's claims being of a political nature was not justiable ...[121]

Academic Question/Advisory Opinion

It must be generally known that there must exist between the parties to a suit or an appeal a matter in actual controversy which the Court is called upon to decide as a living issue. This is because on the basis of the extent of the grundnorm upon which our judicial authority is based, Courts in this country have no jurisdiction to give advisory opinions. Any judgement which does not decide a living issue is academic or hypothetical. It stands in its best quality only as an advisory opinion. No Court in Nigeria will engage in rendering such a judgement.

There cannot be said to be a live issue in a litigation if what is presented to the Court for a decision, when decided, cannot affect the parties thereto in any way either because of the fundamental nature of the reliefs sought or of changed circumstances since after the litigation started. So that in case of an appeal, the appeal may become academic at the time it is due for hearing even though originally there was a living issue between the parties. And I think the fact that the decision may help any of the parties to redirect its affairs in an entirely different or probably anticipated situation is irrelevant.

[121] See Yesufu V. Juppe International (1996) 5NWLR (pt 446) 17, Nwabueze V. Okoye (1988) 4NWLR (pt 91) 664.

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The pronouncement of Viscount Simon LC in Sum Life Assurance Company of Canada V. Jevis (1949) AC III at 113 – 114 covers in my view, this very principle I have stated and it deserves to be quoted inter alia: *"The House should decline to hear this appeal on the ground that there is no issue before us to be decided between the parties … I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing lis between the parties who are before it, but would merely be expressing its view on a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties … No doubt, the appellants are concerned to obtain, if they can, a favourable decision from this House because they fear that other cases may arise under similar documents in which others who have taken policies of endowment assurance with them will rely on the decision of the Court of Appeal, but if the appellants desire to have the view of the House of Lord on the issue on which the Court of Appeal has pronounced, the proper and more convenient course is to await a further claim and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest is to resist the appeal. The research which has been given to the matter does not discover any previous decision in which the House of Lords has undertaken, on the petition of an unsuccessful appellant, to review the decision below what the opposite party has been finally settled with, and I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."*

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In the case of **A. G. Kwara State V. Alao**[122] the Court held that it will not render advisory opinions nor will it deal with a matter which is speculative and academic.

Also in **A. G. Fed. V. ANPP & ors**[123] where the Supreme Court held that:

"It is clear from the brief of the appellant that the main issue centers on the interpretation of Section 182(1)(b) of the Constitution, particularly whether the provision can be interpreted retrospectively. Can this Court involve itself in the interpretation of the subSection when the office of Governor of Yobe state has been occupied in the April 19, 2003 gubernatorial election? That is the relevant question. What purpose or objective will this Court achieve by the interpretation of the provision? I can hardly see any purpose or objective in the interpretation of the provision other than embarking on a mere academic exercise. And Courts of law do not embark on academic exercise because they are not an academic institutions ... I say this because the interpretation of the provision will not affect the position of the present occupant of the office, who is understandably not a party to the action. And what is more, the 2nd and 3rd respondents who were directly involved in the action have thrown in the towel and are no more interested in pursuing the matter."

Conclusively, whenever a question before the Court is entirely academic, speculative, hypothetical or advisory, the appellate Court in accordance with well-established principles must decline to decide such a point.

Wrong Court

Since it is trite law that parties cannot consent or collude to vest a Court with jurisdiction or waive Constitutional

[122] (2000) 9NWLR (pt 671) 84

[123] (2003) 16NSCQR pg 535, at 555 – 556.

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provisions, therefore, any prospective litigant should know exactly which Court should a particular matter be commenced. The issue here is whether the action should be instituted in the State High Court, Magistrate Court or Federal High Court. The nature of the matter, the parties involved in the proceedings, the claim of the plaintiff are relevant factors to be considered. Now, if it is the matter between the Federal Government and the State Government which Court should have the jurisdiction? And if it is an action between individual and Federal Government agencies like NEPA, NITEL, INEC, NNPC, etc. which Court should have jurisdiction to entertain such matter among such parties. These questions are what the plaintiff should cogitate about before approaching any Court for redress in respect of any matter. For lack of appropriate Court will disrobe the Court of its jurisdiction.

However, where a plaintiff commenced an action in the wrong Court or tribunal that action is bound to be struck out as Court will lack jurisdiction to entertain such matter. The above principle is amply illustrated in different decided cases which we shall consider *in extenso.*

In the case of **NEPA V. Edegbero & ors**[124] . The legal issue in the case goes thus:

Whether the High Court of Niger State had jurisdiction to hear and determine the action which was brought before it by the plaintiffs in view of the Constitution (suspension and modification) Decree 107 of 1993.

[124] (2002) 12NSCQR pg 105, R. 1 – 6.

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The Supreme Court unanimously allowing the appeal held *inter alia* as follows:

> *'By the above provision, which is now Section 251 of the 1999 Constitution, exclusive jurisdiction is vested in the Federal High Court in civil causes and matters arising from the administration, management and control of the Federal Government, the operation and interpretation of the Constitution as it affects the Federal Government as well as any action or proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government". 'The proviso to the subSection emphatically states that a person has the right to seek redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity. The proviso cannot be invoked where no relevant enactment, law equity authorizes an action for damages, injunction or specific performance.*
>
> *In construing the parties, the Court will have no difficulty in identifying the Federal Government but it may have some difficulties in identifying an agency of the Federal Government in certain matters. The case law and the law of agency will certainly be of help in relevant cases. In this appeal, both counsel agree that the appellant, the National Electric Power Authority is an agency of the Federal Government. They are correct. It cannot be otherwise."*

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In addition, similar principle was laid down in the case between **Fed. Gov. of Nigeria V. Oshiomole**[125] . The issues are as follows:

(1) Whether or not the appellants are not entitled to an order of interlocutory injunction in the lower Court having regard to the materials before the Court grounds (i) (ii) (iii) (v) (vi) (vii) and (viii).

(2) Whether or not the trial judge was not in error to have decided substantive claim before it at the hearing of the interlocutory application based on his findings. Ground (iv).

(3) Whether or not the plaintiffs/appellants placed sufficient materials before the lower Court to entitle them to the grant of an order of an interlocutory injunction.

(4) Whether or not the learned trial judge was right to have held that the respondents have a fundamental rights to protest against the fuel tax imposed on the country by the appellants.

(5) Whether or not the lower Court has jurisdiction to entertain the substantive case.

The Court of Appeal unanimously struck out the appeal and held as follows:

> *"The words "suing or being sued" in paragraph (a) of sub-Section (1) of Section 251 of the Constitution postulates no more, in my respective opinion, than authority of the Federal Government to initiate and defend actions in respect of the revenue of the Government*

[125] (2004) 2 FR pg 181, R. 2, 3, 6, 7

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of the Federation in the Federal High Court. It follows that Federal High Court to the exclusion of all other Courts has exclusive original jurisdiction. Consequently, jurisdictional question arises in the instant suit. The Federal Government and one of its functionaries namely the Attorney-General of the Federation, are suing and are parties to the suit and are, therefore, caught by the said provisions of the Constitution. It thus follows that where the Federal Government or any of its agencies is the plaintiff or even where another person is suing on its behalf the jurisdictional question arises.

The issues that will also turn up at the trial is the right or otherwise of the plaintiffs to collect the tax of N1.50k per litre, being taxation, the appropriate Court is the Federal High Court because it takes the deep to see the deep. It is the Court that specializes in the Federal Government Revenue matters. Paragraph ® of subsection (1) of Section 251 of the Constitution talks about declaration and injunction which is in no manner restricted to tort or contract or Constitution."

The Court held further that:

"The cross-appeal succeeds and it is allowed. The trial Court has no jurisdiction to hear and determine the suit. Having found that the Court has no jurisdiction to entertain the suit it cannot hear the application arising therefrom. What then does it profit the appellant or cross-respondents if the order had efficacy only in the Abuja Capital Territory and of no consequence in the rest of

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the country? It follows that the order does not avail them or is not enforceable.

In the circumstance the Court should not make an order which is not enforceable contrary to the established principle of practice that Court should not make an order or orders which are of no avail … The reliefs sought in the instant matter is wider than the territorial jurisdiction of the Court approached and for that reason is incapable of enforcement."

Also in the case of **Dikko Yusuf V. Obasanjo**[126]. The legal issues are as follows:

1) Whether or not breaches of the Constitution and Companies and Allied Matter Acts (1990) are cognizable in an Election Petition based, founded and rooted in the Constitution, in this case under Section 239(1)(a) of the 1999 Constitution
2) Whether or not paragraphs 12, 14 and 16 of the petition in this case are not incompetent for non-joinder of necessary parties? Grounds 5, 6, 7.
3) Whether or not 5th – 39th respondents and 42nd – 56th respondents are necessary parties to this suit? Grounds 9, 10 and 11.
4) Whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case? Ground 8.
5) Whether or not order of dismissal of the appellant's motion on notice by the lower Court was a proper order in the circumstances of this case. The issue covers ground 12.

[126] (2004) 18 NSCQR (pt 11) pg 477, R. 2, 12, 22

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In a reserved and well considered ruling, the Tribunal in the lead ruling of **Mahmud Mohammed, JSC** (which was concurred to by all the other 4 Justices) concluded as follows:

> *"In the result, the application filed by the 1st respondent on 12-6-2003 raising objection to the petition as contained in paragraph 1 and 2 of his reply also filed on 12-6-2003, except for the striking out of paragraphs 13 and 17 of the Petition has failed and the same is hereby dismissed with no order on costs. Similarly the application of the 2nd respondent filed on 13-6-2003 raising objection to the petition except for striking out paragraphs 13 and 17 of the petition has also failed and the same is dismissed with no order on costs. Finally, the preliminary objection by the 40th – 55th respondents seeking for the striking out of the petition or dismissing it, has also failed except for the striking out of paragraphs 13 and 17 of the petition. Consequently, the preliminary objection is also hereby dismissed with no order on costs."*

It is abundantly clear from the above that each of the applications or objections succeeded in part and failed in part. Paragraphs 13 and 17 of the petition were struck out while all the other prayers or reliefs including that of dismissal and or striking out the petition were dismissed. Aggrieved by the ruling of the Tribunal, both the 1st and 2nd respondents have appealed separately to the Supreme Court.

The Supreme Court unanimously dismissed the appeal and held as follows inter alia that: "There is no doubt at all that the Tribunal has original jurisdiction to hear and determine Presidential Election Petition vide Section 239(1) of the

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Constitution and consequently to hear all matters related to the election. But the issue here is – would that include matters specifically assigned to other Courts under the Constitution? The tribunal says 'yes' I say 'no'. Strictly speaking,

> *I think matters or things which constitute infractions of the Constitution and Companies and Allied Matters Act or any Act for that matter, should go before the High Court and or Federal High Court as the case may be. The Courts are vested with jurisdiction under the Constitution, and the laws to listen to those infractions or complaints, and not the Tribunal."*

The Court held further on whether the violation of other legislations such as Companies and Allied Matters Act can be the basis for questioning an election or return. It said: "The allegation in the petition speaks of the appellants' subtle use of or reliance on method that offend the provisions of the Constitution and CAMA to thwart the will of the people and thereby give themselves undeserved advantage over the 1st respondent and other contestant that where there are allegations of flagrant abuse of power by use of or resorting to unacceptable method by way of mobilizing corporate bodies to contribute a huge sum of money as election fund to an incumbent office holder such allegations ought to be looked into by the tribunal. Attractive as this line of argument would seem, it obviously ignores the provision of Section 134(1) of the Electoral Act. There is no way this Court or any Court can stretch the interpretation of this Act by assuming the jurisdiction to undertake matters relating to CAMA which ordinarily is vested in the Federal High Court. Besides it is not

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within the contemplation of the Electoral Act that this Court should strain the construction of the said Section or for that matter Section 239 of the Constitution and clothing itself with negative altruistic motive commence to enlarge the grounds of petition set out in the Electoral Act. Where a party conceives that there has been an infringement of any law, it could decide if so motivated and aggrieved to commence action in the Federal High Court. This Court is not the right Court for such a matter. If the language of the Constitution is clear and unambiguous the Court must interprete its plain and evident meaning. **A. G. (Bendel State) V. A. G. (Federation) (1981) All NLR 1.** The original jurisdiction of the Court of Appeal under Section 239(1) of 1999 Constitution is very clear. All other grievances outside that provision can only be justiciable in other Courts recognized for such jurisdiction in the Constitution. I therefore agree that the Court of Appeal has no jurisdiction to adjudicate on matters relating to alleged breaches or contravention of the provisions of the Constitution and the Companies and Allied Matters Act, Laws of the Federation, 1990 in an Election Petition based, founded, and rooted in the Constitution."

At this juncture, considering how hard and sensitive nature of jurisdiction is, Courts of law must always bow to the provisions of the Constitution and the enabling statute. On no account should we remove from a Court which has jurisdiction to hear a matter to another Court which has no jurisdiction to hear the matter. That is not right and we should not do it. Therefore, every litigant should approach the Court in respect of their matters.

Also, the Supreme Court, **per Iguh JSC** in **A. G. of Lagos State V. A. G. Fed. (2004) 20NSCQR pg 99 @ 157** held

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that "Claims (vii) and (viii) of the defendants pertaining to election conducted in the Local Government. Areas are incompetent as this Court is not an Election Petition Tribunal. They are accordingly struck out."

Composition of Courts and Qualifications of the Members

By the authority in **Madukolu v. Nkemdilim**[127] where the Court explained the conditions for Court's jurisdiction. The Court held that: "A Court is competent when:"

1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
2) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and
3) The case comes before the Court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

It is indeed, a notorious fact that apart from the above conditions for the jurisdiction of a particular Court to be known recourse has to be made to the statute creating that Court. The statute will specifically state the number of qualified people to preside over in respect of any matter in that Court.

In our country, the 1999 Constitution and other enabling statutes expressly stated numbers and qualifications of the Justices of the Supreme Court, Section 234 of the 1999

[127] (1962) (pt 2) ALL NLR 581

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Constitution provides that "for the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, the Supreme Court shall be duly constituted if it consists of not less than five Justices of the Supreme Court: Provides that where the Supreme Court is sitting to consider an appeal brought under Section 233(2) (b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with Section 232 of this Constitution, the Court shall be constituted by seven Justices".

If the numbers of justices specified above in respect of any matter presided over by them is incomplete, that means the quorum is not formed and the Court will automatically lack jurisdiction and competence to preside. This is not peculiar to Supreme Court alone but it also applies *mutatis mutandis* to all other Courts and tribunals.

In the Court of Appeal, Section 247(1)(a) & (b) of the 1999 Constitution says: "for the purpose of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal and in the case of appeals from –

(a) a Sharia Court of Appeal, if it consists of not less than three Justices of the Court of Appeal learned in Islamic personal law; and

(b) a Customary Court of Appeal, if it consists of not less than three justices learned in Customary law".

Also, Federal High Court shall be duly constituted if it consists of at least one Judge of that Court, (Section 253 of the 1999 Constitution). In addition, the High Court of the Federal Capital Territory and of States shall be duly constituted if they consist of at least one Judge of that Court, Section 258 & 273, of 1999 Constitution.

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In the case of the Sharia Court of Appeal of the Federal Capital Territory, Abuja and that of States they shall be duly constituted if they consist of at least three Kadis of that Court (Sections 275, & 260 respectively of the 1999 Constitution). Similarly, in the Customary Court of Appeal of the Federal Capital Territory, Abuja and that of States shall be duly constituted if they consist of at least three Judges of that Court. Section 268 & 283, 1999 Constitution.

The composition of the National Assembly Election Tribunals, Governorship and Legislative Houses Election Tribunals are set out in the Sixth Schedule to the Constitution.

A National Assembly Election Tribunal shall consist of a chairman and four other members. The Chairman shall be a Judge of a High Court and four other members shall be appointed from among judges of a High Court, Kadi of a Sharia Court of Appeal, Judges of a Customary Court of Appeal or other members of the judiciary not below the rank of a Chief Magistrate.

The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the Chief Judge of the state, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

Governorship and Legislative Houses Election Tribunal shall consist of a Chairman and four other members.

The chairman shall be Judge of a High Court and the four other members shall be appointed from among Judges of a High Court, Kadis of Sharia Court of Appeal, Judges of a Customary Court of Appeal or members of the Judiciary not below the rank of a Chief Magistrate.

The Chairman and other members shall be appointed by the President of the Court of Appeal in consultation with the

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Chief Judge of the State, the Grand Kadi of the Sharia Court of Appeal of the State or the President of the Customary Court of Appeal of the State, as the case may be.

Furthermore, the Judges and Justices of our various Courts must be competent and qualified to practice as a legal practitioner in Nigeria and they must have been so qualified for a specific periods/numbers of year before they could be appointed.

Pre-Action Notice.

It is necessary to state that there are circumstances where a Court of law has no original or any Constitutional jurisdiction to hear a matter.

Their jurisdiction is either taken away or merely put on hold pending compliance with certain pre-condition. One of such pre-conditional steps is pre-action notice. Pre-action notice is a procedure for invoking the jurisdiction of the Court which should not be confused with the authority of the Court to decide matters which on the face of the proceedings have been properly presented in the formal way for its decision and which are within its jurisdiction.

It is a special defence available to an appropriate defendant by statute (or contract) which he ought to raise to the effect that he has not been served with the requisite pre–action notice and therefore that the action is incompetent or premature. Such a defence of non–service which is a matter of fact, should be raised in the proper manner at the trial Court–preferably soon after the defendant is served with the writ of summons. If not so raised, the fact of non–service ought to be pleaded in the statement of defence. If it is raised, and it is shown, that there has been non-service, the Court is bound to hold that the

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plaintiff has not fulfilled a pre-condition for instituting his action. The action will be considered premature, or in the usual parlance incompetent and struck out.

However, the incompetence of the action as a result of non–service of a pre–action notice resulting in the Court being unable to exercise its jurisdiction to proceed with the hearing is an irregularity which is not such that cannot be waived by the defendant who has filed it by motion or plead it in the statement of defence. It is different from circumstances of total lack of jurisdiction in the Court. Care must be taken to understand the essence of pre–action notice. Non-compliance does not abrogate the right of a plaintiff to approach the Court or defeat his cause of action. If the subject matter is within the jurisdiction of the Court, failure on the part of a plaintiff to serve a pre–action notice on the defendant gives the defendant a private right to insist on such notice before the plaintiff may approach the Court. The defendant is perfectly at liberty to ignore the fact of irregular commencement of the action and decides or acquiesces to waive his right to pre–action notice. It is not a substantive element but a procedural requirement, albeit statutory, which a defendant is entitled to before he may be expected to defend the action that may follow.

Much stress has been placed on the argument that non-compliance with pre-action notice leads to a question of jurisdiction which can be raised at any time and which if resolved against the plaintiff renders the entire proceedings a nullity. This rather mechanical approach to the issue which tends to ignore the distinction between jurisdictional incompetence which is evident on the face of the proceedings and one which is dependent on ascertainment of facts, leads to error. In my opinion, bearing the distinction in mind,

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appropriate guidelines could be fashioned out as follows:

1) Where on the face of the proceedings a superior Court is competent, incompetence should not be presumed.
2) Where on the face of the proceedings the Court is incompetent, the Court should of itself take note of its own incompetence and decline to exercise jurisdiction, even if the question had not been raised by the parties. If it does not, the question of its incompetence can be raised at any stage of the proceedings because the fact of its incompetence will always remain on the face of the proceedings.
3) Where the competence of the Court is affected by evident procedural defect in the commencement of the proceedings and such defect is not dependent on ascertainment of facts, the Court should regard such incompetence as arising *ex facie*.
4) When the competence of the Court is alleged to be affected by procedural defect in the commencement of the proceedings and the defect is not evident but is dependent on ascertainment of facts, the incompetence cannot be said to arise on the face of the proceedings. The issue of fact if properly raised by the party challenging the competence of the Court should be tried first before the Court makes a pronouncement on its own competence.
5) Where competence is presumed because there is nothing on the face of the proceedings which reveals jurisdictional incompetence of the Court, it is for the party who alleges the Court's incompetence to raise the issue either in his statement of defence in proceedings commenced by writ

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or by affidavit in cases commenced by originating summons.

6) A judgement given in proceedings which appear *ex facie* regular is valid.

Furthermore, pre–action notice is not an ouster clause and not a device adopted by government to prohibit judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the Courts. Such notice is rampant when contemplating of bringing action against government or a government agency as a condition precedent to invocation of Court's jurisdiction.

Example of such pre-action notice is found in Section 110 (1) & (2) of Ports Act (Nigeria Ports Authority)[128] . "*When any suit is commenced against the authority or any servant of the authority for any act done in pursuance of execution, or intended execution of any law or of any public duties of authority or in respect of any alleged neglect or default in the execution of such Act, Law, duty or authority, such suit shall not lie or be instituted in any Court unless it is commenced within twelve months next after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof.*"

"No suit shall be commenced against the Authority until one month at least after written notice of intention to commence the same shall have been served upon the Authority by the intending plaintiff or his agent, such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims".

[128] Cap, 361 Laws of Federation of Nigeria 1990 The section provides: 110 (1)

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Let us see what Court had said concerning pre-action notice. In the case of **Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency & ors**[129]

The legal issues are as follows:

1) Whether the various 4th respondents had the locus to raise and /or properly raised the issue of the appellants alleged non-compliance with the pre-action notice requirement under Section 29 (2) of the FEPA Act 1988 to support the application to strike out the Originating Summons and vacate the subsisting order of interim injunction.
2) Whether the lower Court was right in affirming the trial Court's decision striking out the originating summons and vacating the order of interim injunction on the ground that the appellant failed to show in the affidavit in support of the originating summons (or otherwise) that it had complied with the provisions of the FEPA Act 1988 by giving the requisite one month pre-action notice to the 2nd respondent.
3) Whether the originating summons did not disclose a reasonable cause of action even if the action against the 2nd respondent was incompetent on account of the appellant's failure to show that it had served the 2nd respondent with the requisite one month pre-action notice (which is denied) having regard to the issues for determination in the originating summons with regard to the 1st, 2nd, and 3rd respondents.

[129] (2002) 12 NSCQR pg 263, at 283

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The Supreme Court unanimously allowed the appeal and held as follows among others that:

"Although the respondents put their case in their respective briefs in different words, each of them focused on the consequence of failure to serve pre-action notice as affecting the competence of the action and the jurisdiction of the Court. There is no dearth of authorities as to the consequence of failure to serve a pre-action notice when such is made a condition precedent for the commencement of a suit."

A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit.

A party who challenges the competence of a Court on the basis of certain facts but fails to put in issue those facts, stands the risk of being precluded at a later stage when the proceedings have been brought to a final conclusion from re-opeing that issue of fact. Held further that:

"Service of a pre-action notice on the party intended to be sued pursuant to a statute is, at best, a procedural requirement and not an issue of substantive law on which the rights of the plaintiff depend. It is not an integral part of the process for initiating proceedings. A party who has served a pre-action notice is not obliged to commence proceedings at all or, barring any limitation period, to commence one within anytime after the time prescribed for pre-action notices. That is why in Section 29 (2) of the Act he is referred to as an "intended plaintiff""

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The argument that a pre-action notice forms part of the cause of action of the plaintiff is misconceived and untenable as it ignores the distinction between matters of substance and matters of procedure. Notwithstanding that, sometimes, the distinction between substantive law and procedure is blurred, it is generally accepted that matters (including facts) which defines the rights and obligations of the parties in controversy are matters of substantive law defined by substantive law whereas matters which are mere vehicles which assist the Courts or tribunal in going into matters in controversy or litigated before it are matters of procedure regulated by procedural law. Facts which constitute the cause of action are matter of substantive law and should be pleaded, whereas facts which relate to how a party is to invoke the jurisdiction of the Court for a remedy pursuant to his cause of action is a matter of procedure outside the realms of pleadings. The distinction was stated thus in Halsbury Law of England volume 8 (1), 4th Edition paragraph 1066:... generally speaking, it may be said that substantive rules give or define the right which it is sought to enforce and procedural rules govern the mode or machinery by which the right is enforced.

A pre-action notice which is for the benefit of the person or agency on whom or on which it should be served is not to be equated with processes that is an integral part of the proceedings – initiating process.

As have been said in a number of authorities its purpose is to enable that person or agency to decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy. The law is clear that conditions imposed for the benefit only of a particular

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person or class of persons can be dispensed with. In **Graham V. Ingleby (1884) 1 Exch. 651, 657 Alderson B,** said: " it is evident, that a party who has a benefit given him by statute may waive it if he thinks fit".

Also, in the case of **Chief Eze V. Dr. Okechukwu & ors**[130] the Supreme Court held that:

> *'I have no doubt in my mind that interpretation given to that phrase in Section 11 (2) by the appellant, namely that "the plaint when eventually prepared shall contain a statement that such notice has been so delivered" to the effect that failure to so endorse the plaint (or writ of summons) was fatal and would inexorably lead to the action being declared incompetent cannot be right. I think the purpose of such an endorsement is to signify early that the necessary pre-action notice has been given. By so doing, the defendant would be in a position to admit or refute it. The endorsement is not to be taken as conclusive by itself, that the notice has in fact been given. It is the actual giving of the notice that is of real relevance.*
>
> *In other words, failure to give the notice could, in appropriate circumstances be adjudged as a factor of the incompetence of the action not failure to indicate by the endorsement of the plaint that notice has not been given.*
>
> *It follows that what can truly be raised as an objection to competence is the failure to give notice..."*

[130] (2002) 9NSCQR pg 148, (a) 161

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Finally, let it be noted, that the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the Court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered indispensable, and either party may waive them without affecting the jurisdiction of the Court.

Immunity

Section 308 of the 1999 Constitution and other statutes shield some categories of people from liability, essentially most of those people are public officers. So where the public officer or authority sought to be sued has immunity from liability under law, then legal action will not succeed against them within that stipulated period. As a general rule, those who have immunity from liability include:

a) The President, Vice-President, Governors and Deputy-Governors: Under the Constitution, precisely, Section 308 of the 1999 Constitution, the above mentioned people have immunity in their personal capacity from liability in respect of suits brought against them in their personal capacity during their term of office. **See Olabisi Onabanjo V. Concord Press of Nig. Ltd.**[131]

b) Judges: Under the principle of Judicial immunity, judges are not liable for acts done in their judicial capacity.[132]

[131] (1981) 2NCLR 399 HC, Keyamo V. LSHA (2000) 12 NWLR (pt 680) pg 196 C. A. Tinubu V. IMB Securities Plc. (2001) 16NWLR (pt 740) pg 670 SC. Abacha V. Fawehinmi (2000) 6NWLR (pt 600) p. 228 SC, Fawehinmi V. I. G. P. (2002) 7NWLR (pt 767) p. 606 SC.

[132] (1951) 21 NLR 19, Egbe V. Adefarasin (1985) 1NWLR (pt 3) 549 SC. Minister V. Lamb (1882 – 83) 11QBD 588, Okeke V. Baba (2000) 3NWLR (pt 650) p. 644.

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c) Public bodies: Statutory authority may be granted by a statute which may exclude a public body or agency from liability or limit the liability of the public body.[133]

d) Diplomats: Under the principle of Diplomatic immunity, diplomats are immune to legal process and legal liability in their host country.[134]

Furthermore, during the term of office of the above mentioned officers, any suit which seeks to make them liable in their personal capacity cannot be brought nor continued against them. (i.e. the Court will lack jurisdiction to entertain the same). Where one was pending before they assume office, it has to be adjourned *sine die*. Alternatively, the parties may settle the matter amicably.

However, they are not immune from the following:

i) Impeachment proceedings
ii) Election petitions and
iii) Actions brought against them in their private capacity, concerning their office and functions. Therefore, they can always be sued in their private capacity, usually by suing the Attorney General. Whenever an action is to be brought against the state, the Attorney General may be sued as representing the state. Sometimes the relevant public officers are sued in the names of their offices or sued the Attorney General and the relevant public officer jointly.

[133] See Allen V. Gulf Oil Co. Ltd. (1981) 1ALLER 353.

[134] See Diplomatic Immunities and Privileges Act, Cap. 99 LFN, 1990, Dickinson V. Del Solar (1930) 1KB 376, Noah V. His Excellency, The British High Commissioner to Nigeria (1980) 1ALL NLR 208.

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iv) Public officers: Under the Public Officers Protection Act and Laws of the various states, the liability of a public officer, if any, is limited to three months and thereafter they are immuned from liability for all time for any wrong they may have committed in the course of their employment or duty as public officers or civil servants.[135] Also in **Tinubu V. I. M. B. Securities Plc (2001) 8NSCQR pg 1**, where the appeal by the 3rd defendant (Governor. Tinubu of Lagos State) against the ruling of the High Court came before the Court of Appeal, Lagos Division, learned counsel to the respondent applied to the Court seeking the adjournment of the appeal sine die until the Appellant, Mr. Bola Tinubu vacated office as Governor of Lagos State. The Appellant opposed the application. After argument of counsel, the Court of Appeal granted the application. Appellant has brought this appeal against the ruling of the Court of Appeal. The Court, per **Karibi-Whyte JSC** held that the literal construction as Section 308(1)(a) is that no actions, civil or criminal can be brought or continued against any of the persons stated in Section 308(3). Such a person cannot be arrested or imprisoned during tenure either in pursuance of the process of any Court or otherwise – Section 308(1)(b). No process of any Court requiring or compelling the appearance of a person to whom the Section applies, shall be applied for or issued."

[135] See Egbe V. Adefarasin (1985) 1NWLR (pt 3) p. 549 SC.

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On when can the Governor be sued during his period. **S. M. A. Belgore JSC** opined that: *"the only permissible proceedings is when such a person holding any of the aforementioned offices is sued in his official capacity i.e. President or Vice-President, or as Governor or Deputy Governor and only when he is a nominal party."*

Also is **Fawehinmi V. I. G. P.**[136], the appellant filed an originating summons against the respondents/cross appellants on the 7th October, 1999 at the Federal High Court Lagos, where he sought an order of Mandamus against the respondents to investigate criminal allegations which he made against Governor Bola Ahmed Tinubu of Lagos State. The trial Court dismissed the summons on 14th Dec., 1999 upon a preliminary objection based on the ground of immunity enjoyed by the Governor by virtue of Section 308 of the 1999 Constitution.

The Appellant appealed to the Court of Appeal and it held that;

> *Section 308 of the 1999 Constitution does not preclude investigation of person holding office under the Section.*
>
> *That in the circumstances of the case no order of mandamus would be made compelling the respondents to investigate the allegations against the Governor of Lagos State and That the appellant had locus standi to institute the action.*

The appellant further appealed to the Supreme Court, so also the respondents cross appealed. The Supreme Court **per Kalgo JSC** at pages 873 – 874 held that it must be clearly understood that there is a distinction here between

[136] (2002) 10NSCQR (pt 11) pg 825

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"proceedings" and "investigation" leading to the proceedings … It appears to me clearly therefore that the holders of the offices mentioned in Section 308(3) of the 1999 Constitution can be investigated but only to the extent that they should not be questioned, arrested or detained or asked to make any statement in connection with such investigation. I think the main purpose of Section 308 of the 1999 Constitution is to allow an incumbent President, Vice President, Governor or Deputy Governor mentioned in that Section a completely free hand and minds, in the performance of his or her duties and responsibilities whilst in office, so that no encumbrances may be placed in his or her way in execution or performance of the public duties responsibilities assigned to the office which he or she holds under the Constitution. But this is not intended to grant him or her, an immunity forever from full criminal investigation or any criminal proceedings in respect of any offence allegedly committed by him or her during the tenure of office." **Wali JSC** concurred in his judicial reasoning when he held "notwithstanding the interpretation of Section 308 of the 1999 Constitution, it must not be assumed that a blanket authority is given to the police to question the officers mentioned in Section 308(3) while in office no matter how strong such evidence might be against him. Such evidence must be kept in the cooler until such time and officer vacates the office."

In the case of **Egbe V. Adefarasin**[137] in that case, the Supreme Court held: in favour of the defendant/respondent judge, that at common law, persons exercising judicial functions are immuned from all civil liability whatsoever for anything done in their judicial capacity. This common law rule has been

[137] (1987) 1NWLR (pt 3) pg 549 SC.

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enacted into statute law, for instance in Section 88(1) of the High Court Law of Lagos State Cap. 60, 1994 which provides: "No judge shall be liable for any act done by him or ordered by him to be done in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do, or order to be done the act in question.

Therefore, the Court will lack jurisdiction to entertain any complaints or actions brought against the officers mentioned above pending the time of sojourn in offices.

Right of action

A right of action is the legal right to sue another person, body or government. In Nigeria, a person has a right of action when any of his rights has been, is being or is likely to be contravened. To be able to challenge an administrative power, decision or act, one must have a right of action in law. As a general rule in Nigeria, a person has a right of action under Section 6(6)(b) of the 1999 Constitution as follows:

i) Under Section 6(6)(b) 1999 Constitution, "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 to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligation of that person."

ii) Under Section 46(1) 1999 Constitution, any person who alleges that any of the provisions of that chapter has been, is being or likely to be contravened in any state in relation to him may apply to a High Court in that state for redress."

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iii) And under Section 17(2)(e) provides "The state social order is founded on ideals of freedom, equality and justice – In furtherance of the social order – the independence, impartiality and integrity of Courts of law, and easy accessibility thereto shall be secured and maintained."

Furthermore, it is law that where there is a right, there is a remedy *(Ubi jus ibi remedium)*. This was buttressed in the case of **Ashby V. White**[138] where the plaintiff, a voter, went to vote at an election, but his vote was discountenanced. He sued alleging wrongful rejection of his vote. Held: that an elector has a right to legal action, for a form of nuisance or disturbance of rights, if his vote was wrongly rejected by the returning officer, even though the candidate he had tried to vote for was elected anyway. In this case **Lord Holt C. J.** said: "If the plaintiff has a right he must of necessity have the means to vindicate it, and a remedy, if he is injured in the exercise of it and indeed it is a vain thing to imagine a right without a remedy, for want of right and remedy are reciprocal."

But by and large, where right of action is expressly ousted by statute with appropriate words for example our grundnorm (1999 Constitution), an aggrieved party may not be able to challenge the act in question. For instance, under the Constitution, impeachment proceedings initiated by the Legislature cannot be challenged in Court Section 143(10) provides that "No proceedings or determination of the panel or of the National Assembly or any matter relating thereto shall be entertained or questioned in any Court." Also Section 188(10) says "No proceedings or determination of the panel or of the House of Assembly or any matter relating to such

[138] (1703) 1ER 417

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proceedings or determination shall be entertained or questioned in any Court."

Why are these provisions? Because going by the Constitution, an impeachment proceedings is a function and an internal matter of parliament. Once it is Constitutionally carried out then the Courts will automatically lack jurisdiction as the law commands it. For judiciary will not go against the doctrine of separation of powers to interfere in the sphere of parliament's Constitutional powers to tell the parliament to discontinue the action or setting it aside.

In the matter between **Otunba Iyiola Omisore V. Dr. Mojeed O. Alabi & anor suit No. FHC/S/CP/3/2002 (unreported), Nigerian Tribune 21 November, 2002.** Where the applicant sought declarations for the following reliefs:

1) A Declaration that the Notice of Impeachment dated the 12th of Nov. 2003 in so far as it accuses the Applicant of criminal offences under the Code of Conduct Bureau and Tribunal Act is unconstitutional, illegal, unlawful, null and void.
2) A Declaration that only the Code of Conduct Tribunal or a Court set up under the 1999 Constitution could assume jurisdiction to indict and or try the Applicant on the criminal offences contained in the Notice of Impeachment dated the 12th day of Nov. 2002.
3) A Declaration that in so far as the allegations, contained in the purported Notice of Impeachment dated the 12th day of Nov., 2002, disclose indictable criminal offences the Applicant is immuned under Section 308 of the 1999 Constitution and consequently the purported Notice of Impeachment is unlawful, unconstitutional, null and void.

4) An order setting aside the purported Notice of Impeachment dated the 12th day of Nov., 2002.

5) An order of Injunction restraining the 1st to the 19th Respondents from indicting and or trying the Applicant on the criminal allegations contained in the Notice of Impeachment dated the 12th of Nov., 2002.

6) Further or other reliefs.

The Federal High Court holden at Osogbo ***per incuriam*** granted the order when it said "leave is granted to the Applicant for the enforcement of his fundamental rights in terms of the reliefs set out in paragraph 2 of the accompanying statement and other orders. But eventually, the court vacated the orders earlier granted when its attention was drawn to Section 188(10) of the 1999 Constitution.

Also the Court of Appeal in the case of **Aiyeketi V. Registered Trustees of Association of Agege Bus Owners**[139] held: on when the right of action in Court is exercisable: that "indeed, by the combined effect of Section 6(6)(b), 33(1) and 236(1) of the 1999 Constitution the right of action is a Constitutional right exercisable by a person who has complaints touching on his civil rights and obligation against another person, government or authority. To be able to exercise that right he must show his legal interest in the subject matter which establishes his locus standi."

The case of **Alhaji Abdulkardri Balarabe Musa V. Auta hamza and 6 ors.**[140]

139 (2003) 10FR pg. 174, R. 2

140 Supra.

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The ratios of **per Adenekan Ademola JCA** at page 242 para 5-7, 9 and **per Adolphus G. Karibi –Whyte JCA** pg 248 para 7. are fundamental to the development of law in this direction.

Adenekan Ademola JCA: observed that "This Section has been popularly termed impeachment Section in relation to the removal of the Governor and his Deputy from office. It is novel in the Constitution of Nigeria. It has its origin in the political thought and Constitutional law of the medieval Europe and the Constitution of England in the 16th to 18th centuries. It was transplanted to the American soil during the settlement of the Colonies on that continent. It was a powerful weapon in the hands of parliament in its fight against the King and the Executive in its desire to control and tame despotism from these quarters. It is now thought obsolete a method in getting rid of Minister and servant of the King. But in our present situation in this Country one must not discountenance its potentialities. In England, the House of Commons is the accuser and the prosecutor before the House of Lords which tries the offender and hands down judgement. In the judicial set up in England, the House of Lords is the Highest Court. The Law Lords take part in the proceedings in the House of Lords and this fact and other consideration may in my view be responsible for the lack of judicial control or interference in impeachment proceedings in the Country . . . . In Nigeria under Section 170 of the Constitution, the exercise is begun by members of the House. Even the speaker who appoints the Committee of seven persons to investigate the allegation against the Governor or his deputy must have the approval of members of the Committee Report. It is only when the Committee report that the allegation has not been proved that

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members of the House of Assembly are not called to finish the work it has begun. The whole exercise cannot be said to guarantee independence or objectivity and impartiality by the norms of Section 33 (I) of the Constitution. It is a trial by the legislative organ of the State and the law it administers is Lex parliament: as Section 170 (II) lays down; such a law is hardly the ordinary law the normal Courts administer. The judgement the House gives is a legislative judgement. Does such a judgement come in for a review by the ordinary Courts of the land? That is where the true meaning and intendment of Section 170 (10) comes in.

> *The obvious end that Section 170 of the Constitution was designed to serve is that the Governor or his deputy could only be removed by the Act and doings of the Legislature and subSection 10 of it is put in to step any interference with any proceedings in the House or the Committee or any determination by the House or the Committee. It follows from the premise of this that no Court can entertain any proceedings or question the determination of the House of the Committee.. It is a political matter... for the Court to enter into the political ticket as the invitation made to it clearly implies would in my view be asking its gates and its walls to be painted with mud; and throne of justice from where its judgements are delivered polished with mire".*

per Adolphus G. Karibi – Whyte JCA: who also observed in concurrence with his brethren that "The Constitution is therefore not only the charter of government, but is also the anchor and ultimate refuge of the citizen. No rights or duties can be enjoyed or enforced except insofar as

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the Constitution allows . . . the exercise of the power under Section 170 is not a power derived from an Act of the National Assembly or a House of Assembly but a power conferred on the House of Assembly by the Constitution. That the Constitution has vested the power to remove the Governor or Deputy Governor in the State House of Assembly is not questioned . . . . I am satisfied that the moment the Legislature commenced removal proceedings under Section 170 (2), the jurisdiction of the Court was ousted by Section 170 (10) . . . Where the Constitution has not vested in the Courts any supervisory jurisdiction the Court will be acting contrary to the Spirit of the Constitution if it went on any inquiry into the manner Parliament had performed the function assigned to it by the Constitution. No source of Conflict between the different departments is greater than an interference of that opinion that the Court cannot enter into such an enquiry. Not only because it has no jurisdiction to do so, but also essentially because such an enquiry is productive of insoluble conflicts".

In **Balarabe Musa V. Kaduna State House of Assembly & others**[141] the plaintiff by an application sought the leave of the High Court of Kaduna State to apply for judicial review by way of certiorari, declarations and injunction of the impeachment proceedings against him as Governor. The Court held: that it has no jurisdiction to entertain the application as it relates to the process of removal of a state Governor, by virtue of Section 170(10) of the 1979 Constitution which ousted the jurisdiction of Courts."

So also a person who is not a privy to a contract cannot have right of action to enforce such a contract under the

[141] (1982) 3NCLR 463 HC

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doctrine of privity of contract. This is a general rule but there are exceptions to this doctrine.

But the general rule is our area of concern. **As Karibi-Whyte JSC** in the case of **A. G. Fed. V. A. I. C. Ltd.,**[142] said: *"As a general principle a contract affects the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purport to give him the right to sue, or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration does not entitle him to sue upon the contract."*

Furthermore, in the case of **Nangibo V. Okafor & ors**[143] one of the legal issues is whether a non-party to a contract can seek a cancellation of that contract for one cause or the other. The Court held that: *"It is not competent for the Rivers State Government to cancel the Deed of Assignment of which it was not a party ... It needs to be stressed in this respect that one cardinal principle of the law of contract is that it is only a party to a contract that can seek a cancellation of it for one cause or the other."*

In the case of **Anuka Community Bank (Nig.) V. Olua (2000) 7NCLR pg. 64** the Court held that by virtue of Section 42 (1) of the 1979 Constitution and Order 1 rule 2 (1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979 a person has a right of action where he feels that his fundamental right is contravened or is being or likely to be contravened[144]

[142] (2000) 2SCNQR (pt 2) pg 1112, R. 4 & 5

[143] (2003) 14NSCQR (pt 2) pg 1194, R. 3

[144] See Okogie V. A-G. Lagos State (1981) INCLR 218; Momoh V. Senate of the National Assembly (1981) INCLR 105; Saude V. Abdullahi (1989) 4NWLR (pt 116) 387; Uzoukwu V. Ezeonu II (1991) 6NWLR (pt 276) 410; Peterside V. I.M.B. (Nig.) Ltd (1993) 2NWLR (pt 278) 712.

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Internal Affairs of the Legislature

The Courts cannot interfere in the internal affairs of the legislature or the arrangement or conduct or organization of its business or in what might be a mere measure of internal discipline over its members especially where the limitation on power of Court to issue a writ or direction to the House of Assembly, Senate or House of Representative in connection with its internal proceedings arises from the provisions of the Constitution.

The Courts have no jurisdiction to question or enquire into the validity of what took place within the walls of the legislative assembly. The reason being that if the Court were allowed to enquire into the legality of every and any act that took place in a Legislative Assembly, it is doubtful whether any law would be passed, as the best part of the time would be spent in dragging the Speaker in and out of Court. The Courts can only enquire into whether a person was legitimately removed or voted in as a member of a Senate, House of Representative or of a State House of Assembly, but not whether he was legitimately removed or appointed as a Speaker or Senate President of any legislative assembly; This is because a legislator is voted into the House by the generality of the voters in his constituency, whereas a speaker or Senate President is voted into that office only by the members of the House. So, his colleagues who voted to appoint him as a Speaker or Senate President can also remove him by the necessary majority.

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Consequently, the Courts have no jurisdiction to inquire in the following instances:

(a) Whether the House breached its own rules in removing the speaker, Senate President, Majority Leader, Minority Leader, Chief Whip or other elective office within the four walls of the House.

(b) Whether the respondent was denied fair hearing or not before he was removed from the office of the speaker of the House of Assembly or any other elective office within the four wall of the House by the requisite majority votes of members. **Ezeoke V. Makarfi**[145]

In the case of **Senator BC Okwu V. Senator Dr. Wayas**[146], Facts: The complaint of the plaintiff is that he has been wrongly removed as a leader of his party (the Nigerian Peoples Party) in the Senate. And it offended against a Section of the Standing Rules of the Senate. He sought a remedy in the High Court. However the defendants objected to the jurisdiction of the Court to hear the matter as it concerned the internal affairs of the legislative arm of government. The Court held as follows;

(1) No Court can interfere in any matter within the internal affairs to the other arms of Government – Executives and Legislative.

(2) Each organ of the three arms of government is to that extent independent within its own domain and no one organ has any supervisory powers or control over the conduct of the affairs of the other, unless there has been a violation of any of the provisions of the 1979 Constitution.

[145] (1982) 3 NCLR 663.

[146] (1981) 2 NCLR 522

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(3) The judicial power of the Courts are confined to the provisions of the Constitution and the rights guaranteed thereunder.

In addition, the Court provides for the following judicial pronouncement in the case of **Obi V. Waziri**[147] that:

> *"the internal proceedings of the Houses of Parliament are not subject to review by the High Court. Unless specifically granted to the Court, the control of each House of Parliament over its internal proceedings is absolute and cannot be interfered with by the Courts of law"*

Finally, it is now clear beyond any iota of doubt in the case of **Ekpenkhio V. Egbadon**[148], the legal issues are

(1) Whether the respondent's claim is justiciable on the ground that his removal as speaker of the Edo State House of Assembly was in breach of his fundamental rights.

(2) Whether the High Court had jurisdiction to inquire into the respondent's claims.

(3) Whether the respondent who participated and voted in the proceedings of the Edo State House of Assembly leading to his removal on 13th August, 1992 can be heard to complain about the conduct and/or outcome of the said proceedings or decision reached thereat.

The Court held *inter alia* as follows that: "Upon a general reading of the provisions of Section 237 (1) of the 1979 Constitution it seems clear that the Constitution vests in the

147 (1961) ALL NLR 371

148 (1993) 7 NWLR (pt 308) pg. 717

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competent High Court original jurisdiction to hear and determine any question whether any person has been validly elected to any office, to the membership of any legislative house or whether the term of office of any person has become vacant. By this Section all dispute with regard to the validity of the election of any person to the membership of any legislative house are justiciable by a competent High Court. However the provisions of Section 260 of the Constitution are designed to qualify and delimit the meaning of "office" in Section 237 (1) of the Constitution. Section 260 provides that "office" includes office of the President of the Federation, Vice President, Governor or Deputy Governor of a State but does not include the office of the President of Senate, Speaker of House of Representatives or Speaker of a State House of Assembly."

Per Ogundare, J. C. A. at pages 744 – 745, paras F-B:

> *"The Second question is whether his action is justifiable. Section 260 of the Constitution provides an answer. The validity of an election to an office,* ***a contrario*** *a removal from office does not include the office of President of the Senate, Speaker of the House of Representatives, Speaker of the House of Assembly or any office not established by the Constitution of 1979. The reason is not far to seek. The appointment and removal of such officers are within the domestic sphere of such legislatures and exercisable within the applicable statute procedure but not subject to an Election petition ... that the Court does not possess a general veto power over Legislative or executive action and that in particular, the circumstances in which the judicial power under Section 6 (6) (b) of the 1979 Constitution can be exercised*

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> *by the Court for the purpose of pronouncing on the Constitutional validity of a legislative or executive action must be limited to those actions in which it has become necessary for the Court, in the determination of a justifiable controversy or case based on bona fide assertion of rights by the adverse litigants, or any one of them, to make such a pronouncement. An example of a justifiable issue is if the House of Assembly were to pass a law in violation of the Constitution or remove a speaker by less than two-thirds majority of members of the House."*

Also in the case of **Hon. Edwin Ume Ezeoke V. Alhaji Isa Aliyu Makarfi**[149] , the fact of the case goes thus: the plaintiff is a member of the House of Representatives and the defendant is the Speaker of the House. The plaintiff went to Court as a result of an announcement made by the Speaker in the House on Wednesday 28th May, 1980 to the effect that he had received a letter from the leader of the plaintiff's party that he has been suspended from the party's membership. The said announcement tended to indicate that the defendant is empowered to suspend the plaintiff from the standing Committees of the House. The plaintiff sued the Speaker for a declaration that the action of the speaker was unconstitutional and he sought an injunction restraining the speaker from taking any step with reference to the membership of the plaintiff in the House. The defendant raised preliminary objection to the effect that being an internal affair of the House, the Court has no jurisdiction to interfere. The objection was overruled and thereafter the defendant requested a reference to the Federal

[149] (1982) 3NCLR pg 663

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Court of Appeal on the issue of Court's jurisdiction to hear and determine the same issue raised in the preliminary objection.

The Court held that "except where there is specific provision of the Constitution as to any particular procedure the legislature must comply with, the Courts will not interfere with the internal proceedings of the Legislature.

To cap it all **Per Ayoola JCA** (as then was) **in Guardian Newspaper Ltd v. A. G. Fed.**[150] held that: "... *Whatever procedure the Federal Military Government has fashioned for itself for the exercise of its law-making powers has no statutory sanction as would enable the Court to concern itself with whether or not such procedure has been observed. The Courts are to supervise compliance with law and not the observance of procedure fashioned, probably, for convenience or expedience. There is nothing to show that the procedure implied in the public statement issued by the former Attorney – General is anything but a procedure fashioned for convenience or expediency ...*"

Matters of Administration and Discipline in Educational Institutions

Educational Institutions are citadel of learning. It is also an institution comprising of colleges, polytechnics, Universities and every other buildings, established for the advancement and dissemination of knowledge with the mandate to confer degrees and engage in academic research The University in particular, is an omnibus institution where a large collectivity of peoples with various backgrounds, but bound by unbroken ties of consanguinity are assembled for the purposes of fulfilling the defined and well-articulated mandate.

[150] (1995) 5 NWLR (pt 398) 750-751 paras D-A.

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Most essentially, educational institutions are established by statutes which specify how the affairs of those institutions are to be directed and effected. It includes internal rule governing disciplinary procedures. Post-graduate institutions, Polytechnics, Universities and even Colleges have in many cases their own internal rules, often with right of appeal where a case involving such institutions calls for the application or interpretation of internal rules and these institutions have their Visitors, such cases will fall within the exclusives jurisdiction of the Visitors and a Court will not entertain such[151] , except where it is shown that in the performance of their duties, the senate or the council or the Visitors of the University or Institution has breached these principles of fair hearing the Court would readily interfere by granting the relief's sought in remedy of the breach.

It should be noted that where there has been an accusation of crime on the part of any student, an administrative authority must hand off the matter and turn over to the appropriate police authority and the Court for prosecution and a conviction before the administrative authority can invoke and exercise its disciplinary powers.

[151] Student Union Activities (control and regulation) Act Laws of the Federation of Nigeria 2004. 3(1) The Minister may as from the commencement of this Act, whenever he is of the opinion that public interest or public safety so demands, suspend for any specified period of time, remove, withdraw or expel any student (whether undergraduate, postgraduate or otherwise) from any University, Institution of Higher Learning or similar Institution. 3(2) The power conferred on the Minister by section (1) of this section may be exercised by –

(a) any person or authority authorized by the Minister to do so on his behalf or

(b) the Governing Council, Vice-Chancellor or any authority or person in charge of or in control of that institution.

Provided that any student affected by paragraph (b) of this section may within 28 days on receiving notification to that effect make representations to the President, Commander-in-chief of the Armed Forces, whose decision on the matter shall be final and conclusive.

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In the case of **Abia State University V. Anyaibe (1996) 3NWLR (Pt. 439) p. 646 CA**, where the plaintiff/respondent student was alleged to have assaulted two students on the university campus. The 2nd appellant, Vice-Chancellor of the university set up a panel to investigate the incident. The respondent was invited to testify and he appeared before the panel and testified. He denied the allegation. At the conclusion of the sitting, the panel submitted its report to the 2nd appellant who acted upon it by expelling the respondent. The respondent instituted action against his expulsion. The learned trial judge declared the respondents expulsion from the university null and void and ordered his readmission into the university. The appellant/university being dissatisfied appealed against the ruling.

Katisina-Alu JCA (as he then was) reading the lead judgement of the Court of Appeal in a unanimous decision dismissed the university's appeal and held in favour of the plaintiff or respondent affirming the judgement and orders of the High Court which tried the matter, His Lordship held as follows " "Under the Constitution only a Court of Law or Judicial Tribunal established by law is competent to hear and determine a criminal charge against a person. It is common knowledge that assault is an offence under Section 252 of the Criminal Code of Eastern Nigeria. The Investigating Panel in this case, not being a Court of Law or Judicial tribunal has no competence in law to try the respondent upon a criminal charge of assault. This was not a matter of internal discipline as assault is a crime against the state. Where a conduct of a particular student amounts to a crime, it is a matter for the Courts to deal with. It is not a matter of internal discipline.

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Once the allegation against a person amounts to a crime, the power of the appellants to act is suspended until a regular Court or tribunal has determined the matter one way or the other. Judicial power in Section 6 of the Nigerian Constitution are not vested in private person, administrative tribunals or other authorities. By the purported exercise of judicial powers, by the investigating panel in the instant case, the respondent was denied the right to fair hearing under the Constitution. It is therefore clear that offences against the laws of the land fall outside the jurisdiction of the visitor and Vice Chancellor of a University."

He said further at pp 667 that

"The complaint of the respondent that he has been tried by an incompetent body for a criminal offence is well founded. In my judgement therefore, the fundamental right of the respondent to fair hearing within a reasonable time by a Court has been violated by his being punished for a criminal offence without a preceding trial and conviction by a Court. The issue here is not whether the respondent was afforded the opportunity to defend himself before the panel but whether the panel had the competence to hear and determine a criminal charge accusation against the respondent. From all that I have said, it is clear that the panel lacked the competence in law so to do."

Moreso, order of Mandamus cannot lie against these Educational Institutions if there is another remedy open to the party seeking it. In buttressing the point that a Court is always wary in interfering with the domestic affairs of an

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institution, I consider it appropriate to recall the reasoning of **Lord Goddard C. J.** in **R. V. Dunsheath Exparte Meredith**[152] where at page 743 he said and I quote:

> *"it is important to remember that mandamus is neither a Writ of course nor a Writ of right, but that it will be granted if the duty is in the nature of public duty and specially affects the rights of an individual, provided that there is no more appropriate remedy. This Courts has always refused to issue mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, ..., where there is a visitor of a corporate body, the Court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges. I see no difference for this purpose between a college and university. Any question that arises of a domestic nature is essentially one for a domestic forum, and this is supported by all the authorities which deal with visitoral powers and duties, and although the question has generally arisen with regard to election of fellowships, I see no difference in principle between the question whether a particular person ought to be elected to a fellowship or whether the particular person is a fit and proper person to be appointed or retained as a teacher at the University or School".*

The dictum of **Lord Goddard C J** reproduced (supra) was given approval by the Court of Appeal (England) in **Thorne V. University of London**[153] where it was held that

[152] (1950) 2 A.E.R. 741

[153] (1966) 1 ALL E.R 338

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the High Court has no jurisdiction to hear complaints by a member of the University of London or by a person seeking a degree from the University against the university about its examination or Conferment of degrees, because those matters are within the exclusive jurisdiction of the Visitor of the university. Again, in **Herring V. Templeman**[154] a student / teacher who had been asked to withdraw from a teacher training College on academic grounds initiated an action against the governors for a declaration that the resolution of the governing body dismissing him was ultra vires, null and void. He alleged breach of internal regulations of the Colleges and a breach of natural justice. Suffice it to say that he conceded that his matters of complaint fell within the jurisdiction of the Visitor but strongly argued that in so far as the allegations were a breach of natural justice the Court had a concurrent jurisdiction. That submission was rejected at page 591 of the judgement as it was observed – "In the action which I am concerned, the plaintiff's case is that he did not have a hearing before the academic board, that he did not have a fair hearing before the governing body and that the procedure of his dismissal was defective. In my judgement, these are essentially matters which touch the internal affairs or government of the College and province of the Visitor".

Also in **R. V. Herford**[155] , a Mr. Tillyard complained that the College has refused to examine him for a lay fellowship and wrongly elected another person to the fellowship examination. He sought and obtained an order of Mandamus from the High Court directed to the principal, fellows and scholars of the College commanding them to examine him

[154] (1973) 2 AER 581

[155] (1878) QBD. 693

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(Tillyard) as a candidate for a vacant fellowship in the College and to proceed to the election of a fellow-pursuant to the statutes of the College. Dissatisfied with the decision, the authorities of the College lodged an appeal to the Court of Appeal (England) which held that there was no refusal to examine Tillyard and even if there was such refusal the remedy was not by way of Mandamus but by an appeal to the Visitor. The observation of **Lord Coleridge CJ** at page 706 is very instructive; it is in the following terms: "For these reasons, then, upon the fact of this particular case, we think this is no ground for issuing the mandamus. The prosecutor was not refused examination, he did not place himself in a condition to claim more of the College had offered; if he had and if they had improperly refused him his wrong would be one corrigible by the Visitor and not by the Courts of law".

To our own indigenous authorities, in **WAPGMC and Ors V. Dr Okogie**[156] the issues are:

(1) Whether the Court below was right in holding that the claims of the respondent were justiciable.

(2) Whether the Court below was right in law, in holding that the objection of the appellants was incompetent.

(3) Whether the trial Court was right in holding that the plaintiff's case disclosed a reasonable cause of action having regard to Order 22 Rule 4 and 5.

(4) Whether the learned trial judge was right in holding that the plaintiff's case was not within the exclusive jurisdiction of the first defendant and consequently, the jurisdiction of the High Court was not ousted.

[156] (2003) 8 FR pg 117, R. 2 $ 4

The Court of Appeal unanimously allowing the appeal and held inter alia that: "In the instant case if the respondent felt aggrieved by the decisions of the 1st defendant/appellant, her matter, being confined to the exclusive province of the authorities of the 1st defendant / appellant, it is to that body alone that she could lodge an appeal. I think this principle evolved over the years makes for healthy growth of our higher institutions. If the dignity of our higher institutions is to be maintained and sustained there should not be any obligation for the proceedings before the academic board of the institution to be conducted as if the parties were litigants before a Court or before a legal arbitrator, Institutions, particularly, the Universities should and must be governed by men of impeccable character and learning; men whose sense of justice and fairness is of a very high standard.

> *The reliefs claimed by the respondent in her suit are those within the domestic jurisdiction of the first defendant / appellant. The Courts have always refused to intervene in such matters unless the civil rights and obligations of the person complaining are breached. The University or academic community works within its statute or character. From time to time decisions are made by those in charge of these instructions, which turn on their view of events of peculiar nature. They have come to be accepted as experts in their fields of operation. They exercise their discretion on those matters. It is wrong to ask the Court by a civil suit to overrule the decisions of these experts".*

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Finally the case of **Esiaga V. University of Calabar**[157] where the Supreme Court **Pats – Acholonu JSC** said and I quote; *"... Are we now to understand that a University should be incapable of enforcing ultimate and extreme disciplinary measures of expulsions where the facts and circumstances of the case demand that it so acts. The celebrated case of* ***Garba V. University of Maiduguri (Supra)*** *is not intended to be a Court given license and judicial umbrella to provide students of unbridled, recalcitrant and impetuous behaviours in the University system who have no sense of ethics and acceptable level of decency in a civilized society to cause ruination to the educational institution by their uncouth and display of primitive characterizations No, it is not. It is equally not intended to tie the hands of the College Authority and debar it from making an effort temporarily to arrest a perceiving evil that is seen rearing its head which if not nipped in the bud might conceivably raise Cain. To my mind, what the University of Calabar, nay, the respondent did was not assumption of judicial powers ordinarily exercisable by the Courts ..."*

On the power of the university to discipline any erring or **misbehaving** student.

> *"It must be clearly emphasized that the University has authority within its premises to discipline any erring or misbehaving student. The principle of fair hearing as envisaged in the Constitution must however be the guiding principle in applying any sanction against a misbehaving student. If the act of the student amounts to a crime, the normal report should be lodged with the Police but this will not preclude the University exercising its power under its statute to punish misconduct by any student. The case*

[157] (2004) 18 NSCQR (pt 1) pg 1, R. 4-6

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of ***Garba V. University of Maiduguri (1986) INWLR (pt 18) 550*** *has not precluded the University taking action against misconducting student within its campus". "Results of Examination are released when an examination is taken. I believe that where an examination is taken and the institution suspects some unsavoury practices attendant to the behaviour by a student, such result may not be released until the University authority has satisfied itself that it is in position to release the results of one who is considered worthy and fit in learning. Where no examination has been taken it is idle to ask a Court to grant a relief of the release of a result. It is my view that should any Court worth itself lend itself to such a persuasion, then it would have succeeded in no small measure in destroying the Institution of Higher Learning. This type of relief is not of the nature that should come within the contemplation of Section 33, chapter iv of the Constitution of 1979".*

Also in the case of **Akintemi V. Onwumechili (1985) INWLR, (pt 1) pg 68, S.C** the appellants were students of the University of Ife - Arising from allegations of examination malpractices. The results of the appellants were withheld. Thereupon they sought an order of mandamus to compel the University, to publish and communicate their results to them. They also asked for a declaration that the failure or refusal to publish their result was illegal and finally for an injunction to stop any conferment or award of degrees to any student pending the final determination of the substantive action. In the determination of the action, the Chief Judge of Oyo State

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dismissed the action. The appeal to the Court of Appeal was unsuccessful. They then appealed to the Supreme Court. Unanimously dismissing the appeal the Supreme Court held: that the action was premature. The appellants ought to have had recourse to the remedies within the University system and it is only when their rights were denied or abused that the Courts will intervene to grant remedies and reliefs.

In this case **Obaseki JSC** said: :The Courts cannot and will not usurp the functions of the Senate, the Council and Visitor of the University in the selection of their fit and proper candidate for passing and for the award of certificates, degrees and diplomas. If however in the process of performing their function under the law, the civil rights and obligation of any of the students or candidates are breached, denied or abused, the Court will grant remedies and reliefs for the protection of those rights and obligations. In such a situation the matter will be justifiable and the domestic nature of such dispute will not under the 1979 Constitution oust the jurisdiction of the Court. Since it has not been established by the appellants that there was such a breach or denial or abridgement, the domestic forum has not been exhausted, the resort to the Court was premature".

In the same vein **Coker JSC** said: "The remedy provided in this matter in the statutory provisions governing the university in this matter is more convenient, cheaper and more expeditious than proceedings in Court and further the statutory forum is better equipped in dealing with the matter than the Court. The Court guided by a long line of decisions will refuse in principle and justice to entertain the matter. Although it is not for want of jurisdiction, but more on ground of public policy and discretion".

Finally, on the import of exhaustion of available administrative remedies, **Obaseki JSC** said:" If a matter is

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justiciable in Nigeria, the domestic nature of the dispute does not under the 1979 Constitution oust the jurisdiction of the Court see Section 6(6) of the 1979 Constitution. It can only mean that until the remedies available in the domestic forum are exhausted, any resort to Court action would be premature".

Generally speaking, the authorities of various educational institutions should exercise their various powers within the purview of the Constitution. If any of their powers or actions contravenes the Constitution towards any students or people under them, such power or act shall be declared void[158]. This was reiterated in the case of **Ugwumadu V. UNN (2000) 7NCLR pg. 130**, the legal issue in this case is whether the Court has power to entertain a matter within domestic jurisdiction or forum of a University. The Federal High Court when dismissing the preliminary objection held that:

> *"although it is within the domestic domain of a University, like the respondents in this case, to inflict discipline and run its affairs as laid down by the enabling law, it must do so within the confines of the Constitution. Thus, a Constitutional issue, like the issue of a fair hearing raised in this case, transcends the concept of domestic jurisdiction of a University. Therefore, if in the process of performing its functions under the law, the Civil rights and obligations of any student is breached, denied or abridged the Court will grant remedies and reliefs for the protections of those rights and obligations"*[159]

[158] See Section 1 (1) & (3) of the 1999 Constitution.
[159] See Akintemi V. Onwumechili (1985) INWLR (pt I) 68 pg. 137-138.

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Conditions Precedent

A condition precedent was defined as one which delays the vesting of a right until the happening of an event. Condition precedent provides for certain step(s) to be taken before a litigant is entitled to sue, by reasons of the provisions of some statute, such provision(s) of statute should not be misconstrued as an ouster clause and not a device adopted by constituted authority to prohibit judicial review. It is just an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the Courts, in instituting actions in Court. Conditions are imposed either by the common law or a legislation. Such conditions include the giving of notice as in the case of bringing action against government or government agency; the payment of security as in the case of filing an election petition, obtaining leave to sue as in the case of petition of right, Receiver/Manager in liquidation under Companies and Allied Matter Act and Fundamental Right (Enforcement Procedure) Rules, 1979, some of these conditions under the common law have come up for consideration under the 1979 and 1999 Constitution and were declared to be inconsistent with the provisions of Section 6(6)(b) of the above mentioned Constitutions.

For example Section II(2) NNPC Act, 1977 has described the conditions for commencing action against the corporation. Now if the rationale behind such provision as it was canvassed and accepted is to give the corporation breathing time so as to enable it to determine whether it should make reparation to the plaintiff, this is clearly against the guaranteed right of access to the Court enshrined in Section 36(1) read together with Section 6(6)(b) of the 1999 Constitution becomes of critical importance.

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In my opinion a legitimate regulation of access to Courts should not be directed at impending ready access to the Courts. There is no provision in the Constitution for special privileges to any class or category of persons. Any statutory provision aimed at the protection of any class of persons from the exercise of the Court of its Constitutional jurisdiction to determine the right of another citizen seem to me inconsistent with the provisions of Section 6(6)(b) of the Constitution.[160]

Also in contractual agreements, if the provisions of the law require certain formalities to be performed as conditions precedent for the validity of the transactions, without however, imposing any penalty for non-compliance, the result or failure to comply with the formalities merely renders the transaction void, but if a penalty is imposed, the transaction is not only void but illegal, unless the circumstances are such that the provisions of the statute stipulate otherwise.[161]

Likewise in criminal matters, some conditions precedent to making of an application to prefer a charge against an accused. An application to prefer a charge in the High Court should be made pursuant to the provisions of the Criminal Procedure Code/Act. The application must be accompanied by a copy of the charge sought to be preferred, names of witnesses who shall give evidence at the trial, proof of evidence (written statements) which shall be relied upon at the trial. The applicant must also inform that no application for such leave has been made previously in the case and that no preliminary inquiry is being conducted in the matter by any Magistrate Court. So, the learned trial judge had the discretion to grant or refuse the application. The above conditions must

[160] See Amadi V. NNPC (2000) 2SCNQR (pt 11) pg 990 at 1028.
[161] See Solanke V. Abed & Amor (1962) NRNLR 92.

be complied with before the Court at all could attempt the application or else it might be struck out for want of diligent prosecution.

In addition, when the allegation against any person involves commission of crime, which raises the onus to that of proof beyond reasonable doubt on the prosecution. This is a condition precedent if he was to succeed. As for the respondent, he/she needs only to offer evidence to the preponderance of probability to exculpate himself from the accusation.

Finally, the service of process on the defendant so as to enable him appear to defend the relief being sought against him and due appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This very well accords with the principles of natural justice.

Thereafter, competence and jurisdiction may be lacking when the necessary conditions precedent are not complied with.

Granting Relief Not Claimed for

Law is law because it is a law. And it is law because in most general run of cases it has power to prevail.

It is a law that Court of law cannot give a plaintiff what he has not asked for, even with the greatest good will and magnanimity, a Court of law cannot do so. A Court of law is not another Father Christmas which on its own doles out gifts to children at the eve of Christmas – that annual festivity of Christians. Even Father Christmas himself is forced by the global economic recession which has been having effect on Nigeria, to be frugal and misery in his annual Christmas gifts these days. The clientele – the children complain. Since Courts

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of law are not gift shop but institutions established in accordance with the law.

A Court of law has no jurisdiction to give a litigant the relief or what he has not asked for. That will be unusual charity and good will which a Court *qua judex* is incompetent to do. After all, the person who wears the shoes knows the exact point in which it pinches and so should direct that point to the cobbler for necessary repairs. So also the plaintiff who commences an action in a Court of law. If he does not ask for a particular relief in his claim in Court, it is not the business of a trial judge to award such relief. After all, a plaintiff knows what he wants and he comes to Court to prove his claim, judgement will be entered in his favour only to the extent of what he asked for, no more no less. While a Court can give less to what a plaintiff has claimed, it cannot give more. Of course a Court of law can also give the plaintiff exactly what he has claimed.

There are plethora of authorities in respect of this fundamental issue. For example, in the case of **Akinterinwa v. Oladunjoye**[162] where it was in dispute whether the award by the Court of Appeal to the plaintiff of reliefs not proved by legal and credible evidence and relief's not claimed by the plaintiff at all neither in his writ of summons nor in his amended Statement of Claim can be sustained in law and on the high judicial authorities. The Court held that, "in the present case, it is not in dispute that the claim of the plaintiff was for damages for trespass and injunction. He did not seek a declaration of title to the disputed piece of land. So the declaration of title granted by the Court below was clearly a

[162] (2000) 2SCNQR (pt 1) pg 151, 5-7

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relief not claimed by the plaintiff. I do not think there is any justification for the grant. This is because a Court has no jurisdiction to give to a party a relief he has not asked for. The plaintiff in this case is clearly not entitled to the declaration of title not claimed by him".

It was also reiterated in the case of **N. A. F v. Shekete**[163] **Per Tobi JSC** that, it is elementary law that a Court of law cannot grant a party relief not sought. A Court of Law cannot grant an applicant prayer not sought. A Court of law can only grant a relief or prayer sought. The moment a Court of law grants a relief or prayer not sought by the party, it expands therefore boundaries of the litigation and unnecessarily instigate more litigation to the detriment of the parties, and for no reason at all. The litigation is for the parties and not the Court. Therefore, the Court has no jurisdiction to extend or expand the boundaries of the litigation beyond what the parties have indicated to it. In other words, the Court has no jurisdiction to set up a different or new case for the parties"[164]

It must be remembered that Court of law can make consequential order which is also referred to as an incidental order which follows naturally from the relief claimed and to strengthen the relief claimed, and not relief not claimed.

Failure to Exhaust Internal Administrative Remedies

It is trite law that where a statute describes remedies, and aggrieved party must first exhaust those remedies before

[163] (2002) 12NSCQR pg 74, R. 5-7

[164] See Dyktrade Ltd v. Omnia Nig. Ltd (2000) 2SCNQR (pt1) pg 153, R. 9-10, Saviia Ltd v. Sonubi (2000) 3NSCQR pg 381, R. 5, Awoniyi & ors V. Rosicrucian Order (2000) 2SCNQR (pt1) pg 692 R. 14-15.

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recourse will be made to the court. Where he fails to exhaust the remedies statutorily available to him, his action is premature, incompetent and it should be struck out for it does not give rise to a cognizable cause of action. The courts' jurisdiction to entertain such action would be put on hold – See **Dangote v. Civil Service Commission & ors (2001) 6 NSCQR (pt 1) p. 328. R. 6.**

Credence was given to the above statement of law by His Lordship **Niki Tobi JSC** in the case of **Provost, Lagos State College of Education & ors v. Dr. Kolawole Edun & ors (2004) 17NSCQR p. 370, R.11** where the court held that "where a statute specifically provides for a particular way in which government or any party can obtain title, the government or the party can only acquire title by strict compliance with the statute, unless the statutes by its wordings is against the constitution of the land…"

A.G. Karibi-Whyte, JSC in the case of **Raymond S. Dangote v. Civil Service Commission, Plateau State & ors** (supra) held that "it is a well settled principle that where a special procedure is prescribed for the enforcement of a particular right or remedy, non-compliance with or departure from such a procedure is fatal to the enforcement of the remedy. The remedy provided by the statute must be followed". – **See Barrachlough v. Brown (1897) A. C. 615.**

Essentially, exhaustion of internal administrative remedies is a condition precedent which is the most important factor in order not to get the litigant's suit struck out in court for prematurity and incompetency. **See A. G. Federation v. A. G. States (2001) 7 NSCQR p. 458 @ 543.**

Furthermore, internal administrative remedies provided by statute is rampant in an action against Public Corporations where pre-action notice is needed. Also, in chieftaincy matters

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where necessary administrative steps must have been taken before the suit can be filed in Court of Law.

Obaseki JSC in the case of **Akintemi v. Onwumechili (1985) 1NWLR, p. 68, S.C.** when speaking on the importance of exhaustion of available administrative remedies said; "if a matter is justiciable in Nigeria, the domestic nature of the dispute did not under the 1979 Constitution oust the jurisdiction of the court… It can only mean that until the remedies available in the domestic forum are exhausted, any resort to court action would be premature".

Internal administrative remedies provided by statutes include appealing to the higher authorities when the matter is within their domestic jurisdiction. This is rampant in our educational institutions particularly in the laws establishing and governing our universities. For example, **Section 19 University of Abuja Act, Laws of Federation of Nigeria 2004** provides

19(1) Subject to the provisions of this sections, where it appears to the Vice-Chancellor that any student of the university has been guilty of misconduct, the Vice-Chancellor may, in consultation with the Senate and without prejudice to any other disciplinary power conferred on him by statute or regulations, direct-

(a) That the student shall not, during such period as may be specified in the direction, participate in such activity of the university or make use of such facilities of the University as may be so specified….

19(2) Where a direction is given under subsection 1(c) or (d) of this section in respect of any student, that student may within the prescribed period and in the prescribed manner appeal from

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the direction to the council and where such an appeal is brought, the council shall after causing such enquiry to be made in such manner as the council considers just, confirm or set aside the direction or modify it in such manner as the council thinks fit.

19(7) No staff or student shall resort to a law court without proof of having exhausted the internal avenues for settling disputes or grievances or for seeking redress.

In the case of Public Corporations including Universities, before any action could be commenced in court against them, the statutory pre-action notice must have been issued to the concerned government public corporation(s). Example of this is found in **Section 110(2) of Port Act (Nigerian Port Authority) Laws of Federation of Nigeria 2004,** "no suit shall be commenced against the authority until one month at least after written notice of intention to commence the same shall have been served upon the authority by the intending plaintiff or his agents, such notice shall state the cause of action, the name and place or abode of the intending plaintiff and the relief which he claims".

Moreso, in **Section 45(4) & (5) of the Ogun State University Edict, 1987** which provides that:

45(4) No suit shall be commenced against the University until at least three months after written notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent; and such notice shall clearly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and

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the relief which he claims.

45(5) For the avoidance of doubt, it is hereby declared that no suit shall be commenced against an officer or servant of the University, in any case where the University is vicariously liable for any alleged act, neglect or default of the officer or servant in the performance or intended performance of his duties, unless three months at least has elapsed after written notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent.

A suit commenced in default of service of a pre-action notice is incompetent as against the party who ought to have been served with a pre-action notice provided such party challenges the competence of the suit – **Mobil Producing Nigeria Unlimited v. Lagos State Environmental Protection Agency & ors (2002) 12 NSCQR p. 263 @ 283.**

Also, in the case of **Chief Eze v. Dr. Okechukwu & ors (2002) 9NSCQR p. 148, @ 161** the Court held "In other words, failure to give the notice could in appropriate circumstances be adjudged as a factor of the incompetency of the action not failure to indicate by the endorsement of the plaint that notice has not been given. It follows that what can truly be raised as an objection to competence is the failure to give notice..."

However, the incompetence of the action as a result of non-service of a pre-action notice resulting in the Court being unable to exercise its jurisdiction to proceed with the hearing is an irregularity which is not such that cannot be waived by the defendant who has filed it by motion or plead it in the statement of defence. It is different from circumstances of

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total lack of jurisdiction in the Court. Care must be taken to understand the essence of pre-action notice non-compliance does not abrogate the right of a plaintiff to approach the court or defeat his cause of action.

If the subject matter is within the jurisdiction of the court, failure on the part of the plaintiff to serve a pre-action notice on the defendant, gives the defendant a private right to insist on such notice before the plaintiff may approach the court. The defendant is perfectly at liberty to ignore the fact of irregular commencement of the action and decides or acquiesces to waive his right to pre-action notice. It is not a substantive element but a procedural requirement, albeit statutory, which a defendant is entitled to before he may be expected to defend the action that may follow – **Mobil Producing Nigeria Unlimited v. Lagos State Environmental Agency & ors (supra).**

As a matter of fact, internal administrative remedies are condition precedent to the invocation of courts jurisdiction in respect of any matter prescribed by statute. It delays the vesting of a right until the happenings of any event. Conditions are imposed by common law or a legislation. Such condition includes the payment of security, as in the case of filing election petition, obtaining leave to sue as in the case of petition of right, Receiver/ Manager in liquidation under Companies and Allied Matter Act and Fundamental Rights (Enforcement Procedure) Rules 1979 – **See Udene v. Ugwu (1997) 3NWLR (pt 491) 58; Din v. A. G. Federation (1986) 1NLR (pt 17) 471; Saude v. Abdullahi (1988) 4NWLR (pt 116) 387.**

Thereafter, competence and jurisdiction may be lacking when the necessary condition(s) precedent are not complied with.

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Finally, let it be noted that the conditions imposed by statutes which authorize legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions where inserted by the legislature simply for the security or benefit of the parties to the action themselves and that no public interest is involved, such conditions will not be considered indispensable, and either party may waive them without affecting the jurisdiction of the court. Therefore, I submit that failure to exhaust internal administrative remedies provided by statute affects the inalienable rights of a party to seek redress in court as this is in consonance with **Section 6 (6) (b) and 36 of the 1999 Constitution; Abia State Transport Corporation & ors v. Quorum Consortium Ltd (2003) 8FR p. 14, R.10; Guaranty Trust Bank v. Tabib Investment Ltd (2005) 2FR p. 1 @ 11-12; Aina v. Jinadu (1992) 4NWLR (pt 233) 91 @ 109.**

Non-Existing Person

The Court has no jurisdiction to entertain a suit initiated in the name of a non-existing person. The jurisdiction of the Court is determined by the cause of action of the plaintiff as endorsed in the Writ of Summons. Also the parties to the claims endorsed in the Writ of Summons constitute another crucial factor in the determination of the jurisdiction of the court to entertain a particular suit before it. **N. V. Scheep v. M.V. "S-araz" (2000) 15NWLR (pt 691) 622; Adeyemi v. Opeyori (1976) 9-10 S.C. 31.** It would be tantamount to a misnomer when the name of a non-existing personality is used in commencement of a suit or as a party to a suit. Because a misnomer occurs when there is a mistake in stating the name of an existing person or entity. The basis of amendment in the

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case of a misnomer is that the person or thing to which the misnomer related is in existence but the name is wrongly stated - **Olu of Warri v. Essi (1958) SCNLR 384; Okechukwu v. Ndah (1967) NMLR 368.**

A state of facts or the name of an entity not in existence at material time cannot be misnamed and the issue of amendment will not arise. Thus, a party cannot amend or effect correction in processes of court by replacing a non-juristic person or entity with one legal capacity to sue and be sued. In the case of non-juristic person as plaintiff, the title of the suit cannot be amended because there never was a juristic person and the suit in law was not filed in court. In such a case, the trial court has no jurisdiction to entertain the suit. However, the subsequent process filed in the name of a non existing person as plaintiff cannot be said in law to have been filed in suit. The court should not take cognizance of the subsequent processes which should have been struck-out. **Okechukwu & Sons v. Ndoh (1967) NMLR 368.** The question is whether suit commenced in the name of a legal person can be separated from processes filed in suit by non-legal person as plaintiff? The principle of severance applies to separate a suit initiated in the name of legal person as the plaintiff from processes filed in the suit by non-legal person as plaintiff or applicant. The court can therefore strike out the subsequent processes bearing the name of non-legal entity as plaintiff while leaving the suit intact. Therefore, a suit commence by a legal entity cannot be taken over in law and continued by a non-legal entity which can neither sue or be sued. In the same vein, a suit or process initiated by a non-legal entity cannot be taken over or continued by a legal entity for in law the suit or process does not exist – **Obike Int. Ltd v. Ayi Teletronics Ltd (2005) 15NWLR (pt 948) 362.**

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Main Claims Versus Ancillary Claims

It is the claim(s) before the court that has to be looked at or examined to ascertain whether a court has jurisdiction to determine a suit. To say whether the court can decide ancillary claims where it lacks jurisdiction to entertain the main claims in a suits, where incidental or ancillary claims of a party are so inextricably tied to or bound up with the main claims before the court in the same suit, recourse will be made to the plaintiff's claims. A court of law cannot adjudicate over ancillary claim where it has no jurisdiction to entertain the main claims if such incidental or ancillary claims cannot be determined without a determination at the same time of the main claims, or where the determination of such incidental or ancillary claims must involve a consideration or determination of the main claims. Consequently, the trial court having found that it has no jurisdiction to entertain the main claims could not adjudicate over the incidental and ancillary claims. – **See Tukur v. Gov. of Taraba State (1997) 6NWLR (pt 510) 459; Egbuonu v. B.R.T.U. (1997) 12NWLR (pt 531) 29.**

This is because the principal order on which the ancillary or consequential order should stand has been refused, therefore there is no basis for the making of such incidental or consequential order – **See Awoniyi & ors v. Rosicrucian Order (2000) 2SCNQR (pt 1) p. 711, R. 7: Hamson (Nig.) Ltd v. Pedrotech Nig. Ltd (1993) 3NWLR at 548.**

Chapter Four

Striking Out/Dismissal of Action or Name of a Party

Court of justice is a temple of justice adhering to the symbol of a blindfolded woman with a scale on one hand and a sword on the other hand to render Justice" (not injustice), to all manner of people. Indeed the beauty and greatness, nay the purity of justice, in all its consuming allure and essence is to ferret/out from the mass of facts and law before it, relevant points in order to give remedy to anyone who comes for it. It is not justice meted to someone who does not deserve it when that person craving for it has his hand soiled, blemished and besmirched. For he who wants equity must do equity and he who comes to equity must come with clean hands.

Striking out a case means to delete, cross out, erase, rub out or obliterate a case. It is not in all cases the Courts strike out a matter but where the status quo of a particular case deserves it, the Court will give that case full dose of it. The Court may strike out a case *in limine* or towards the conclusion of a trial. For example, it must be said that it is unusual to strike out a civil case which has been heard to conclusion by a trial Court. Such a case should be decided upon the evidence available and the applicable law. The only known exception to

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this is where the Court later found that it has no jurisdiction to hear and determine the case after it had been concluded, or where the plaintiff lacks *locus standi.*

Now it is true that in determining an application for striking out an action, the trial Court will only examine the writ of summons and the statement of claim. It will not examine the statement of defence or any defence by way of the affidavit in support of the application to strike out the action or suit.[165]

As a matter of procedure, an application to strike out a suit on grounds of procedural irregularities must be made by motion on notice supported with an affidavit stating the grounds on which the application is brought before entering an appearance. Then, if a party who becomes aware of any procedural irregularity and nevertheless enters an unconditional appearance and takes further steps with a view to defending the action is deemed to have waived the irregularity.

In addition, the Supreme Court has held in the case of **Adeleke V. Raji (2002) 10NSCQR (pt 2) pg 999 at 1009 – 1010** that where a Court finds some substance in entering order of striking out, it is important to hear the parties to address the Court on the desirability of making such an order. To make an order of striking out of a case when not asked for by any of the parties, and the parties were not asked to address the Court on such an order, injustice may result therefrom.

Moreover, when the order of striking out has been entered, the plaintiff has an option to either pray the Court for the relist of his case or apply for the setting aside of such ruling and also there is nothing preventing him from lodging an appeal against such ruling with which he was aggrieved.

[165] Labode V. Otubu (2001) 5NSCQR pg. 722 R. 1

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Dismissal of a case

To Dismiss a case means to banish, put away, lay / set aside, reject, put out of Court's record, brush aside/repudiate a case. Dismissal of a matter either *in limine* or towards the end is to me the greatest punishment that a plaintiff can receive in the litigation process. By it, the plaintiff is shut away midstream from the stream of litigation and he is in trouble. Therefore before the trial judge dismisses an action, he must be very sure that he has no other option open to him. For the Court to dismiss an action, the writ of summons and statement of claim of the plaintiff should be examined and not the statement of defence or any defence by way of the affidavit in support of the application to dismiss the action. For example, where an action is brought solely to obtain relief which the Court has no power to grant, the statement of claim will be struck out and the action dismissed. The Court can still peremptorily dismiss the suit even after the close of pleadings without hearing evidence, where the plaintiff's statement of claim discloses no cause of action.

Furthermore, once a Court is satisfied that any proceedings before it amounts to an abuse of process, it has the right, in fact the duty, to invoke its coercive powers to punish the party which is in abuse of its process. Quite often, that power is exercisable by a dismissal of the action which constitutes the abuse[166].

Before the Court could dismiss a case, that means the Court has heard that matter on merit. Because after dismissing a case, the plaintiff cannot bring application to relist that case neither can he apply to the same Court for a prayer to set aside

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[166] Onyeabuchi V. INEC, Abuja & ors (2002) 10 NSCQR (pt 1) pg 58, R. 6.

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the order of dismissal. The option opens to him is to appeal to the upper Court for further redress. This is the decision of Court in **Bachelimann V. Nwachi**[167] where the Court says "If the appellant does not appear when his appeal is called for hearing and his appeal is dismissed ... An application to have the appeal re-entered cannot be entertained after the order of dismissal has been drawn up".

Indeed, all appellate jurisdiction is statutory and the power to adjudicate on an appeal by allowing or dismissing it includes the power to decline to adjudicate on the merits where an appeal is not properly before the Court. In such a case the usual course is to strike out the appeal, and although the order striking out an appeal has for some purposes much the same effect as an order dismissing it, it does not thereby become a decision on the merit and does not necessarily preclude a subsequent decision on the merits if the matter can be re-opened by an appropriate procedure.

In addition, the dismissal of an action for want of jurisdiction is no bar to plaintiff suing again in any Court which has jurisdiction to entertain the suit but where an action is dismissed (or struck out) for want of jurisdiction and the same plaintiff institutes a fresh and identical action against the same defendant, the inherent jurisdiction is rightly exercised by striking out the second action

Application to Relist a Case Struck Out

Therefore in considering whether an application to relist a case has to be refused or granted as one of the options open to the

[167] (1965) All N.L.R 112

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plaintiff, the following reasons should be adduced, viz;

(i) The reason for the applicant's failure to appear when the case was heard.

(ii) Whether there has been undue delay in making the application so as to prejudice the respondent.

(iii) Whether the respondent would be prejudiced or embarrassed upon an order for rehearing being made so as to render it inequitable to permit the case to be re-opened.

(iv) Whether the applicant's case is manifestly unsurpportable.

The application to relist a case is at the discretion of the Court and not mandatory. In the case of **Ikomi V. Agbeyegbe**[168] it was held that to relist a case nine years after it was struck out is not a correct exercise of judicial discretion. Also in **Naya V. Wey**[169] the Court said where proceedings are irregular because of failure to use the proper scheduled form the proper order is to strike out and not to non-suit.

Let's scrutinize the different grounds for dismissing an action.

When the Statement of Claim discloses no reasonable Cause of Action

Without any cause of action there is no right to action. In any dispute there must be a reasonable cause of action if such action should see the light of the day. What then is a reasonable

[168] (1948) 12 W.A.C.A. 379.

[169] (1961) All NLR 123

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cause of action? A reasonable cause of action means a cause of action with some reasonable chance of success when only the allegations in the pleading (Statement of claim) are considered. So long as the statement of claim discloses some cause of action, or raises some question fit to be decided by a judge. The mere fact that the case is weak, and not likely to succeed, is no ground for striking out or dismissing it.

A party may apply for any pleadings to be struck out on the ground that it discloses no reasonable cause of action. It means no reasonable cause is disclosed upon the face of the pleadings. In such situations only the writ of summons and statement of claim should be considered.

What I am saying in essence is that, a defendant who conceives that *ex facie* there is a good ground of law which if raised will determine the action *in limine*, is entitled to raise such ground of law. In the determination of the action before the Court, the defendant may without filing a defence apply to strike out the action on the writ of summons and statement of claim for his contention. He may also in his statement of defence rely on the ground of law he considered complete answer to the claim of the plaintiff. The ground of law will then be argued as a preliminary point. If successful the action of the plaintiff ends. If the preliminary point fails the trial commences if it had already started provided there is a triable issue to be determined.

For the avoidance of doubt, what the Court should consider if an action discloses no reasonable cause of action is the contents of the statement of claim and not the extent to which one relief can co-exist with another. Having considered the contents of the statement of claim, deemed to have been admitted, the question is whether the cause of action has some chance of success, notwithstanding that it may be weak or not

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likely to succeed.

In the case of **Labode V. Otubu**[170] where there was a dispute whether the writ of summons and the statement of claim disclose reasonable cause of action, the Court pronounces on what prayers to seek under Order 22, Rule 4 Lagos State High Court (Civil Procedure) Rules when an application is brought on the ground that a pleading discloses no reasonable cause of action. "In effect, whenever an application is brought under Order 22, Rule 4 (ibid) on the ground that a pleading discloses no reasonable cause of action as happened in the instant case, the only prayer that could be sought is an order striking out the relevant pleadings. The action can only be dismissed if it is found at the same time to be frivolous or vexatious."

In addition to that, in the case of **Mobil V. Lagos State Environmental Protection Agency & ors**[171] The Court held on whether a reasonable cause of actions has been disclosed against the other respondents even if the 2nd respondent's name was struck out. "Any party whose interest will be directly affected if a relief claimed in the action were granted is a proper party to a suit. Once the allegations in the pleadings show a real controversy that were capable of leading to the grant of a relief, the pleadings cannot be rightly said to disclose no reasonable cause of action ..." The trial judge was in error in holding that the suit was incompetent as against the 2nd respondent even if he had been right, I am of the view that he had been hasty in striking out the 2nd respondent. The Court below was in error in holding that in the absence of FEPA no reasonable cause of action was disclosed."

[170] (2001) 5NSCQR pg 722
[171] (2002) 12NSCQR pg 263, R. 11

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I commend to the readers, the case of **A. G. Federation V. A. G. States**[172] where the issue was, whether a justiciable cause of action is disclosed.

Facts: Pursuant to the provisions of Order 3 Rule 3 of the Supreme Court Rules, 1985 the Attorney General of the Federation filed a statement of claim in this Court in order to commence proceedings in original jurisdiction of the Supreme Court under Section 232 of the Constitution of the Federal Republic of Nigeria, 1999 against the 36 Attorney-General of all the states of the Federal Republic of Nigeria claiming "a declaration by the Supreme Court of the seaward boundary of a littoral state within the Federal Republic of Nigeria, for the purpose of calculating the amount of revenue accruing to the natural resources derived from that state pursuant to Section 162(2) of the 1999 Constitution. After due service of the Statement of Claim on the defendants, they all entered appearance and each filed their statements of defence. Some states raised preliminary objection challenging the competence of the action and the Supreme Court jurisdiction to entertain the suit on several grounds. The Supreme Court held inter alia; "I therefore, hold that there is a reasonable cause of action in the present case because the statement of claim has disclosed enough facts to give rise to a cause of action. Although the President of the Federal Republic of Nigeria is yet to present a Bill to the National Assembly on revenue allocation in accordance with the provisions of Section 162(2) of the Constitution, there is already an "existing" law on the subject, viz, Allocation of Revenue (Federation Account, etc.) Act. In my opinion, the action is not therefore premature."

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[172] (2001) 7NSCQR pg 458

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Misjoinder

The word misjoinder means to be wrongly joined in an action as a party. Because it is now a trite law that the rationale for a party to be joined in an action is that he shall be bound by the verdict of the Court and it is reasoned that the matter in controversy cannot effectively and completely be settled in the absence of the party who shall be bound by it. The joined defendants must have identical interests or rights. It is important to emphasize that the plaintiff prosecutes his case against those who he perceives ought to be joined although it must quickly be added that the joined defendants may apply to the Court to strike out their names for misjoinder.

And when a party is not properly joined or rather is misjoined in a suit, his name should be struck out and any allegations made against him become irrelevant and incompetent, as the decision of the Court in striking out the name therefore constitutes the end of that party as far as his or its involvement in the case is concerned. The name of a party is struck out on the application of the party and invariably it is a decision of the Court after considering other factors.

The consequence of the complaint against a party whose name is struck out is that he is no longer a party as his exclusion would not affect the party who brought him adversely particularly when that party consents to his removal from the suit either by act of commission or doing nothing i.e. by omission. It would mean too that he has no case to answer as his presence is not considered necessary for final determination of the case.

However, it is reliably gathered from various Rules of Court that a proper joinder in accordance with the rules require the plaintiff to allege the existence of a right to relief against

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all the persons joined; so that judgement may be given against them jointly, severally or in the alternative without any amendment. The implication is that plaintiff must make a claim against all the parties joined, and must seek reliefs from each of them. To be entitled to be joined, the party seeking to be joined should be prosecutable as the defendant in the action. Thus the object of the rules is to prevent a multiplicity of actions by enabling a plaintiff to proceed in the same action against all persons whom he alleges he has the same relief. It is necessary for plaintiff to show that all parties joined in the suit will be entitled to a share of interest in the subject matter of the suit and are parties whose presence is necessary for the effectual and proper determination of the case. It is not sufficient if all a party has is a mere interest in the result of the action. This is because there must be a dispute between the parties giving rise to the action. The fact that a dispute will arise subsequently after the plaintiff had obtained judgement which will give rise to a cause of action is merely speculative and will not be sufficient reason to enable a joinder that would simply be a misjoinder. In **Oduola V. Coker**[173] the Supreme Court **per Irikefe JSC** (as he then was) laid down the test to be applied in determining whether to join a person as a party to an action, and this is: whether the person to be joined will have his interest irreparably prejudiced if any order joining him as a party is not made.

Also in the case of **Sofolahan & anr V. Fowler & anr**[174] where there was in dispute whether the appellants followed the proper practice and procedure in suing as next friends in the Lagos High Court. The Court held on whether Section

[173] (1981) 5 SC 197, 227

[174] (2002) 9NSCQR pg 596, R. 4

6(6)(b) of the 1979 Constitution of the Federal Republic of Nigeria creates proper parties to a suit. "I think it is a misconception as permitting the appellant to sue. That Section does not create proper parties but allows a proper plaintiff to seek redress in Court. He must be a proper plaintiff in the eye of the law. In some cases, a proper plaintiff is determined by a relevant law on a particular subject-matter or by some common law principle or by Rules of Court.

In the case of **Dikko Yusuf V. Obasanjo**[175] where one of the legal issues is whether or not 5th – 39th. Respondents and 42nd – 56th Respondents are necessary parties to this suit. The Court also held inter alia on whether a Respondent in an action could apply that another respondent be struck out where he feels that co-respondent is unnecessary.

If really a particular respondent feels that he or she is improperly joined, it is the prerogative of that party or person to move the Court or Tribunal to strike out his or its name. the petitioner can also move the Tribunal to strike out a Respondent that he/she feels is no longer wanted or required. The petitioner decides who to join with the statutory respondents under Section 133(2) of the Act. I do not think it is the business of one Respondent to apply that another Respondent be struck out simply because he /she feels that the presence of that other respondent is unnecessary. The petitioner who joined him or her must know the reason why he or she made him/her a party in the petition."

Non-joinder

Non-joinder simply means not joining necessary party to a suit. The principle guiding joinder of parties as provided in our

[175] (2004) 18NSCQR (pt 11) pg 477, R. 5.

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various Rules of Court has received judicial interpretations in our Courts and in Courts of other common law jurisdictions. The purpose of the Rules is to allow a plaintiff to proceed in the same action against all defendants against whom he alleges to be entitled to any relief whether his claim is brought against the defendant jointly, severally or in the alternative. The person to be joined must be someone whose presence is necessary as a party and the only reason which makes him a necessary party to an action is that he should be bound by the result of the action and the question to be settled. There must be a question in the action which cannot be effectually and completely settled unless he is a party.

A joinder will be necessary:

i) If the cause or matter is liable to be defeated by the non-joinder of the third party as a defendant.

ii) If the third party is a person who ought to have been joined as a defendant so that he may be bound by the result of the trial or his presence before the Court as a defendant is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.

It is a correct proposition of law that where an action is properly constituted with a plaintiff with legal capacity to bring the action, a defendant with capacity to defend, and a claim with cause of action against the defendants, and the action has satisfied all pre-conditions for instituting the action, the fact that a necessary party to the action has not been joined, is not fatal to the action and will not render the action a nullity.

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Loladeinde & Anor V. Oduwole[176] . Where the nature of the evidence before the Court is such that the case of the parties before it can be determined in the absence of those not joined, it (Court) can proceed to do so. It is only in those cases where it will not be right and the Court cannot properly determine the issues before it in the absence of the parties whose participation in the proceeding is essential for the proper, effectual and complete determination of the issues before it, will it be necessary to insist on the joinder of such necessary parties.

Therefore, failure to join a necessary party in an action is a procedural irregularity, which does not affect the competence or jurisdiction of the Court to entertain the matter before it. But where the irregularity leads to injustice or unfairness to the opposing party, it may lead to setting aside the judgement on appeal. A distinction should be made between a party who is merely interested in the outcome of the suit against whom there can be no claim or relief sought, and a necessary party, against whom there can be a claim or relief, and who would be irreparably prejudiced if he is not joined in the action.

That is one of the tests to determine whether to join a party as a party to an action – whereas the former cannot be joined as a defendant, the latter who is a necessary party is entitled to be joined. Another test for the determination whether several defendants can be joined is that the claims and reliefs against the defendants should be the same, and that the defences to the claim of the plaintiff against the defendants can be tried together in the same suit.

In the case of **Dantsoho V. Mohammed**[177] facts: This is an appeal from a judgement of the Court of Appeal, Kaduna

[176] (1962) WNLR 41

[177] (2003) 14NSCQR (pt 1) pg 1, R. 4.

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Division delivered on 26th of February, 1996. the respondent as plaintiff in the Kano State High Court took out a writ of summons against the appellant as defendant claiming as follows: (I) damages (ii) A declaration that the defendant is not entitled to the premises in such manner as to dig trench and put heaps of sand on the plaintiff's said land. (iii) A declaration that defendant is not entitled to continue to retain the nuisance (i.e. heaps of sand) on the land.(iv) An injunction restraining the defendant from continuing to keep the sand and the trench on the plaintiff's land so as to be nuisance to the plaintiff.

The case went to trial before Saleh Minjibir, C. J. of Kano State. After hearing evidence the learned C. J. entered judgement for the plaintiff. The learned Chief Judge also ordered that if the defendant failed to remove his structures on the land within three months the **maxim *quic quid plantatur solo solo cedit*** should apply.

The first and second orders of Minjibar C. J. were affirmed by the Court of Appeal. The third order i.e. that the defendant should remove his structures on the land in question was set aside on the ground that the relief was not pleaded. The defendant now appealed to the Supreme Court. The Supreme Court held inter alia as follow that "where there is no complaint against a party, the non-joinder of that party will not affect the proper determination of the issues joined. It must be stressed here that the radical title of the land is not in issue. That being so the non-joinder of the Governor of Kano State did not affect the proper determination of the issues joined. Again, it must be pointed out that the complaint of trespass was against the appellant and not against the Governor of Kano State who is not a necessary party to this suit."

No Proper Action before the Court

Before there can be proper and effective invocation of judicial power, proper action must be before the Court. Judicial power is therefore vested in the Court for the purpose of determining cases and controversies before it; the cases and controversies, however, must be justiciable and all other conditions precedent to its invocation must be duly complied with. In deciding whether its power has been properly invoked, the Courts consider whether there is an actual dispute viz;

a) Whether or not such right or obligation is known to the law.

b) Whether the right is of the person invoking the jurisdiction of the Court; or the obligation sought to be enforced is owed to that person;

c) Whether there is a controversy about such right or obligation.

The power of the Court to find the claim lacking in merits in fact and/or in law is one of the essence of exercise of adjudicatory power. And when indeed there is no proper action before the Court, the Court will automatically strike out the action especially where the defect in such action is fundamental. In the case of **Haruna V. Adekwegh & ors.**[178] reported in the selected Rulings and Judgement of **Hon. Justice A. A. Kolajo volume IV**, of his Selected Judgement. The bone of contention in this case is whether there is a proper action before the Court. Mr. O. A. Solake, learned defence counsel raised a preliminary objection to this action. The

[178] Suit No. FCT/HC/CV/375/95

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ground for his objection is that this action is not properly before the Court in that all the conditions precedent to a proper action being filed by a person suing as next friend have not been complied with. Learned defence counsel referred to Order II, Rule 13 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 1991 (hereinafter called the Rules). Learned defence counsel argued that since Order II, rule 13 of the Rules has not been complied with there is no party before the Court. There is therefore no action which the Court can adjudicate.

In his reply Mr. Ladep N. Gwamzhi, learned plaintiff's counsel submitted that there can be no objection if there is no proper action before the Court. He further submitted that the proceedings are not violated by the fact that the plaintiff did not obtain leave of Court to sue in a representative capacity or that the authority of the person suing is not filed before the Court. Learned plaintiff counsel contended that the Court should aim at doing substantial justice and not technical justice. He further submitted that the fact that authority to sue in a representative capacity was not obtained will not vitiate the action because that defect can be cured by an amendment.

The Court ruled that the submission of Mr. Gwanzhi that there can be no objection if there is no proper action before the Court is untenable. Some papers were filed in Court as action on behalf of the plaintiff. These papers are now being attacked as improper because some conditions precedent were not satisfied. The person who sued as next friend did not sign any written authority for that purpose. These lapses violate the mandatory provision of Order II. Rule 13 of the Rules. In **Chidbi V. Ujieze** cited by Mr. Solake, the Court of Appeal held that a Court is competent to hear a case when the case

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comes before the Court initiated by due process of law and upon fulfillment of any conditions precedent to the exercise of jurisdiction. The Court further held that "any defect in the competence of a Court is fatal for the proceedings is a nullity however well conducted and decided the defect is extrinsic to the adjudication. In **Fumudoh V. Aboro**[179], the Court of Appeal held that "the law is common, that where an enabling statute or rule or procedure lays down a pre-condition or a collateral condition as a first step to the issuance of the main process, failure on the part of the applicant to satisfy that pre-condition or collateral condition will be prejudicial to the filing of the main process. The Court as **Per Tobi JCA** (as he then was) held at page 233 that "a party seeking for the invocation of the Court's jurisdiction must satisfy all pre-conditions laid down by the law. He must do first things first. He cannot jump the gun." The learned justice went further: "On the state of these authorities, I am of the view that this action is incompetent. The game must be played according to the rules even in doing substantial justice. In the present action substantial justice can still be done. If the action is struck out, the plaintiff has a chance of coming to Court again properly. I am further reinforced on the stand I take by the judgement of the Supreme Court in **Onwugbufor V. Okoye**[180]. In that case the Supreme Court held inter alia that "for a valid and effective commencement of a claim, an intending plaintiff shall strictly comply with the provisions of relevant statutes and the rules made thereunder and governing the claims made such as the High Court Law and Civil Procedure Rules." In the light of all that I have said above the objection of learned defence counsel

[179] (1991) 9NWLR (pt 214) 210
[180] (1996) 1NWLR (pt 424) 252

Mr. A. O. Solanke succeeds. The suit is therefore struck out with liberty to institute a fresh action if the plaintiff so desires."

The Supreme Court held in **Sofolahan & anr V. Fowler & anr**[181] on the proper format for instituting suits on behalf of infants. The Court said: "finally as to the title of this action supposedly brought on behalf of infants. I have no doubt that it was wrong the way the plaintiffs/appellants here were stated in the writ of summons and other processes. The names of each of the two parents were stated and were indicated as "Suing as a parent and next friend of …" This is against the procedure. It also shows that each of those parents was at the same time pursuing his or her cause since they claim to sue also as parents. The right procedure is that the name of the infant should take the forefront while that of his next friend should follow, labeling each correctly as infant and next friend respectively. The proper format is as per Form 2 in Atkin's Courts Forms, 2nd Edition, vol. 21(3) 1997 issue, page 402. The law is clear that the next friend in a suit is an officer of the Court appointed and allowed to pursue the interests of the minor he represents; he is not regarded as a party to the proceedings. All these authorities were considered by the Court below. The default committed in the title of the suit is no technicality. It is fundamental." For a defect in the procedure followed on the ground of irregularity, but it does not necessarily render them a nullity – **Madukolu V. Nkendilim (1962) 1 ALL NLR 587.**

When Action is Frivolous and Vexatious

A frivolous action means a silly, foolish, flippant, senseless, superficial or shallow action. Also vexatious action means

[181] (2002) 9NSCQR pg 596, R. 5

irritating, exasperating, infuriating, provoking or an annoying action. It is settled law that it is only an abuse of the process of a Court when a party brings to Court frivolous and vexatious suits. The best example of such frivolous and vexatious suit is when an appeal brought by a person is not in conformity with Section 233(1) and (2) of the 1999 Constitution.

For an action to be declared frivolous, vexatious, oppressive and an abuse of the process of Court, it must be shown quite clearly that there are two or more actions between the same parties in respect of the same subject matter in one or more Courts at the same time.

The Supreme Court **Per Aniagolu JSC** in **Professor Ayodele Awojobi V. Dr. Samuel Ogbemudia**[182] after dismissing the appellant's appeal for lacking in merit, held as follows: "Speaking for myself, I consider the frequency with which this appellant goes in and out of our Courts as bringing him dangerously within the meaning of a vexatious litigant who should be restrained by the Courts on the principles and jurisdiction laid down in **Lawrence V. Norreys**[183] it is a matter for regret that the highest Court in the land should be subjected to entertain a frivolous matter of the type of this appeal, in the fact of every weighty matters concerning parties aggrieved, with which this Court has to deal, in the interest of the nation, within the Constitution of Nigeria."

Therefore, it should be borne in mind that an application for any pleading to be struck out or dismissed when an action is frivolous and vexatious should be made at a very early stage of the action where there is only the statement of claim without any other pleadings and without any evidence at all. But at

[182] (1983) 8SC 92 at pg 96

[183] (1890) 15 App. Cas. 210

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large dismissed order is the appropriate order when an action is found at the same time to be vexatious and frivolous **Labode V. Otubu (2001) 5NSCQR pg 722 R. 2** because the Court has an inherent jurisdiction to prevent abuse of its procedure by frivolous or vexatious proceedings.

The Court also held that an order made on motion dismissing an action as frivolous and vexatious is an interlocutory order. Leave to appeal from such an order should not be granted unless such appeal is "reasonable and proper"[184]

Non-existence of a Legal Right

Every suit is aimed at the vindication of some legal rights. The existence of the legal rights is thus an indispensable prerequisite of initiating any proceedings in a Court of law. In other words there must be recognized under the law, a factual situation, the existence of which will entitle one person to remedy. For where there is right, there is remedy *(ubi jus ibi remedium)*. The Supreme Court in the case of **Alsthom S. A. V. Saraki**[185] explained the test to apply when a person has a legal right in any dispute viz:

a) Whether or not such right or obligation is known to the law.

b) Whether the right is of the person invoking the jurisdiction of the Court; or the obligation sought to be enforced is owned to that person.

c) Whether there is a controversy about such right or obligation." This involves among other things a determination of fact of infringement of the claimed right

[184] Eleko V. Baddeley (1925) 6 NLR 71.

[185] (2000) 2SCNQR (pt 1), pg 25, R. 2

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or default in performance of obligation. The power of the Court to find the claim lacking in merit in fact and or in law is the essence of exercise of adjudicatory power. The Court will not deny the exercise of judicial power to a person who seeks it merely because his claim, when examined, may be wanting in merit.

By and large, when there is no existence of a legal right, the Court would strike out or dismiss such action depending on the circumstances of each action – **Ladejobi V. Oguntayo (2004) 19NSCQR pg 1, R. 7,**[186]

The plaintiff is required to establish a legal right in himself which has been violated or an injury or threat to such injury to that right by the

defendant, plaintiff having failed to establish any of this essential requisites has not shown the existence of a dispute.[187]

Where Reliefs are not Competent before the Court

It is rampant that when litigants institute actions in Court of law, they always claim some reliefs along with their stands/ positions. But such reliefs must be within the authority of that Court. When a relief is sought from Court, it must not be a matter of speculation or doubt as to what it entails. The Court cannot be expected to make an order which is uncertain or which is subject to different interpretations as to whether it meets the relief claimed. Nor has the Court a duty to engage in any semantics in the order it makes in an attempt to explain what the plaintiff intended to ask for and accordingly grant it.

[186] A. G. Bendel State V. A. G. Federation & 22 ors (1981) 9 SC 1.

[187] See A. G. Ondo State V. A. G. Federation & ors (1983) NSCC 512, A. G. Fed. V. A. G. States (2001) 7NSCQR pg 458 at pg 537.

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The guiding rule is that the Court must not grant a party what it has not proved. The Court has no jurisdiction to do so.

However, where an action is brought solely to obtain relief which the Court has no power to grant, the statement of claim will be struck out and the action dismissed. In the case of **Dikko Yusuf V. Obasanjo**[188] where it was in dispute on whether or not reliefs in paragraphs 18, 19 and 20 can be sustained having regard to the circumstances of this case, the Supreme Court considered on when a relief may be granted, refused or struck out by a Court or Tribunal. The Court held that: "*a relief may be granted, refused or struck out by a Court of law or Tribunal at the end of the trial in its judgement. And not before. There is however nothing stopping the petitioner from applying to the Court to withdraw any of the reliefs claimed. That is not the case here.*"

Also in the case of **Fagunwa V. Adibi**[189] where one of the issues is whether the consideration of the complaints of the respondents in relation to the claim for declaration of title to a statutory right of occupancy would justify setting aside the judgement of the trial Court without considering whether the other reliefs were on the printed records properly granted by the trial Court, the Supreme Court **Per Niki Tobi JSC** decided on the effect of a plaintiff failing to prove his relief or reliefs when he said "it is trite law that where a plaintiff fails to prove his relief or reliefs, the action stands dismissed and it is dismissed. An order of a retrial gives the plaintiff a second chance to repair his case and return with his repaired case to fight the defendant. While the barman may allow the customer have a second taste or bite at the cherry, there is no such bar in the Court and so the appellants will not be allowed another

[188] (2004) 18NSCQR (pt 11) pg 477, R. 6

[189] (2004) 19NSCQR pg 415, R. 12

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chance to relitigate this action."[190]

Premature and Incompetent Action

Where a statute prescribes a remedy, an aggrieved party must first exhaust that remedy before recourse to the Court. When he fails to exhaust the remedies statutorily available to him, his action is premature, incompetent and it should be struck out for it does not give rise to a cognizable cause of action. The Court has no jurisdiction to entertain the action.

Also when the law presumes a fact on the satisfaction of certain conditions, a party who seeks to take advantage of such presumption must satisfy the conditions. It is by no means a technicality to insist that such conditions must first be satisfied. You cannot take the presumptions and ignore the conditions. Rather, the only way of giving effect to the provisions of the statute is to abide by their conditions. What may amount to technicality if at all is to insist on a particular form of proof. For example the proof of the authenticity of a document when all the surrounding circumstances point to its authenticity as the act of the maker.

Essentially, abide by the condition(s) precedent is the most important factor in order not to get the litigant's suit struck out in Court for prematurity and incompetence. In the case of **A. G. Fed. V. A. G. States[191]** where the Supreme Court **Per A. G. Karibi-Whyte JSC** said, "the claim is not for the interpretation of the formula for revenue allocation and does not concern any determination of that issue which was not a claim before the Court. The question whether the action is

[190] See the case of Akindipe V. C. O. P. Obare & ors (2000) 2SCNQR (pt 11) pg 895, R. 7.

[191] (2001) 7NSCQR pg 458, at 543.

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premature, should concern the claim for the determination of the seaward boundary of the littoral states which was the claim before the Court. A dispute as to the seaward boundary of the littoral states can only properly arise after the National Boundary Commission vested with jurisdiction to determine the issue had so determined; and if the determination is subject matter of dispute between plaintiff and the littoral states. At any rate, Section 3(a) of the National Boundary Commission Act has not provided for the determination of boundary dispute between the Federal Government and any of the constituent states. The action is therefore premature and is incompetent."

Furthermore, when in any case the trial Court has given judgement as regards the suit before it any aggrieved party has Constitutional right to appeal. This would not constitute abuse of Court process. But for such ground of appeal of the appellant to be competent, it must constitute an attack or onslaught on the *ratio decidendi* of the trial Court otherwise it would be incompetent and liable to striking out. See the case of **Chirvwam V. Jelwum**[192]. To make ground of appeal competent what is important is whether or not impugned ground shows clearly what is complaining of. If, therefore, a notice of appeal is struck out for being incompetent, then there can be no appeal to be dismissed. This is a matter of simple logic.

Also in **Governor of Ogun State V. President of Nigeria**[193], the fact of the case goes thus: the governor of Ogun State brought an action against the President of the Federal Republic of Nigeria, the Inspector General of Police and the Commissioner of Police Ogun State challenging the Constitutionality of the Federal Republic of Nigeria

[192] (2003) FR pg 36, R. 2

[193] (1982) 3NCLR pg 538

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(Adaptation of Public Order Act) Order 1981 made by the President. A jurisdictional objection was taken by the defendants by way of a motion saying that the matter was a dispute between a state and the Federation involving the existence or extent of a legal right; therefore, it was only the Supreme Court that has jurisdiction to entertain it under Section 212 of the Constitution. The Court held that the action was incompetent in that only the Supreme Court has jurisdiction and not the High Court.

But respectively, what makes a ground incompetent is not whether it is framed as an error and a misdirection but whether by so stating it the other side is left in doubt and without adequate information as to what the complaint of the appellant actually is – **See Aderounmu V. Olomu (2000) 4NWLR (pt 652) 253 at page 265 to 266.**

Want of Diligent Prosecution

Diligence is primarily one of the watchword of legal profession. So anybody who belongs to this noble profession is implored to imbibe the culture for there is no royal road to winning of cases than diligence and industry. The law and the Court expect certain degree of diligence from the barrister when handling a suit before it. And for that diligence to be actively displayed steps which are mandatorily or discretionary to be taken in pursuing such brief should be taken expeditely and expediently which include filing of various and relevant documents, payment of filing fees, putting the other side on notice about the impending action against them in Court, bringing his witnesses to Court properly, display of legal prudence, candour and decorum in the temple of justice and such other prerequisites honourably expecting from any members of the bar.

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Therefore, when a suit is not pursued and prosecuted with expected diligence such suit may get thrown out from Court (i.e. to be struck out). The litigant can still come back to the Court when the needed, expected momentum and diligence had been gathered. The Court expressed its mind in the case of **Ogundoyin & ors V. Adeyemi**[194] when it said, "it needs be emphasized, however that the fact that the order dismissing the appeal of the appellant will be set aside is not tantamount to a decision by this Court that the appellants have conducted their appeal in the Court below with due diligence…"

This may happen in different spheres of handling a matter. It may be due to an inordinate and inexcusable delay which has resulted in prejudice to the defendant or in other non-challant ways.

In order for an application to dismiss a suit for want of diligent prosecution to succeed the defendant must show:

(i) That there has been an inordinate delay by the plaintiff; what is an inordinate delay must depend on the facts of each particular case;

(ii) That this inordinate delay is inexcusable; as a rule, until a credible excuse is made out, the natural inference is that it is inexcusable.

(iii) That the defendant is likely to be seriously prejudiced by the delay, as a rule, the longer the delay, the greater the likelihood of serious prejudice. This, however, must not be taken as saying that the application will not succeed even if the defendant is unable to show that he will be seriously prejudiced provided conditions (i) and (ii) exist:[195].

[194] (2001) 7NSCQR pg 378 at 398

[195] See Pryer V. Smith (1977) I.W.L.R 425; (1977) 1 All E.R 218.

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In considering whether to dismiss an action where it has been established that the plaintiff has been guilty of inordinate and inexcusable delay which is likely to prejudice the fair trial of the action, the Court has a discretion and is bound to consider all the circumstances. The fact that the trial of action is imminent and the claim is not statute-barred, so that the plaintiff would still be free to bring a second action on the claim if the first is dismissed, would be relevant and highly important considerations and the Court would be slow to strike out an action in such circumstances[196]

Now, if there has been an inordinate delay which is due to the negligence of his counsel, while the plaintiff is personally blameless it may be unjust to deprive him of the chance of prosecuting his claim[197]. Where the fault was that of Solicitor's clerk, the fact that the plaintiff may have an effective remedy against his Solicitor for professional negligence is not a relevant consideration in deciding whether to dismiss an action for want of diligent prosecution:[198] This is also provided for in **Order 6, Rule 10 of the Court of Appeal Rules 2002** as follows: Where an appellant fails to file his brief within the time provided for in Rule 2 of this Order, or within the time as extended by the Court, the respondent may apply to the court for the appeal to be dismissed for want of diligent prosecution. If the respondent fails to file his brief, he will not be heard in oral argument except by leave of the court. Where an appellant fails to file a reply brief within the time specified in Rule 5, he

[196] Dutton V. Spink Breeching (Sales) Ltd & ors (1977) 1 All E.R 287 CA. see also Austin Securities Ltd V. Northgate and English Stores Ltd (1969) 2 All E.R. 753, & 756; Birkett V. James (1977) 3 WLR 38; (1977) 2 All E.R. 801.

[197] See Abiegbe & ors V. Udhremu Ugbodume & ors (1973) 1 SC 133.

[198] Martin V. Turner (1970) 1 All E.R. 256: (1970) 1 WLR 82; Parton V. Allsop (1971) 3 All E.R. 370.

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shall be deemed to have conceded all the new points or issues arising from the respondent's brief - **INEC & Ors v. Nnaji & ors (2005) 2FR p. 95, @ 102-103; Chukwuka v. Ezulike (1986) 5 NWLR (pt 45) 892; Omoyinmi v. Ogunsiji (2001) 7 NWLR (pt 711) 149 @ 155; Anyaegbunam v. A. G. Anambra State (2001) 6 NWLR (pt 710) 532 @ 540.**

The consequence is that the dismissal of an appeal for want of diligent prosecution under Order 6 Rule 10 is final decision and the only cause open to a party adversely affected thereby is that of appeal to the Supreme Court. In my respective view, after the dismissal (wrongly or rightly) the Court became *functus officio*.It no longer has the legal power or authority to reverse itself by setting aside its judgement of dismissal of the appeal and restoring the appeal to the cause list for rehearing except where fraud is in issue – See **United Bank for Africa Plc v. Michael Ajileye (1999) 13 NWLR (pt 633) p. 116 @ 126.**

Where there is no evidence supporting a Claim/ Relief

In law, for every claim or relief sought in Court there must be evidence either oral, documentary, real or any other classifications of evidence adduced before the Court could grant such claim. It is a known law, that pleading not supported by evidence does not constitute evidence and is deemed abandoned. Also it is wrong in law to 'look at' pleading and accept it as evidence of the facts in issue or claim sought without actual testimony in support thereof.

Therefore, where there is no evidence in support of the claim, relief or order sought for, the Court will as a matter of practice dismiss the claim. This is the decision of Court in the

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case of **Minister of Internal Affairs & ors V. Okoro & ors**[199] where the Court held as follows: "Therefore the learned trial judge having clearly found that there was no evidence to support the appropriate order being sought by the application, the learned trial judge should have there and then dismissed the application. To proceed to grant the application as he did in the absence of any evidence to support it constitutes a serious misdirection in law justifying the setting aside of the ruling."[200]

In the case of **Fagunwa V. Adibi**[201] where the Supreme Court held that "it is trite law that where a plaintiff fails to prove his relief or reliefs, the action stands dismissed and it is dismissed …" Also in the case of **Total Plc V. Ajayi**[202] where it was decided on whether Court can grant reliefs not supported by evidence. The Court held that; "… The respondent in his statement of claim has admitted that the appellant on 1st January, 1998 attempted to take over the Petrol station which he refused to surrender. Except for relief under paragraph 31(f), of the Amended Statement of Defence, I hold that it was wrong for the trial judge to have dismissed the counter-claim of the appellant. Relief under 31(f) has not been supported by any evidence."

Improperly Constituted Action

The elementary considerations about the commencement of an action and the essential elements of a properly constituted action is that a Writ of Summons must not only state the name

[199] (2003) 10FR pg 115, R. 2

[200] See Shodeinde V. Ahmadiyya Movement in Islam (1983) 2SCNLR 284, Menakaya V. Menakaya (2001) 16NWLR (pt 738) 203 at 237 – 239.

[201] (2004) 19NSCQR pg 415, R. 12

[202] (2003) 12 FR pg 174, R. 7

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of a plaintiff with legal capacity to bring the action, it must also contain the name of a defendant, with legal capacity to defend the action and the claim against the defendant. The writ of summons therefore shall state briefly and clearly the parties to the action, the subject matter of the claim and the relief sought. There must be a justiciable dispute between the plaintiff and the defendant.[203]. That is, defendant should not be brought to Court unless a plaintiff has a claim against him.

Presumably, if there is no competent defendant on record, before the case went to trial and throughout the trial, certainly the action in respect thereof would be struck out on the ground that it is improperly constituted. Anything to the contrary will be absurd and unacceptable. The case of **Gov. of Kogi State & ors V. Col. Hassan Yakubu & anor (2001) 5NSCQR pg. 598, R. 3** is appropriate in this arena. In this case Col. Hassan Yakubu (rtd), the 1st respondent/cross-appellant, was deposed as the Ejeh of Ankpa by the Government of Kogi State. Aggrieved by his removal and subsequent detention, he commenced an action, vide an application ex-parte for leave for the enforcement of his fundamental rights. The leave was granted. He therefore filed an application on notice within the provisions of the Fundamental Rights (Enforcement Procedure) Rules, 1979 seeking for certain orders. The application was opposed. Learned Counsel for the appellants argued that it was not a fundamental right to be a chief. He said the action being brought under Fundamental Rights (Enforcement Procedure) Rules was improperly constituted. The learned trial judge agreed with him and dismissed the action. The 1st respondent/cross-appellant filed an appeal

[203] See Nnodi V. Okafor (1963) WNLR 42

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against the order of the learned trial judge dismissing his suit when the proper order to make was to strike it out. The Court of Appeal agreed with him and set aside the order of dismissal and struck out the suit. It however went into an error and considered the appeal against the inconsequential decision made on the merits. Dissatisfied with the judgement, the Attorney General of Kogi State, representing the appellant appealed to the Supreme Court. The Supreme Court held that when a Court finds an action improperly constituted the proper order to make is to strike it out and not to dismiss it. The decision of the Court of Appeal therefore is right when it substituted the order of the High Court dismissing the action filed by the cross-appellant with an order striking out his claim ... Any further pronouncement on the merit of the action after it had been struck out is incompetent and outside the jurisdiction of the Court of Appeal. Relevant to the above case is the case of **Okegbe & ors V. Chikere & ors (2000) 3NSCQR pg. 215, R. 16** the Court held that where a suit is improperly constituted, the only order open to the Court is an order of striking the suit out. The simple reason justifying the order for striking the suit out is that respondent's suit is incompetent being wrongly constituted.

In addition, the case of **Ataguba V. Gura (2005) 21NSCQR pg. 720, R. 1**, the Supreme Court gave the judgement among other when it held that: "undoubtedly, for an action to be properly constituted so as to vest jurisdiction in the Court to adjudicate on it, there must be a competent plaintiff and a competent defendant. As a general principle, only natural persons, that is, human beings and juristic or artificial persons such as body corporate are competent to sue or be sued. Consequently, where either of the parties is not a

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legal person, the action is liable to be struck out as being incompetent."

What are the options open to appellate Court in cases not properly constituted? The appellate Court might give any of the following options:

(1) To remit the case for retrial and for those who might have been joined to be joined.
(2) To strike out the action if a retrial would necessitate extensive and/or complicated amendments to the Writ and Statement of Claim to reflect the joinder.
(3) To join for purposes of the appeal the person who ought to have been joined in the trial Court: and
(4) To hold that the person complaining that he ought to have been joined was not such a necessary party and that the non-joinder would not defeat the cause of the matter[204]

Also in the case of **Chief Adeniran Ogunsanya V. Prof. Ishaya Audu**[205] the plaintiff is the Chairman of the Nigerian Peoples Party – one of the five registered political parties in Nigeria. The defendant was also a member of the said party – serving as a Minister of the Government of the Federation. On the 20th July, 1981, the defendant tendered his resignation by a letter to the President. On the same day he resigned his membership of his party. However, the President did not accept his resignation. On the 22nd July, 1981, he wrote to the President, accepting the President's ruling and withdrawing

[204] See the case of Leonard Okoye & ors V. Nigerian Construction and Furniture Co. Ltd & ors (1991) 6 NWLR (Pt. 99) 501 @ 512, Ayorinde V. Oni (2000) 1 SCNQR pg. 180, R. 4.

[205] (1982) 3 NCLR pg. 529

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his resignation. The plaintiff filed an action against the Minister only seeking, a declaration by Originating Summons that the defendant has ceased to be a Minister by his letter of resignation dated 20th July, 1981. The Court held that the action is not properly constituted as the President who obviously will be affected by any order of the Court is not a party to this action.

Discontinuation of an Action: Proper Order to make

It is apparent, that leave of the Court is necessary to discontinue with a case on or after the date fixed for its hearing: failure to obtain leave will lead to the dismissal of the case as it is not generally open to Court to allow a plaintiff to *suo motu* discontinue a case after it has been set down for hearing. Whenever a suit is being discontinued after evidence has been led, a judge is bound to consider the effect of the evidence so far given before he can correctly arrive at a proper order to make. This is so because once issues have been joined to be tried and the stage set for the trial then once a certain stage has been reached the plaintiff is no longer *dominus litis* and cannot be allowed to escape through the back door to enter again through another action.

Therefore a suit withdrawn after issues have been joined should be dismissed and not struck out; when the case is part-heard. See **Eronini V. Ihauko (1989) 2NWLR (pt 101) 46, Omo V. Amanta (1993) 3 NWLR (pt 210) 187, Nwachukwu & ors V. Nze & ors 15 WACA 36.**

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How the Applicant can raise Objection against the Jurisdiction of Court

An objection to the jurisdiction of the court can be taken at any time. The position of the law is that, it could be raised in any of the following ways;

(a) On the basis of the Statement of Claim; or

(b) On the basis of the evidence received; or

(c.) On the face of the Writ of Summon, where appropriate as to the capacity in which the action was brought, or against whom the action was brought – Nnonye v. Anyichie (2005) 2 NWLR (pt910) 623; Ogboru v. Ibori (2005) 13 NWLR (pt 942) 319.

A defendant in raising a preliminary objection on point of law needs not file an affidavit evidence. A preliminary objection can be raised *viva voce*[206], by mere Notice not supported by an affidavit or by a Motion on Notice supported by an affidavit. It may even be raised by the Court *suo motu* – **Prof. K. Ologe & ors V. Bappah**[206a]. It can also be raised by Summons[206b].

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[206] P. E. Ltd v. Leventis Trading Company (1992) 5 NWLR (pt 244) 625 @ 679; Osadebey v. A.G. of Bendel State (1981) I NWLR (pt 169) 525; Owoniboys Technical Services Ltd v. John Holt Ltd (1991) 6 NWLR (pt 199) 550; Okesuyi v. Lawal (1991) 1NWLR (pt 214) 126; Utih v. Onoyiwe (1991) 1NWLR (pt 166) 166.

[206a] Suit No. FCT/HC/CV/243/95

[206b] Order 5, Rule 2 of the High Court of Lagos State (Civil Procedure) Rules 2004 states that an application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying as taking any fresh step after becoming aware of the irregularity. An application under this rule may be made by Summons or Motion and the ground of objection shall be stated in the Summons or Notice of Motion.

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While a Court has the jurisdiction to raise an issue *suo motu*, it has no jurisdiction to resolve it *suo motu*. The parties must be given an opportunity to react to the issue before a decision is taken.[207]

I also agree with the law that an objection to the jurisdiction of the Court can be raised at any time, even when there are no pleadings filed and that a party raising such an objection need not bring the application under any rule of Court and that it can be brought under the inherent jurisdiction of the Court. Thus, for this reason, once the objection to the jurisdiction of the Court is raised, the Court has inherent power to consider the application first even if the only process of Court that has been filed is the writ of summons and affidavits in support of an interlocutory application.

Where for some exigencies, the Court is called upon to take the preliminary objection along with substantive matter, and the court grants the request, the court is still under a duty to determine the preliminary matter first before delving into hearing the substantive issue. Where the preliminary objection is upheld, that is the end of the substantive matter before the court especially where the challenge is against the competency and jurisdiction of the court.

The position is the same for pending motions. But where the preliminary objection is overruled in favour of the pending motion, it is the duty of the court to hear arguments for the grant or refusal of the motion on the merit. And where both the preliminary objection and the substantive motion are heard simultaneously, the court is under a duty to restrain from commenting on the merit of the substantive motion except

[207] See Agbanelo V. Union Bank (2000) 2SCNQR (pt 1) pg 444, R. 16, Arewa Textiles Plc & ors V. Finetex Ltd. (2003) 6 FR pg 205 – 206.

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where the preliminary objection is overruled – See **Ogoja v. Offoboche (1996) 8 NWLR (pt 458) 48; Nwanwata v. Esumi (1998) 8 NWLR (pt 563) 650; Tambco Leather Works Ltd v. Abbey (1998) 12 NWLR (pt 579); Military Administrator of Taraba State v. Jen. (2001) 1 NWLR (pt 694) 416; Ege v. Shipping & Trading Ind. (1999) 14 NWLR (pt 637) 70; UBN Plc v. C.F.A.O (Nig.) Ltd (1997) 11 NWLR (pt 527) 118; Katto v. C.B.N. (1991) 9 NWLR (pt 214) 126.**

How preliminary objection to an Appellate Courts is raised

A preliminary objection to an appeal should be by Motion on Notice before the hearing of the appeal so that arguments on it can heard by the court. While notice of objection may be given in the brief, it does not dispense with the need for the respondent to move the court at the oral hearing for the relief(s) prayed for. A respondent intending to raise a preliminary objection to an appeal must –

(a) give three days notice before the objection is heard;

(b) seek the leave of the court to move the notice of the objection before the oral hearing of the appeal commences where the notice is given in the respondent's brief, otherwise it will be deemed to have been waived and therefore abandoned - See **Oforkire v. Maduike (2003) 5NWLR (pt 312) @ 166; Ajibade v. Pedro (1992) 5NWLR (pt 241) 257; Ariori v. Elemo (1983) 1SCNLR 1; Nsirim v. Nsirim (1990) 3NWLR (pt 138) 258.**

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The manner of raising a point of preliminary objection in an appellate courts is stipulated by **Order 2, Rule 9 of the Supreme Court Rules (as amended in 1999)**, and Order 3, Rule 15(1) of the Court of Appeal Rules 2002. Also, by Order 6, Rule 5 of the Court of Appeal Rules 2002 where a new point has been raised in a respondent's brief; and this includes a notice of preliminary objection embedded in the respondent's brief, there may be the need for the appellant to respond to such new point by filling a reply brief within the stipulated period permitted by the rules of Courts. The court cannot validly brush aside a preliminary objection where there is no reply brief filed, unlike new points raised on appeal generally, which if not responded to through a reply brief are deemed admitted by the appellant – See **Agbaka v. Amadi (1998) 11NWLR (pt 572) 16; Yusuf v. UBN Ltd (1996) 6 NWLR (pt 457) 632; Nwankwo v. Ecumenical Dev. Co. Society (2002) 1NWLR (pt 749) 513.**

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