GEORGE ATTAH

V.

PETER ONYEMA EMEKA

Appeal No.: **FCT/CCA/CVA/14/2009**

HON. JUSTICE MOSES A. BELLO, (JP), PCCA (Presided)

HON. JUSTICE STANLEY KUNLE LAWAL, JCCA

HON. JUSTICE (DR.) NGOZIKA UWA OKAISABOR, JCCA (Delivered the Leading Judgment)

16th November, 2011

ACTION-	*Cause of Action – Meaning of – How determined*
APPEAL -	*Grounds of Appeal – Particulars of Error – Specifying of – whether mandatory*
APPEAL-	*Notice of Appeal – Competence of – How determined*
COURT-	*FCT Customary Court of Appeal – Appellate jurisdiction of – exercise of outside customary law – propriety of*
EVIDENCE-	*Preponderance of – duty of trial court – attitude of appellate court to*
JURISDICTION-	*Meaning of – Issue of - Source of Jurisdiction- fundamental nature of – where court lacks jurisdiction – appropriate order to make*
PRACTICE AND PROCEDURE-	*Parties to action – Joinder of -Desirable and Necessary Parties*
PRACTICE AND PROCEDURES-	*formulation of arguments – whether court can formulate argument for parties*

ISSUES

1. Whether the Learned Judges of the Court below correctly assumed jurisdiction over this matter when the necessary parties were not before them.
2. Whether the court below was right in making orders against parties not before the Court.

3. Whether an agent of a disclosed Principal can incur liability for the actions he carried out on behalf of the said Principal and whether any cause of action has been disclosed against the Appellant.
4. Whether by critical examination of the facts of this case, the judgment of the Court below was not against the weight of evidence adduced

FACTS

Plaintiff (Respondent herein) at the Court below, being a guardian of his late brother's children initiated a suit against the Defendant/Appellant claiming the amongst others that the shop subject matter of the suit belonged to his late brother while the Defendant/Appellant claimed that the subject matter was allocated to one Mr. Emeka Emmanuel Oketah who was the former Secretary of Zuba Amalgamated Traders Association and that the shop was given to him by the Late Emeka Oketah's wife. At the end of a full trial, the trial Court entered judgment in favour of the Plaintiff/Respondent. The Appellant being dissatisfied with the judgment filed an appeal to this Court via their Notice of appeal. On 14/10/2010, the Court granted the application of the application of the Appellant via his Motion on Notice dated 8th July, 2010 and filed same day to amend his Notice of Appeal.

HELD (Dismissing the Appeal):

1. **On whether the court can formulate argument for parties**
   It is now settled that it is not the duty of the Court to formulate arguments for Counsel.
2. **On when a court is said to be competent.**
   A court is competent when:
   (1) It is properly constituted as regards numbers and qualification of the members of the bench and number is disqualified for one reason or another.
   (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 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. See ***Madukolu v. Nkemdilim (1962) ANLR (Pt. 2) Pp 581***
3. **On Desirable and Necessary Parties**
   Desirable Parties are those parties who have an interest or who may be affected by the result while Necessary Parties are those who are not only interested in the subject matter of

the proceedings but also who in their absence the proceedings could not be fairly dealt with in other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the Plaintiff. See ***Iyimoga v. Governor Plateau State (1994) 8 NWLR (Pt 360) Pp 73 at 95***; ***Kalu v. Uzor (2004) 12 NWLR (Pt 886) Pp 1 at 33 Paras E-F.***

4. **On preponderance of evidence by trial court.**

   The Trial Judge after a summary of all the facts must put the two sets of facts on an imaginary scale and weigh one against the other, then decide upon the preponderance of credible evidence which one weighs more and accept it in preference to the other, then apply the appropriate law to it.

   In determining which is heavier the Judge will have regard to:

   (a) Whether the evidence is admissible.

   (b) Whether it is relevant.

   (c) Whether it is credible.

   (d) Whether it is conclusive.

   (e) Whether it is more probable than that given by the other party*".* See ***Onwuka v. Ediala (1989) 1 NWLR (Pt 96) Pp 182 at 187.***

5. **On what the appellate court will consider in determining whether the judgment of the trial court is against the weight of evidence.**

   Where the judgment of a court is attacked on the ground of being against the weight of evidence or whether the finding or non-finding of facts is questioned, the Court of Appeal in its primary role in considering such judgment will seek to know the following:

   (a) The evidence before the trial Court.

   (b) Whether the trial Court accepted or rejected any evidence upon the correct perception.

   (c) Whether it correctly approached the assessment of the value on it.

   (d) Whether it used the imaginary scale of justice to weigh the evidence on either side,

   (e) Whether it appreciated upon the preponderance of evidence which side the scale weighed having regard to the burden of proof. ***Adebayo v. Adjei (2004) 4 NWLR (Pt 862) Pp 44 at 51***

6. **On joinder of party under the FCT Customary Court (Civil Procedure) Rules, 2007.**

   Under Order 22 Rule 3 of the Federal Capital Territory Abuja, Customary Court (Civil Procedure) Rules, 2007**,** the trial Court is only empowered to join a party to a suit where the presence of such party is essential to a just decision of the matter in dispute.

7. On whether an agent can exist without a principal

Indeed an Agent relationship cannot legally be created when there is no Principal. In order words, in the absence of a Principal, an agency could not arise. An Agency cannot arise out of a non-existent Principal as "you cannot build something on nothing". See ***Macfoy v. UAC Ltd. (1962) A. C. 152.***

8. On the meaning of cause of action

A cause of action has been defined to mean a bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make claim for the relief or remedy being sought. The factual situation on which the Plaintiff relied to support his claim must be recognized by law as giving rise to a substantive right capable of enforcement or being claimed against the Defendant. See ***Cookey v. Fombo (2005) NWLR (Pt 947) Pp 182 at 2002 Para E.***

9. On whether it is mandatory to specify particulars of error

Where a Ground of Appeal by the way it is couched is self explanatory and does not need any particulars to understand its purport, it is not mandatory that the Appellant should specify the particulars of error. See ***Shyllon v. Asein (1994) 6 NWLR (Pt 353) 670 at 681, Pp 685, Para H; 693 Para D***

10. On proof of title

There are five established ways of proving title thus:

i. By traditional evidence.

ii. By document of title.

iii. By various acts of ownership and possession numerous and positive to warrant inference of ownership.

iv. By acts of long possession and enjoyment of land

v. By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land is the owner of the land in dispute"; See ***Idundun v. Okumagba (1976) NSCC Pp 445 at 453-454; Yusuf v. Adefoke (2008) Vol. 40 WRN at 28-29Lines 30-10SC.***

11. **On attitude of the appellate court to evaluation of evidence by the trial court**

Evaluation of evidence is primarily the function of the trial court. It is only where and when it fails to evaluate such evidence properly or at all that an appellate court can intervene and itself re-evaluate such evidence. Otherwise, where the trial court has satisfactorily performed its primary function of evaluating evidence and correctly ascribing probative

value to it, the appellate court has no business interfering with its finding on such evidence. See ***Adebayo v. Aduse (2004) 4 NWLR (Pt 862) Pp 52***

12. On the issue of jurisdiction

The issue of jurisdiction is fundamental to the administration of justice and adjudication, therefore any adjudication no matter how well tried and or conducted is incompetent if it is conducted without jurisdiction. See the case of. Any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided. See ***Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR Pt. 702, 178 at 188***, ***Prof. Aderemi Olutola v. Unilorin (2004) 18 NWLR Pt. 905, 416***

13. On the meaning of jurisdictiont

Jurisdiction is the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. See ***Mobil Producing Nigeria Limited v. Lagos State Environment Protection Agency & Ors (2002) 18 NWLR pt. 798, 1 at 32***

14. On the sources of Court's jurisdiction

Courts are creation of statute. It is the statute that creates the court and define the powers and the extent of its application. It follows therefore that courts derive their jurisdiction therefrom. See ***Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713, 576; Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196; Trustee, P.A.W. Inc. v Trustee, A.A.C.C. (2002) 15 NWLR pt. 70, 449.***

15. On the appellate jurisdiction of the FCT Customary Court of Appeal

This court as an Appellate Court, its appellate jurisdiction is also statutory having being derived from the statutes creating it; the Constitution and any other enabling law inclusive. This Court is a creature of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from Section 267 and 8 (1) of the 1999 Constitution and Decree No. 30 of 1991 respectively.

16. On jurisdiction of court

Jurisdiction of a court is a matter of law and it is vested in a court by the constitution and the statutes establishing the court. See ***Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR Pt. 820,577 at 63; Peter Adeboye Odofin & Anor v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350 at 367*.**

17. On what determines the appropriate appellate court to which an appeal lies

On appeal it is the issue or issues for determination in an appeal that determines the court to which an appeal lies, if the appeal raise questions involving customary law, it goes to the Customary Court of Appeal and if the appeal raises questions of general law, it goes to the High Court. See ***M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 NWLR pt. 254, 377 at 397 – 398***

18. On when an appeal is competent before the Customary Court of Appeal

To properly invoke the appellate jurisdiction of this court, the notice of appeal must contain a ground or grounds of appeal that raises question or questions of customary law. The grounds of appeal from which the Customary Court of Appeal could derive its jurisdiction must therefore relate to customary law alone. For an appeal to be competent before Customary Court of Appeal, the grounds of appeal must relate to and raise questions of customary law. See the case of ***C.C.A. Edo State v. Aguele (2006) 12 NWLR pt. 995, 545***

19. On the propriety of a Customary Court of Appeal hearing an appeal outside customary law

Where a Customary Court of Appeal proceeds to hear and determine grounds of appeal other than on customary law, it acts without jurisdiction to do so and such decision no matter how well conducted will be a nullity.

20. On notice of appeal

The notice of appeal is without doubt the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39***

21. On the fundamental nature of jurisdiction

There is no justice in exercising jurisdiction where none exists. It is injustice to the law, to the court and to the parties to do so. The issue of jurisdiction is vital and fundamental; any order made without jurisdiction of court is a nullity. See the case of ***NDIC v. CBN & ANOR (2002) 7 NWLR pt. 766, 272 at 294-295*.**

22. On the appropriate order to make where court lacks jurisdiction to hear a matter.

Where a court finds that it lacks jurisdiction to entertain the suit before it, the proper order to make is one striking out the suit, see ***NDIC v. CBN & Anor. (2002) 7 NWLR pt. 766, 272 at 294-295*; *Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR pt. 199, 501.***

Cases cited in this judgment

Adebayo v. Adjei (2004) 4 NWLR (Pt 862) Pp 44 at 51

Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR Pt. 702, 178

Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR Pt. 820,577
C.C.A. Edo State v. Aguele (2006) 12 NWLR pt. 995, 545
Cookey v. Fombo (2005) NWLR (Pt 947) Pp 182 at 2002
Idundun v. Okumagba (1976) NSCC Pp 445 at 453-454
Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196
Iyimoga v. Governor Plateau State (1994) 8 NWLR (Pt 360) Pp 73 at 95
Kalu v. Uzor (2004) 12 NWLR (Pt 886) Pp 1 at 33 Paras E-F
Macfoy v. UAC Ltd. (1962) A. C. 152
Madukolu v. Nkemdilim (1962) ANLR (Pt. 2) Pp 581
Mobil Producing Nigeria Limited v. Lagos State Environment Protection Agency & Ors (2002) 18 NWLR pt. 798, 1
NDIC v. CBN & ANOR (2002) 7 NWLR pt. 766, 272 at 294-295
Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713
Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR pt. 199, 501.
Onwuka v. Ediala (1989) 1 NWLR (Pt 96) Pp 182 at 187
Peter Adeboye Odofin & Anor v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350
Prof. Aderemi Olutola v. Unilorin (2004) 18 NWLR Pt. 905, 416
Shyllon v. Asein (1994) 6 NWLR (Pt 353) 670 at 681, Pp 685
Trustee, P.A.W. Inc. v Trustee, A.A.C.C. (2002) 15 NWLR pt. 70, 449
Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39
Yusuf v. Adefoke (2008) Vol. 40 WRN at 28-29Lines 30-10SC

Statutes/Rules of Court referred to in this Judgment
1999 Constitution of the Federal Republic of Nigeria
Decree No. 30 of 1991
FCT Customary Court (Civil Procedure) Rules, 2007.

APPEARANCES:

Ike Ugwoke Esq. for the Appellant
C.C. Obi-Anyanwu Esq. for the Respondent

Hon. Justice Ngozika U. Okaisabor, JCCA (Delivering the Leading Judgment): This is an appeal against the judgment of the Customary Court, Zuba, Abuja dated 10th day of June, 2009 in which the

trial court entered judgment in favour of the Plaintiff by ordering that the subject matter in dispute which is Shop LS-13-141 Zuba market be released to Mr. Peter Onyema Emeka (brother to late Mr. Paul Onyema Emeka); that the Zuba Market Management Authority release 38 pieces of jerry cans belonging to the Plaintiff's late brother, to the Plaintiff; that the Defendant refund the sum of ₦6,000 being the said rent collected by him in respect of Shop LS-13-141 to the Plaintiff and that the Defendant desists from further act of trespass, putting tenants and collecting rent in respect of Shop LS-13-141, Zuba Market, Abuja.

Briefly, the facts leading to this appeal are that; on the 25th of March, 2009 the Plaintiff Respondent at the Court below, being a guardian of his late brother's children initiated a suit against the Defendant/Appellant claiming the following:

"(1) That the shop belonging to his late brother situated at Zuba market, bearing number 141 be released to him to enable him look after the children of his late brother.

(2) That the 38 jerry cans belonging to his late brother in the shop be released to him.

(3) That the money the Defendant collected from the tenant of the shop totaling ₦34,000.00 be refunded to him to enable him look after the children.

(4) That the Defendant be restrained from further act of trespass on collecting rent or putting any tenant in the shop" (Sic.)

The Plaintiff/Respondent in the course of the proceedings, testified that his brother Paul Onyema Emeka and his wife had an accident and died three years to the initiation of the Plaintiff's action and that his brother's wife was nine months pregnant at the time of the accident which necessitated an operation on the brother's wife. According to the Plaintiff/Respondent, the brother's wife was operated upon and the baby removed alive which required the Plaintiff staying in the village for a year. The baby subsequently died. After the demise of the brother and his wife, the Plaintiff was left to raise four children of his late brother. He further testified that his late brother and the wife had a shop in Zuba market in which they sold groundnut oil and packed 38 (thirty eight) jerry cans. The Plaintiff testified further that when he came back from the village, he found the door of the shop broken and changed from a rolling door to a normal door. The Plaintiff in his testimony claimed to have found someone in the shop who said the Defendant owns the shop and he rented it from him. The Plaintiff further testified that the Tenant claimed to have paid ₦10,000.00 to the Defendant remaining ₦2,000.00 as yearly tenant of which the balance of ₦2,000.00 was given to the

Plaintiff. The Plaintiff in his testimony claimed further to have confronted the Defendant who informed him that there was a woman who he paid the ₦10,000.00 to and that the jerry cans were at the market office. Plaintiff/Respondent further testified that he fell sick during the period and did not go to the shop for sometime but when he later went back, he found out that the former tenant had left and there were new tenants who also told him that the Defendant/Appellant rented the shop to them. The Plaintiff/Respondent according to his testimony confronted the Defendant/Appellant who told him that he got the permission of the Zuba Market Authority to rent the shop out. The Plaintiff/Respondent in his testimony stated that the Defendant/Appellant claimed to have given the rent to Zuba Market Authority and requested the Plaintiff/Respondent to go to Zuba Market Authority. According to the Plaintiff/Respondent in his testimony, he chose to initiate an action at the trial court against the Defendant/Appellant.

In the course of his testimony, the Plaintiff/Respondent tendered the following documents: a Sales Agreement marked as **EXHBIT A,** document bearing Zuba Market Committee, dated 12/6/1996 marked as **EXHBIT B** and document bearing Gwagwalada Area Council with the name of the beneficiary as Murfa A. N. Katsina marked as **EXHBIT C.**

The Defendant/Appellant testified in his defense on April 1, 2009, that the Gwagwalada Area Council advertise both on Radio and TV and asked all allottees to appear before a screening exercise and that Zuba market under which Gwagwalada Area Council supervises was revoked severally. The Defendant/Appellant brought a witness "DW2" who testified that he is a member of Zuba Market Traders Association, that where a shop owner dies, the family is to inform the Zuba Amalgamated Traders Association in which they will collect the passport photograph and death certificate of the member and place an obituary in front of the shop. According to his testimony, the shop will be protected for six months after the demise of the owner and if the family fails to continue utilizing the shop after six months, the shop would be rented.

The Defendant/Appellant on 7/5/2009 testified that the subject matter was allocated to Mr. Emeka Emmanuel Oketah who was the former Secretary of Zuba Amalgamated Traders Association and that the shop was given to him by the Late Emeka Oketah's wife. He further claimed that the Jerry cans were in the custody of Zuba Market Management Authority and he collected only ₦6,000.00 from the tenant in the shop who happens to be the first tenant. In the course of his evidence, he tendered the following documents: (a) four receipts of payment from Gwagwalada Area Council, (b) the extract from the Police Station, Zuba dated 13/4/2006 stating that on 13/4/2006, Stella Oketah

reported that on 13/4/2005 she lost her allocation of market shop LS 13-141 belonging to her husband Mr. Oketah Emmanuel between Zuba and Suleja while on transit. (c) An Affidavit from Niger State Judiciary dated 31/3/2009 was also tendered by the Defendant of which it was deposed to by Stella Oketah on 13/5/2005, that Mr. Emeka Oketah was involved in a motor accident along Dei-Dei, Zuba Express Road in which he lost his life and in the accident, lost a file containing the original allocation by Gwagwalada Area Council of Shop LS 13-141 dated 16/10/2004. (d) A death certificate with the name OKETAH EMMANUEL was also tendered by the Defendant/Appellant dated 18th May, 2005.

Defendant/Appellant during cross-examination admitted removing the rolling door of Shop LS-13-141 and testified that he changed the rolling door to a normal one after applying to the market authority to have it changed because the rolling door was stiff and he applied on behalf of the Late Emmanuel Oketah.

On the 10th of June, 2009, the trial Court entered judgment in favour of the Plaintiff/Respondent.

For purposes of emphasis, I hereby reproduce the order of the trial Court dated 10th June, 2009 which precipitated the Appeal in this matter.

" (1) That shop LS-13-141 Zuba market be released to Mr. Peter Onyema Emeka, brother to late Paul Onyema Emeka.

(2) That the Zuba market Management Authority is to release 38 pieces of jerry cans belonging to the Plaintiff's brother Paul Onyema Emeka to the brother.

(3) That the Defendant is to refund the sum of ₦6,000 being the said rent collected by him in respect of Shop LS-13-141.

(4) The Defendant is to desist from further act of trespass, putting tenants and collecting of rent in respect of Shop LS-13-141."

The Appellant being dissatisfied with the above judgment filed an appeal to this Court via their Notice of appeal. On 14/10/2010, the Court granted the application of the Appellant via his Motion on Notice dated 8th July, 2010 and filed same day to amend his Notice of Appeal.

The amended Notice of Appeal which contained four Grounds of Appeal read thus:

"(1) The Learned Honourable Judges erred in law when in view of the material evidence before them, assumed jurisdiction when the proper parties are not before them or the suit is improperly constituted.

(2) The Learned Honourable Judges erred in law when they made orders to parties not before them.

(3) The Learned Honourable Judges erred in law when despite the fact that the suit discloses no cause of action against the Appellant made an order against the Appellant.

(4) The judgment is against the weight of evidence".

RELIEFS SOUGHT

The following reliefs were sought by the Appellant:

"(1) An order of the Honourable Court quashing the judgment of the Court below and declaring same null and void and of no effect whatsoever.

(2) A declaration that Shop No LS-13-141 Zuba Market belongs and ensures to the Estate of late Mr. Oketah Emmanuel.

(3) An order of perpetual injunction restraining the Respondents, his agents, heirs and those claiming right of ownership from him from further laying any claim of rights whatsoever to Shop LS-13-141 Zuba Market, Abuja, FCT.

(4) The cost of this Appeal."

On the 28th of September, 2011, the Appellant through his Learned Counsel IKE UGWOKE having filed his Brief of Argument dated 22/9/2010 on an application dated 22/9/2010 for an enlargement of time which was granted on 14/10/2010 to file his Brief out of time, adopted same with his reply Brief dated 1/8/2011 on same day. While the Respondent through his Learned Counsel, C.C. OBI ANYANWU adopted the Respondent's Brief.

The Appellant in his settled brief formulated four issues for determination, namely:

"(1) Whether the Learned Judges of the Court below correctly assumed jurisdiction over this matter when the necessary parties were not before them.

(2) Whether the court below was right in making orders against parties not before the Court.

(3) Whether an agent of a disclosed Principal can incur liability for the actions he carried out on behalf of the said Principal and whether any cause of action has been disclosed against the Appellant.

(4) Whether by critical examination of the facts of this case, the judgment of the Court below was not against the weight of evidence adduced."

Looking at the four Grounds of Appeal and the four issues formulated thereof, it is clear that Issue One relates to Ground One of the Appeal, Issue Two relates to Ground Two, Issue Three relates to Ground Three, while Issue Four relates to Ground Four. However Ground Four has no particulars of Error.

Before delving into the issues for determination, it is imperative to emphasize that by virtue of **Section 48 (1) of the Federal Capital Territory Customary Court Act, 2007(Act No 8)** which provides that:

> *"Any party who is aggrieved by decision or Order of a Customary Court may within thirty days from the date of such decision or Order Appeal to the Customary Court of Appeal" and*

Section 267 of the Constitution of the Federal Republic of Nigeria, 1999 as amended which provides that:

> *"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".*

The National Assembly has the legislative power to confer additional jurisdiction on the Customary Court of Appeal which the National Assembly had in their wisdom conferred on this Court by **Section 48(1) of the Federal Capital Territory Customary Court Act, 2007, and as such,** this Court has jurisdiction to hear this case on its merit.

Having made this clarification, I will now reproduce the argument of Learned Counsel for the Appellant.

On Issue One, the Appellant argued that the Learned Judges of the Customary Court, Zuba wrongly assumed jurisdiction when the necessary parties were not before them. He submitted that the necessary parties in this case were the Zuba Market Management Committee which superintended the allocation of shops in Zuba International Market and secondly, the Gwagwalada Area Council in whose authorities the Zuba Market Management Committee derived its legitimacy to allocate shops to applicants.

Placing reliance on ***Madukolu v. Nkemdilim (1962) ANLR (Pt. 2) Pp 581*** to buttress his argument, the Appellant submitted further that the condition precedent for the Court to assume jurisdiction was not fulfilled in that the necessary parties for the proper adjudication of the case were not before the Court and relied on ***Awoniyi v. Registred Trustees of AMORC (2000) 10 NWLR (Pt 676) ratio 10.***

The Appellant further submitted that the Supreme Court in ***Madukolu v. Nkemdilim*** **(Supra)** laid down the test for the determination of the Courts competence as follows:

> *"A Court is competent when; (1) It is properly constituted with respect to the number and qualification of its member; (2) The subject matter of the action is within its jurisdiction, (3) The action is initiated by due process of law, (4) Any condition precedent to the exercise of its jurisdiction has been fulfilled".*

The Appellant further relied on the cases of ***Okafor v. Nnaife (1973) 8 SC 132*** and ***Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) P 116 at 180, Paras. A-B*** to buttress his argument that all parties that are necessary for the invocation of the judicial powers of the Court must come before it so as to give the Court jurisdiction to grant the reliefs sought.

The Appellant further submitted that a party must be bound by the outcome of the action and secondly that the issues cannot be effectually and completely settled without that party. Placing reliance on ***Green v. Green (1987) 2 NSCC*** to buttress his argument, the Appellant quoted the decision thus *"The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled. These must be a question in the action which cannot be effectually and completely settled unless he is a party."*

The Appellant further submitted that the issues of payment of rent and revocation of allocation cannot be effectually and completely settled without joining the Zuba Market Management Committee and Gwagwalada Area Council and relied on **Exhibits "D (I-VI)",** being receipt of

payment of rent to Gwagwalada Area Council in respect of the property in issue bearing the name of OKETAH EMMANUEL. He further submitted that the issue of title to Shop No. LS-13-141 cannot be effectually and completely settled without bringing the necessary parties before the Court.

The Appellant submitted further that the Court made orders affecting Zuba Market Management Committee and Gwagwalada Area Council and non inclusion of the necessary parties in the case renders the Court below incompetent to adjudicate upon the matter. He placed reliance on the case of ***Madukolu v. Nkemdilim*** **(Supra)** to buttress his argument.

The Appellant urged the Court to hold that the Customary Court, Zuba was incompetent to adjudicate upon this matter and therefore lacked jurisdiction to make the orders they made in this case.

On Issue Two, the Appellant argued that a Court does not make orders against parties not before it and submitting that the Lower Court made orders affecting the Zuba Market Management Committee and the Gwagwalada Area Council which were not before it. The Appellant further submitted that such an order cannot be allowed to stand. Counsel relied on the decision of the Court of Appeal in ***Pelfaco Ltd. v. W.A.O.S. Ltd (1997) 10 NWLR (Pt. 524) Pp. 222 at 227, ratio 8***; and the decision in ***Onyekwuune v. Ndulue (1997) 7 NWLR (Pt. 1075) at 569 particularly PP 586-587 Paras H-A*** to buttress his argument.

Counsel further submitted that the Supreme Court affirmed this principle of law in ***Green v. Green (1987) 2 NSCC*** **per Oputa JSC** wherein it was stated inter alia that:

> *"It is correct that a judgment or order made against a person who was not a party to the pending suit should not be allowed to stand".*

The Appellant relied on the strength of the above principle and urged the Court to quash the decision of the Lower Court which made orders against parties that were not before it.

On Issue Three, the Appellant submitted that an agent of a disclosed Principal incurs no liability and placed reliance on the case of ***ESSANG v AUREOL Plastic Ltd (2002) 17 NWLR (Pt. 795) Pp. 155 at 181 Paras F-G.***

The Appellant further argued that he disclosed his Principal who is Mrs. Stella Oketah during his testimony at the trial Court. He submitted that he, the Appellant having disclosed his Principal

cannot be held responsible for the action he took on behalf of Mrs. Stella Oketah. Counsel relied on the decision in ***Owena Bank PLC v. Olatunji (2002) 12 NWLR (Pt. 781) Pp 259 at 305, Paras A-B*** where the Court of Appeal held that a disclosed Principal is the proper party to be sued in an agency situation not the agent and further relied on ***Orji v. Anyaso (2000) 2 NWLR (Pt. 643) Pp1 at 5.***

Appellant submitted that the order made by the trial Court directing the Appellant to pay the sum of ₦6,000 being the rent collected on behalf of the Principal was made in error and same cannot stand in the face of the plethora of authorities that an agent of a disclosed Principal incurs no liability.

The Appellant submitted also that the evidence before the Court below disclosed no cause of action against the Defendant/Appellant and placed reliance on ***Rhein Mass Undsee GMBH V. Rivway Lines Ltd (1998) 5 NWLR (Pt. 549) (P. 276, Paras E-G)*** *and* ***Festus Keyamo v. Lagos State House of Assembly (LSHA) (2000) 12 NWLR (Pt. 680) P 217, Paras B-C; D-E.***

Appellant submitted that no cause of action was disclosed against him as he was an agent of a disclosed Principal.

On Issue Four, the Appellant submitted that the decision of the Court below was against the weight of evidence. The Appellant submitted further and I quote:

> *"In spite of the evidence before the Court that the title of the Plaintiff/Respondent has been revoked the trial Court did not deem it fit to join the necessary parties in order to determine effectually and completely who amongst the contending parties was entitled to Shop No. LS-13-141."*

The Appellant argued that the trial Court was in error in awarding the title of the Shop to the Plaintiff where the Plaintiff had failed woefully to proof that he is the rightful owner of the shop in question and placed reliance on the case of ***Ugoji v. Onukogu (2005) 16 NWLR (Pt. 950) Pp 97 at 113, Paras A-C.***

Responding, the Respondent canvassed two issues for determination thus:

(i) Whether a Defendant in whose favour another party should have been joined at trial, but failed can rely on such non-joinder to defeat the cause of the Plaintiff on appeal and whether the Respondent's allocation had been revoked.

(ii) Whether a person who claims proprietary interest which is the subject-matter of a suit is not bound by the judgment in the suit against his caretaker, even though the person was not a party to the suit.

On Issue One above, the Respondent argued that Gwagwalada Area Council and Zuba Market Management Committee are not proper parties before the Court below. Respondent placed reliance on ***Ikine v. Edjerode (2002) 10 WRN 46 at 48*** in which the Supreme Court defines cause of action as all those things necessary to give a right of action whether they are to be done by the Plaintiff or third person. ***Iyernaman v. Smith (1855) 10 EXCH 659, Per Park B at 66; Amodu v. Amode (1990) 5 NWLR (Pt 150) 356 at 358.***

He further submitted that neither the Gwagwalada Area Council nor the Zuba Market Management Committee had issued nor pretended to have issued another letter of allocation intending it to supersede the Respondent's letter of allocation. Respondent argued that he was at no instance issued any notice that his allocation had been revoke. Respondent placed reliance on ***Nigeria Engineering Works Ltd. v. Denap Limited (2001) 18 NWLR (Pt 746) Pp 726 at 734 ratio 8.***

The Respondent further submitted that the trial Court held *that "To prove that Shop LS-13-141 was reallocated to late Emmanuel Oketah, it is instructive to note that the testimony of DW2 did not help the Defendant. All DW2 informed the Court was that he was aware that Emmanuel Oketah applied for Shop LS13-141 and it was allocated to him. This Court expected more. There was nothing to depict or support the assertion".*

The Respondent submitted that the fact of breaking into the Respondent's shop and carting away containers did not amount to revocation and reallocation as none was proved by the Appellant. Respondent placed reliance on ***Green v. Green (1987) 3 NWLR (Pt 61) Pp 480*** that the non-joinder of a desirable party either by failure of the parties or the Court to join *suo motu* will not be taken as a ground for defeating an action nor does it rob the Court of jurisdiction to entertain the action. He also commended the Court to the decision *in* ***N.E.W. Ltd v. Denap (Supra) ratio 32*** and the decision in ***Osho & Anor v. Foreign Finance Corporation & Anor (1991) 4 NWLR (Pt 184) Pp 157*****;** to the effect that a party at whose advantage it would be to join another party in the suit, should at the earliest opportunity apply for such a party to be joined and must not rely on the non-joinder to defeat the cause of the other party.

On issue two, the Respondent argued that the Defendant at the Court below received a tacit approval of his said Principal to defend the suit and thus placed himself in a position to accept the outcome of the suit. He further argued that the Appellant tendered all documents in his possession that were delivered to him by his Principal. The Respondent submitted that the documents tendered by the Defendant/Appellant included the following **Exhibit D (I - IV), EXHIBITs E AND F. Exhibit F** is the sworn affidavit of his "supposed" Principal, Mrs. Oketah Stella which was dated 31/2/09 when his case was already pending at the Court below.

He further argued that having taken up the defense of the suit with the acquiescence of his said Principal; the Appellant cannot be heard to say he was an Agent of a disclosed Principal without responsibility. Respondent placed reliance on the case of ***Duru v. Onwumelu (2002) Vol. 7 WRN page 1 at Page 7 para 3.***

Respondent submitted that claim that a party is merely acting as an Agent of a disclosed Principal may certainly not remove him from being a necessary or proper party and placed reliance on ***Alele v. Olu (2001) 7 NWLR (Pt 711) Page 119 at 123 Para 8 and 9*** to buttress his argument.

Placing reliance on ***Akani v. Makanju (1978) 11 SC Pp 526; Bala v. Bankole (1986) 3 NWLR Pt 27 PP 141 at 14 ratio 7 and Duru v. Onwumelu (2002) WRN Vol. 7 PP 1 at 8,*** he reemphasized that a person who knowingly stands by during litigation concerning property in which he claims interest in circumstances in which he might reasonably be expected to apply to be joined as a party may find him/herself bound by a judgment even though he was not a party to the suit in which the judgment was given.

Respondent further submitted that unchanged evidence must be made use of in arriving at the decision of the Court and be acted upon. He commended the Court to the decision in ***Lawal v. P.G. Nigeria Limited (2001) 17 NWLR (Pt 742) Pp 393 at 397 Para 3*** in his submission.

He further submitted that the Plaintiff/Respondent diligently proved his title to the property in accordance with the requirement of our laws relating to prove of title and placed reliance on ***Idundun v. Okumagba (2002) Vol. 20 WRN Pp 127.***

The Respondent maintains that having duly proved his case through the presentation of title documents as handed over to him by the Gwagwalada Area Council and same not having been revoked and or controverted, the Court below was right in finding for the Plaintiff.

He further argued that Gwagwalada Area Council and Zuba Market Management Authority are not necessary parties but at best desirable parties whose presence the Plaintiff/Respondent did not need to prove his title to the shop in issue and commended the Court to the decision in ***Nigeria Engineering Works Limited v. Denap Ltd (Supra)*.**

An in-depth examination of Ground One gives this Court the view that the Appellant is challenging the competence of the trial Court on the Grounds that the Court assumed jurisdiction when the Defendant/Appellant was a disclosed Agent to Mrs. Oketah. This Court is minded of the fact that in his particulars of error, he averred that "the Court wrongly assumed jurisdiction when the Defendant was a disclosed Agent to the property in issue". However, Learned Counsel for the Appellant totally digressed from this Court's perception of Ground One by arguing under Issue One that the necessary parties were the Gwagwalada Area Council and Zuba Market Management Authority who were not joined as parties. It is the submission of Learned Counsel that they are both necessary parties who ought to have been before this Court. His arguments under Issue One in this Court's view is rather confusing. Confusing in the sense that in his particulars of error he contends that this Court assumed jurisdiction over a disclosed Agent to the property. Going by the testimony of the Defendant/Appellant before the trial Court, one may presume that the Defendant/Appellant is alleging that the disclosed Principal to the property in Issue One is "Mrs. Oketah". One would have expected that he would have marshaled his submissions on the non-joinder of Mrs. Oketah. However, he focused on the non-joinder of Zuba Market Management Authority and the Gwagwalada Area Council to which he had not alleged or proved that he was their Agent or they his "Principals".

It is now settled that it is not the duty of the Court to formulate arguments for Counsel. Having chosen to follow the line of argument under Issue One, this Court has no other option than to evaluate the merit of these arguments for whatever it is worth.

To this end, this Court would also consider the Respondent Counsel's Issue One as it relates to the issue of non-joinder. The other aspect of Respondent Counsel's argument on Issue One, that is on whether the Respondent's allocation has been revoked would be considered later in this judgment.

Counsel for the Appellant relied on the case of ***Maduloku v. Nkemdilim (Supra)*** as a litmus test and the principles enunciated therein to establish whether the Court was competent. Looking at the Appellant's Brief of Argument and Grounds raised, can the principles in ***Maduloku v. Nkemdilim***

apply? The Court will proceed by looking at the principles enunciated therein in order to find out whether or not it is applicable. A court is competent when:

(1) It is properly constituted as regards numbers and qualification of the members of the bench and number is disqualified for one reason or another.
(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 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.

Looking at the entirely of the judgment of the trial Court there is nothing indicative of the fact that the decision of the trial Court fell short of the principles enunciated in ***Maduloku v. Nkemdilim (Supra)*** because, the trial Court was properly constituted, the subject matter was within its jurisdiction and the case was initiated by due process of law. However, the Appellant/Respondent submitted that the condition precedent for the assumption had not been fulfilled by the trial Court. He also commended the Court to the decision in ***Awoniyi v. Reg. Trustees of AMORC (Supra)*** as an authority that all necessary parties must come before a Court in order to cloth the Court with jurisdiction.

The pertinent question to ask is whether Gwagwalada Area Council and Zuba Market Management Authority are necessary parties whose interest would be or was affected by the outcome of the decision of the trial Court.

With great respect to the Learned Counsel for the Appellant, both bodies are in my humble view, merely desirable perhaps nominal parties whose evidence at trial should suffice.

A thorough evaluation of the issues before the trial Court leaves this Court with the inescapable conclusion that both parties are not necessary parties. The Court of Appeal in ***Iyimoga v. Governor Plateau State (1994) 8 NWLR (Pt 360) Pp 73 at 95*** defines Desirable Parties (underlined mine for emphasis) as "*those who have an interest or who may be affected by the result"* while Necessary Parties (underlined mine for emphasis) are *"those who are not only interested in the subject matter of the proceedings but also who in their absence the proceedings could not be fairly dealt with in other words, the question to be settled in the action between the existing parties must be a question which cannot be properly settled unless they are parties to the action instituted by the Plaintiff".*

See also ***Kalu v. Uzor (2004) 12 NWLR (Pt 886) Pp 1 at 33 Paras E-F.***

From the above, Gwagwalada Area Council and Zuba Market Management Authority are only desirable parties. The trial Court in this Court's view satisfactorily resolved the revocation of allocation issue based on the evidence at their disposal.

The trial Court rightly held that it is Defendant that alleged that the shop was revoked. Hence the trial Court rightly held that the burden of proof lies on him. This Court is unable to fault the evaluation of evidence of Defense Witness 2 by the trial Court when it held that testimony of Defense Witness 2 (DW2) fell short of the evidence required to support Defendant's assertion of a revocation. The Supreme Court in ***Onwuka v. Ediala (1989) 1 NWLR (Pt 96) Pp 182 at 187*** held that in deciding whether a certain set of facts given in evidence by one party in a civil case before a Court in which both parties appear is preferable to another set of facts given in evidence –

> *"The Trial Judge after a summary of all the facts must put the two sets of facts on an imaginary scale and weigh one against the other, then decide upon the preponderance of credible evidence which one weighs more and accept it in preference to the other, then apply the appropriate law to it.*
>
> *In determining which is heavier the Judge will have regard to:*
>
> *(a) Whether the evidence is admissible.*
> *(b) Whether it is relevant.*
> *(c) Whether it is credible.*
> *(d) Whether it is conclusive.*
> *(e) Whether it is more probable than that given by the other party".*

See also the Court of Appeal decision in ***Adebayo v. Adjei (2004) 4 NWLR (Pt 862) Pp 44 at 51*** where the Court of Appeal held that where the judgment of a court is attacked on the ground of being against the weight of evidence or whether the finding or non-finding of facts is questioned, the Court of Appeal in its primary role in considering such judgment will seek to know the following:

(a) The evidence before the trial Court.
(b) Whether the trial Court accepted or rejected any evidence upon the correct perception.
(c) Whether it correctly approached the assessment of the value on it.
(d) Whether it used the imaginary scale of justice to weigh the evidence on either side.

(e) Whether it appreciated upon the preponderance of evidence which side the scale weighed having regard to the burden of proof.

The trial Court having put the above criteria in determination, the credibility of the Exhibits cannot be faulted in its decision to discountenance Exhibits 'E' and 'F'.

The determination of the payment of rent as this Court sees it, could not in any way have assisted in resolving the crucial issue for determination which is who between the two parties (or their Principal) is the actual grantee of the allocation of the shop which is the subject matter of dispute. The presence or absence of Zuba Market Management Authority and or Gwagwalada Area Council is needless as a party having regard to the facts and circumstances of this case. The Court is minded that issues are not joined as to the original owner of the grantor of the shop. In the instant case, only one allocation was presented before the trial Court, which was Exhibit 'A' issued in favour of Emeka Onyema's predecessor in title "Mr. Murfa A.N. Katsina" by the Gwagwalada Area Council. It is noteworthy that the integrity of this document was not impuned under cross examination. Be that as it may, assuming issues are joined on the validity of the allocation, the Gwagwalada Area Council would at best be a witness to testify on the validity of the allocation and not a party to the suit. It is in this regard that this Court finds almost compelling, the submission of Learned Counsel for the Plaintiff/Respondent and his commendation of this Court to the decision in ***Green v. Green (1987) 3 NWLR Pt 6, PG 752-753*** where it was held that a desirable party may not be a necessary party to a suit.

It is noteworthy to state that under Order 22 Rule 3 of the Federal Capital Territory Abuja, Customary Court (Civil Procedure) Rules, 2007**,** the trial Court is only empowered to join a party to a suit where the presence of such party is essential to a just decision of the matter in dispute. I hereby reproduce **Order 22** Rule 3 of the Federal Capital Territory Abuja, Customary Court (Civil Procedure) Rules for a proper elucidation:

> *"The Court may at any stage strike out the names of any parties improperly or unnecessarily joined, and may, after due notice given to the parties affected, add the names of parties whose presence is essential to a just decision of the matter in dispute, and on proof of such notice, the parties so served, whether they shall have appeared or not shall be bound by the proceedings in the action".*

The point being made here is that the non-joinder of both the Gwagwalada Area Council and Zuba Market Management Authority cannot vitiate the decision of the trial Court. The Court of Appeal in ***Iyimoga v. Gov. Plateau State (Supra)*** has held that:

> *"Where there has been non-joinder either by failure of the parties or an intervener to apply for such joinder or failure of the Court to join suo motu, this non-joinder is not a ground to defeat the action. Failure to join a party will not be fatal to the proceedings and the Court may determine the issues or questions so far as those relate to and affect the rights and interest of the parties".*

In summary, this Court is of the view that contrary to the submissions of the Appellant in Paragraph 2:12 of his Settled Brief, the trial Court effectively and completely settled Ground One without bringing in both bodies as necessary parties before the Court.

Though Learned Counsel for the Appellant in Paragraph 2:13of his settled brief canvassed argument on the propriety of the orders made against the Zuba Market Management Authority, this Court considers it appropriate to deal with this argument in its consideration of Ground Two together with the argument canvassed under Issue Two by the Appellant's Counsel.

It is important to reemphasize that the Learned Counsel for the Appellant stated in his Particulars of Error in Ground One of his Notice of Appeal that the trial Court was in error when it assumed jurisdiction over a <u>disclosed agent.</u> As hitherto noted, Appellant's Counsel failed to proffer argument on this aspect. But suffice it to say that the trial Court rightly discountenanced **Exhibits E and F** and gave judgment in favour of the Respondent. Appellant palpably failed to establish any proprietary interest whatsoever on his alleged principal in the Property in Issue. Having failed to establish by credible and admissible evidence the existence of a Principal, it puts to question his authority to act as agent. Indeed an Agent relationship cannot legally be created when there is no Principal. This is more so, in a matter which concerns allocation of market stall which needs to be acknowledged in some form of writing.

The Defendant/Appellant by his own showing before the trial Court had knocked the bottom out of his bucket. He failed to persuade the Court on the existence of a Principal. In order words, in the absence of a Principal, an agency could not arise. Using the evergreen expression of his lordship Dennings LL in the celebrated case of ***MacFoy v. UAC Ltd. (1962) A. C. 152*** that *"you cannot build*

something on nothing", An Agency cannot arise out of a non-existent Principal. This Court would decline in the circumstance to interfere with the decision of the trial Court in this regard.

This takes us to issue two of the Respondent's Brief of Argument raised by the Respondent's Counsel on whether a person who claims proprietary interest in the subject matter of the appeal should not be bound by the judgment against his agent notwithstanding the fact that he is not a party. This Court will disregard this issue on the ground that it is a non-issue before the Appellate Court. It is recounted that the trial Court unequivocally held that the Defendant/Appellant herein failed to establish his "Principal" interest in the shop. Having so held, Issue two is merely an academic exercise and for this reason it is needless to embark on a voyage of tracing the reliability or otherwise of a non-existing party.

On issue Two, this Court has carefully examined the submission of Learned Counsel for the Appellant and finds persuasive his submission that the Court cannot make an order against parties that are not before it.

He rightly commended this Court to the decision in ***Pelfaco v. W.A.O.S. Ltd (1997) 10 NWLR (Pt 524), Onyekwulune v. Ndule (1997) 7 NWLR (Pt 512) P. 227 Paras B-C*** and this Court will also in the same breath refer to ***Okonkwo v. Okagbue (1994) 9 WLR (Pt 368) Pp 301at 325; Koiko v. First Bank Oof Nig. (1994) 8 NWLR Pp 665 at 677.***

The propriety of this leg of appeal is therefore questionable, mindful that the Appellant has not shown that he has been affected by this aspect of the Court's decision. The Appellant in this case must not be seen to be weeping for and on behalf of the bereaved.

It is accordingly open to the parties who are affected by this order to sue and or applly to be joined as parties interested for whatever order that was made against them to be set aside ***Denten West v. Muoma (2008) NWLR (Pt1083) Pp 418.***

On Issue Three, Learned Counsel for the Appellant submitted that an Agent of a disclosed Principal in law has no liability for acts being carried out for and on behalf of his Principal. He referred to the case of ***Essang v. Aureol Plastic Ltd. (Supra) 17 NWLR (P 795).*** He further commended this Court to ***Owena Bank v. Olatunji (Supra); Orji v. Anyaso (Supra).***

Much as this represents the law and this Court is bound by it, could it be said that a Principal/Agency relationship has been established by the Defendant/Appellant. The answer is No.

The trial Court rightly discredited the evidence of DW1 when it held thus:

> *"**EXHIBIT E** we suppose triggered **EXHIBIT F** then why the conflict on this, it is our considered opinion that the Defendant ought to lead credibly (sic) evidence to show that the shop was revoked and actually reallocated to Emmanuel Oketah, this is because Defendant tilt the scale once more, if by not doing so, he stands the risk of having judgment given against him.*
>
> *See **Union Bank (Nig) Ltd v Ajagu (1990) 1 NWLR (Pt 126) 328 at 342.** Further to the above, this Court having considered **EXHIBIT 'D' sub (I- IV)** and **EXHIBIT 'G'** is of the view that they are not material for the prove of the allocation and therefore attached no weight to them" (Sic).*

Flowing from the foregoing pronouncement of the trial Court, this Court has arrived at an irresistible conclusion that the Appellant was totally on his own at all material times to the cause of action at the trial Court. He cannot take sanctuary under the Principle of "PRINCIPAL AND AGENT" relationship which the trial court has rightly established that does not exist. In other words, he is personally liable for his own acts in the absence of any admissible evidence or proven principal.

Learned Counsel to the Appellant in Issue Three has submitted that there is no cause of action. A cause of action has been defined by the Supreme Court in the case of ***Cookey v. Fombo (2005) NWLR (Pt 947) Pp 182 at 2002 Para E*** as:

> *"a bundle or aggregate of facts which the law will recognize as giving the Plaintiff a substantive right to make claim for the relief or remedy being sought. The factual situation on which the Plaintiff relied to support his claim must be recognized by law as giving rise to a substantive right capable of enforcement or being claimed against the Defendant".*

From the above definition, how does this add up in the case before this Court? What are the bundle of facts? It is the Plaintiff/Respondent's case that the shop was originally allocated to Mr. Murfa A. N. Katsina who then transferred it to his late brother Mr. Onyema Emeka. The Plaintiff/Respondent met a person in occupation who told him that he was put there by the Defendant/Appellant. All these give rise to a cognizable right giving rise to a substantive right capable of enforcement or being claimed against the Defendant/Appellant. The mere fact that the case may be is weak or not likely to succeed is of no moment to a court of law. All that is necessary is for there to be a reasonable cause of action as in the instant case. In the light of the foregoing considerations, Ground three also fails.

Appellant's Counsel failed to identify any particulars of error on which ground four is predicated upon, nonetheless this court will examine the argument proffered by both Counsel. The Supreme Court in ***Shyllon v. Asein (1994) 6 NWLR (Pt 353) 670 at 681, Pp 685, Para H; 693 Para D*****,** held that where a Ground of Appeal by the way it is couched is self explanatory and does not need any particulars to understand its purport, it is not mandatory that the Appellant should specify the particulars of error. The Court of Appeal in ***Adedoyin v. Sonuga (1999) 13 NWLR (Pt 635) PG 355 at 358*****,** had held that *"Particulars of Grounds of Appeal may be set out separately and distinctly or they may be inbuilt. What is important is the need to frame the ground in such a way that the Respondent and the Court may be able to appreciate the nature and purport of the complaint being made against the judgment being appealed against and so prevent an element of surprise."*

On issue four, the Defendant/Appellant made needless heavy weather on the alleged revocation of Plaintiff/Respondent's alleged interest. It is trite that in a declaration of ownership, as decided by the Supreme Court in ***Idundun v. Okumagba (1976) NSCC Pp 445 at 453-454,*** there are five established ways of proving title thus:

"1. By traditional evidence.
2. By document of title.
3. By various of acts of ownership and possession numerous and positive to warrant inference of ownership.
4. By acts of long possession and enjoyment of land.
5. By proof of possession of adjacent land in dispute in such circumstances which render it probable that the owner of the adjacent land is the owner of the land in dispute"; ***Yusuf v. Adefoke (2008) Vol. 40 WRN at 28-29 Lines 30-10SC.***

In the instant case, proof of title will validly be established by a valid grant by the common grantor before this Court i.e. Gwagwalada Area Council. The trial court in our view was right when it held that the Defendant/Appellant has failed to establish how shop LS-13-141 belongs to Emeka Oketah by the contents of **Exhibits E and F.** It is also worthy to note that the Defendant/Appellant has not in any way controverted the Plaintiff/Respondent's claim that shop LS-13-141 belongs to Paul Onyema.

Though the Defendant's Counsel has submitted that the Defendant traced his title to the shop to Emmanuel Oketah, the husband of his principal, Mrs. Stella Oketah, the documents i.e. **Exhibits 'E' and 'F'** were rightfully discountenanced in the light of their conflicting evidence. Besides, the Court

exhaustively considered the Defendant's testimony on the revocation of the Plaintiff/Respondent's interest in the shop which is the subject matter of dispute and rightfully concluded that the Defendant/Appellant's evidence on the revocation is weak and unpersuasive as it failed to show that the shop was revoked and actually relocated to Emmanuel Oketah.

This Court is unable to flaw the trial court's decision upon a thorough evaluation of the testimony of witnesses before the trial court that **EX D sub (I-V) 'E' 'F' & 'G'** are not material for the prove of allocation and therefore attached no weight to them. Consequently, this Court would uphold the decision of the trial court that the alleged revocation and reallocation to late Emeka Oketah was not satisfactorily proved. Consequently, the trial court rightly resolved the case against the Defendant/Appellant.

It is noted that the evidence of DW1 was discredited and rightly by the trial court. The credible evidence of the Plaintiff/Respondent who presented the title document of the shop tilted the balance in his favour. The court was unpersuaded by the testimony of the Defendant/Appellant on the existence of his supposed principal. The Court of Appeal in ***Diyelpwan v. Golok (1996) 3 NWLR (Pt 38) Pp 599 at 620-611, Paras H-A*** held that *"It is not enough in law that the evidence of the parties when weighed on the imaginary scale balances the other. The credible evidence of the parties when put side by side on the imaginary scale, the one which outweighs the other, tilts the balance in favour of that party who should be entitled to judgment. It is not a game of poker where the parties may be at par".* ***Mogaji v. Odofin (1978) SC 91; Owoade v. Omitola (1988) 2 NWLR (Pt 77) 413 at 422*** referred to.

This court considers it needless to interfere with the decision of the trial court. After all, it has been held in ***Adebayo v. Aduse (2004) 4 NWLR (Pt 862) Pp 52*** that *"Evaluation of evidence is primarily the function of the trial court. It is only where and when it fails to evaluate such evidence properly or at all that an appellate court can intervene and itself re-evaluate such evidence. Otherwise, where the trial court has satisfactorily performed its primary function of evaluating evidence and correctly ascribing probative value to it, the appellate court has no business interfering with its finding on such evidence".*

The Appellant's Counsel in his reply brief argued that the title was not registered. This argument is tantamount to springing a surprise at the Respondent because the entire gamut is devoid of the salient evidence required for projecting this argument. It behoves on the Defendant/Appellant to have led evidence to the effect that the document was not registered in order to put the

Plaintiff/Respondent in a position to join issues on it. In abiding by the hallowed principle of *audi alterem partem* this ought to have been canvassed at the trial level.

Besides, an exhaustive look at **Exhibit C** leaves one without doubt that the allocation of Market Stall No LS13-141, Zuba Modern Market has more of the coloration of a landlord and tenancy relationship than a leasehold interest which would have called for registration. **Exhibit C** enjoins the person allocated the Stall to pay monthly or annual rent for an uncertain period. In the absence of a term certain fixed for the duration of the allotment, **Exhibit C** is not in my view, a registerable instrument. Accordingly, the argument canvassed by the Appellant in his reply is hereby discountenanced.

CONCLUSION

This Court is unable to uphold this appeal in the light of the analysis made and for reasons given in this judgment.

I hereby reemphasize the principle that you cannot give what you do not have. The Appellant's supposed Principal cannot authorize an agent to do an act which he himself prima facie lacks legitimate right to exercise. The reasoning that flows from this position is that a right of action accrues against the Appellant. It may well be that the Appellant may sue or join Mrs. Oketah in a third party proceedings for monies had and received under a misrepresentation to the Appellant that she is the wife of the deceased landlord, all these would not fetter the Respondent's right to sue the Appellant as he has rightly done in this case.

I now proceed to consider the reliefs sought:

1. Leg one fails having upheld the Respondent's claim to the shop, the estate of late Oketah has no valid interest whatsoever.
2. Leg two would likewise fail in the light of the decision of the trial court, late Mr. Oketah has no valid interest whatsoever in LS13-141 which is the subject matter of this appeal.
3. Finally, leg three fails also.

This court hereby reaffirms the order given by the trial court and accordingly this appeal is hereby dismissed. There shall be no order as to costs.

Hon Justice Moses A. Bello (JP), OFR, PCCA: I, Honourable Justice Moses Abu Bello (JP), OFR, President of Customary Court of Appeal, FCT, Abuja have had the opportunity of reading in advance the erudite judgment of my earned brother, Hon. Justice Ngozika Okaisabor (Hon. Judge of this Court) and I totally agree with all the reasons he used in elucidating and evaluating the submissions of the learned Counsels of both the Appellant and the Respondent. I therefore agree with his conclusions and concur with his well-reasoned judgment and orders.

Hon. Justice S. Adekunle Lawal, JCCA**:** I agree that the appeal of the Appellant should fail, however, my reasons for the view that the Appellant's appeal should fail are not quite the same as my learned brother's. And, of course, I disagree with his reasoning and conclusion as they relate to the appeal.

This is an appeal by the Defendant against the judgment of Zuba Customary Court of the Federal Capital Territory, Abuja dated the 10th day of June, 2009.

In the Zuba Customary Court, Abuja, the Plaintiff being a guardian of his late brother's children lodged a complaint against the Defendant/Appellant claiming for the following:

1. That the shop belonging to his late brother situated at Zuba market bearing number 141 be released to him to enable him look after the children.
2. The 38 jerry cans belonging to his late brother that is in the shop be released to him.
3. That the money the Defendant collected from the tenant of the shop totaling ₦34,000 be refunded to him to enable him look after the children.
4. That the Defendant/Appellant be restrained from further act of trespass collecting rent or putting any tenant in the shop.

Upon hearing the case, the court delivered a judgment and ordered as follows:

i. That shop LS-13-141 Zuba market be released to Mr. Peter Onyema Emeka, brother to late Mr. Paul Onyema Emeka immediately.
ii. That the Zuba Market Management Authority is to release the 38 pieces of jerry cans belonging to the Plaintiff's late brother Paul Onyema Emeka to the Plaintiff – Peter Onyema Emeka immediately.
iii. That the Defendant is to refund the sum of ₦6,000 being the said rent collected by him in respect of shop 141 to the Plaintiff.
iv. That Defendant is to desist from further act of trespass, putting tenants and collecting rent in respect of shop LS-13-141 Zuba market, Abuja.

The Appellant being dissatisfied with the said judgment of the lower court delivered on the 10th day of June, 2009 filed before this court an undated notice of appeal which later by an application dated 8th day of July, 2010 was amended on the 14th day of October, 2010.

The four grounds of appeal filed are herein reproduced for ease of reference:

GROUND ONE

ERROR IN LAW

The learned Honourable Judges erred in law when in view of the material evidence before them, assumed jurisdiction when the proper parties are not before them or the suit is improperly constituted.

Particulars of Error

The court wrongly assumed jurisdiction when the Defendant was a disclosed agent to the property in issue.

GROUND TWO

ERROR IN LAW

The learned Honourable Judges erred in law when they made orders to parties not before them.

Particulars of Error

The Gwagwalada Area Council that allotted the said shop was not a party to the suit nor the Zuba Market Management Authority was made a party to the suit yet the learned Judges made against them when they were not joined as parties to the suit.

GROUND THREE

ERROR IN LAW

The learned Honourable Judges erred in law when despite the fact that the suit discloses no cause of action against the Appellant made an order against the Appellant.

Particulars of Error

i. The learned trial erred in law by making an order against the Appellant when no cause of action has been disclosed against the Appellant.

ii. The Appellant is a mere agent to the estate of late Mr. Emmanuel Oketah and had in his evidence before the trial court disclosed his status as stated above.

GROUND FOUR

The judgment is against the weight of evidence.

3. **RELIEFS SOUGHT FROM CUSTOMARY COURT OF APPEAL**

1. An order of the Honourable Court quashing the judgment of the court below and declaring same null and void and of no effect whatever.

2. A declaration that Shop No. LS-13-141 Zuba Market belongs and enures to the Estate of late Mr. Oketah Emmanuel.

3. An order of perpetual injunction restraining the Respondents, his agents, heirs and those claiming right of ownership from him from further laying any claim of rights whatsoever to Shop LS-13-141 Zuba Market, Abuja – FCT.

4. The cost of this Appeal.

The Appellant filed a brief of argument dated the 22nd day of October, 2010. The Appellant in his said brief of argument formulated four (4) issues for determination and same is hereby reproduced as follows:

i. Whether the Learned Judges of the Court below correctly assumed jurisdiction over this matter when the necessary parties were not before them.

ii. Whether the court below was right in making orders against parties not before the court.

iii. Whether an agent of a disclosed principal can incur liability for the actions he carried out on behalf of the said principal and whether any cause of action has been disclosed against the Appellant.

iv. Whether by critical examination of the facts of this case, the judgment of the court below was not against the weight of evidence adduced in this case.

On the 28th September, 2011, when the matter came up for hearing, the Appellant's Counsel relied on both the Appellant's brief of arguments and the reply brief filed on 1st August, 2011 and adopted the submissions in the Appellant's brief of argument and the reply brief and urge the court to allow the appeal.

The Respondent's Counsel also filed the Respondent's brief of argument dated the 19th day of July, 2011 wherein he formulated 2 issues for determination:

i. Whether a Defendant in whose favour another party should have been joined at trial, but failed, can rely on such non-joinder to defeat the cause of the Plaintiff on appeal and whether the Respondent's allocation has been revoked.
ii. Whether a person who claims proprietary interest which is the subject matter of a suit is not bound by the judgment in the suit against his caretaker, even though the person was not a party to the suit.

The Respondent's Counsel also adopted the Respondent's brief filed on the 19th day of July, 2011 and urged the court to uphold the judgment of the lower court and dismiss the appeal with substantial cost.

ISSUE FOR DETERMINATION

1. Where or not this Court (Customary Court of Appeal, Abuja) has jurisdiction to entertain the appeal.

It is very important and mandatory to consider whether or not this Court has jurisdiction to entertain and hear this appeal before going into the merits of the appeal proper. It is so because the issue of jurisdiction is fundamental to the administration of justice and adjudication, therefore any adjudication no matter how well tried and or conducted is incompetent if it is conducted without jurisdiction. See the case of ***Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR Pt. 702, 178 at 188***. Any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided. See also the case of ***Prof. Aderemi Olutola v. Unilorin (2004) 18 NWLR Pt. 905, 416.*** The Supreme Court in the case of ***Mobil Producing Nigeria Limited V Lagos State Environment Protection Agency & Ors (2002) 18 NWLR pt. 798, 1 at 32*** defined jurisdiction as the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

Courts are creation of statute. It is the statute that creates the court and define the powers and the extent of its application. See the case of ***Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713, 576.*** It follows therefore that courts derive their jurisdiction therefrom. See ***Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196, Trustee, P.A.W. Inc. v. Trustee, A.A.C.C. (2002) 15 NWLR pt. 70, 449.***

Similarly, this court as an Appellate Court, its appellate jurisdiction is also statutory, having being derived from the statutes creating it, the constitution and any other enabling law inclusive. This Court is a creature of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from Section 267 and 8 (1) of the 1999 Constitution and Decree No. 30 of 1991 respectively.

S. 267 of the 1999 Constitution is herein reproduced as follows:

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

And

S. 8 (1) of Decree No. 30 of 1991 provides as follows:

"Subject as otherwise provided in this Decree, the Court shall have jurisdiction to hear and determine appeals in civil matters involving questions of customary law".

The Supreme Court held in the case of ***Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR Pt. 820,577 at 635*** that jurisdiction of a court is a matter of law and it is vested in a court by the constitution and the statutes establishing the court. See the decision of **Hon. Justice Karibi – Whyte JSC in *Peter Adeboye Odofin & Anor v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350 at 367*.** The Supreme Court in the case of ***M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 NWLR pt. 254, 377 at 397 – 398*** held that on appeal it is the issue or issues for determination in an appeal that determines the court to which an appeal lies, if the appeal raise questions involving customary law, it goes to the Customary Court of Appeal and if the appeal raises questions of general law, it goes to the High Court.

By virtue of the above stated statutes and cited authorities, it is the issue or issues for determination in appeal that confers jurisdiction on an appellate court. For this Court to assume jurisdiction, the court must look and examine the issues raised in the appeal. Therefore, the issues raised by the Appellant in the instant case in his notice of appeal and brief of arguments need to be properly examined to ascertain the competence of this appeal, as it affects the jurisdiction of this Court.

GROUND ONE

ERROR IN LAW

The learned Honourable Judges erred in law when in view of the material evidence before them, assumed jurisdiction when the proper parties are not before them or the suit is improperly constituted.

Particulars of Error

The court wrongly assumed jurisdiction when the Defendant was a disclosed agent to the property in issue.

i. Whether, the learned Judges of the Court below correctly assumed jurisdiction over this matter when the necessary parties were not before them.

GROUND TWO

ERROR IN LAW

The learned Honourable Judges erred in law when they made orders to parties not before them.

Particulars of Error

The Gwagwalada Area Council that allotted the said shop was not a party to the suit nor the Zuba Market Management Authority was made a party to the suit yet the learned Judges made orders against them when they were not joined as parties to the suit.

ii. Whether the court below was right in making orders against parties not before the court.

Grounds 1 and 2, issues 1 and 2 canvassed and argued by the Appellant is a complaint that borders on the jurisdiction of the trial court. That the trial court wrongly assumed jurisdiction over the matter when the necessary parties were not before the court. This complaint or issues did not raise any issue involving customary law, therefore this court (Customary Court of Appeal, Abuja) did not have jurisdiction to hear and determine same.

Therefore, grounds 1 and 2, issues 1 and 2 raised canvassed and argued by the Appellant are incompetent, before this court.

GROUND THREE

ERROR IN LAW

The learned Honourable Judges erred in law when despite the fact that the suit discloses no cause of action against the Appellant made an order against the Appellant.

Particulars of Error

i. The learned trial Judges erred in law by making an order against the Appellant when no cause of action has been disclosed against the Appellant.
ii. The Appellant is a mere agent to the Estate of late Mr. Emmanuel Oketah and had in his evidence before the trial court disclosed his status as stated above.
iii. Whether an agent of a disclosed principal can incur liability for the actions he carried out on behalf of the said principal and whether any cause of action has been disclosed against the Appellant

Ground 3 and issue 3 canvassed and argued by the Appellant is a complaint that borders on law of Agency, Principal/Agent relationship.

The issue did not raise any issue involving customary law.

The said issue 3 is also incompetent before this court.

GROUND FOUR

iv. The judgment is against the weight of evidence.

Whether by critical examination of the facts of this case, the judgment of the court below was not against the weight of evidence adduced in this case.

Issue 4 formulated and argued by the Appellant is a complaint against the weight attached to the evidence adduced in the case. That the trial court did not evaluate the adduced evidence properly.

The issue raised in Ground 4 and issue 4 is issue of general law and does not involve issue of customary law. Therefore, ground 4 and issue 4 raised, canvassed and argued by the Appellant is incompetent.

Since the 4 grounds of appeal and the 4 issues formulated by the Appellant are incompetent, consequently this court did not have the requisite jurisdiction and lacks the competence to entertain this appeal.

To properly invoke the appellate jurisdiction of this court, the notice of appeal must contain a ground or grounds of appeal that raises question or questions of customary law. The grounds of appeal from which the Customary Court of Appeal could derive its jurisdiction must therefore relate to customary law alone. For an appeal to be competent before Customary Court of Appeal, the grounds of appeal must relate to and raise questions of customary law. See the case of ***C.C.A. Edo State v. Aguele (2006) 12 NWLR pt. 995, 545.***

The Supreme Court in *Iorpuun Hirnor & Anor v. Dzungu Yongo & Ors (2003) 9 NWLR pt. 824, 77 at 98 para C* held that where the decision of Customary Court of Appeal turns purely on facts, or on question of customary law, notwithstanding that the applicable law is customary law.

Where a Customary Court of Appeal proceeds to hear and determine grounds of appeal other than on customary law, it acts without jurisdiction to do so and such decision no matter how well conducted will be a nullity.

The 4 grounds of appeal and the 4 issues filed, canvassed and argued by the Appellant does not raise question or questions of customary law and the 4 issues formulated and argued are incompetent and I so hold.

The court can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid notices of appeal not by incompetent notice of appeal. See the case of ***Robert I. Ikweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 at 42 – 426***. In

the case of ***Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949, 616 at 634*** the Supreme Court held that appeals are creation of statutes, as such failure to comply with the statutory requirement prescribed by the relevant laws under which such appeal may be competent and properly before the court will deprive the Appellate Court jurisdiction to adjudicate on the appeal.

The notice of appeal is without doubt the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39*** the notice of appeal filed by the Appellant herein is incompetent as it did not contain a valid ground of appeal that raises issues or questions of customary law and it is so hold.

There is no justice in exercising jurisdiction where none exists. It is injustice to the law, to the court and to the parties to do so. The issue of jurisdiction is vital and fundamental; any order made without jurisdiction of court is a nullity. See the case of ***NDIC v. CBN & ANOR (2002) 7 NWLR pt. 766, 272 at 294-295.***

Where a court finds that it lacks jurisdiction to entertain the suit before it, the proper order to make is one striking out the suit, see ***NDIC v. CBN & Anor. Supra.; Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR pt. 199, 501; CBN v. Katto (1994) 4 NWLR pt. 339, 446.***

The notice of appeal without any iota of doubt is the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39.*** Consequently, the entire appeal rest squarely on the notice of appeal being the foundation of the appeal and derive its competency therefrom. The Appellant's notice of appeal and the 4 issues formulated and canvassed in this appeal are incompetent and liable to be struck out. The notice of appeal and the 4 issues formulated are hereby struck out.

An 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. Having discovered that the 4 grounds of appeal and the 4 issues formulated and argued are incompetent, there is no need to adjudicate on the merits of the appeal.

It is very important for Counsels to draw up competent grounds of appeal in their notice of appeal to Customary Court of Appeal to meet appropriate grievances in the judgment complained of within the limitation imposed by Section 267 of the 999 Constitution of the Federal Republic of Nigeria, and Section 8 (1) of Decree No. 30 of 1991.

In conclusion, this appeal in its entirety is declared incompetent and same is hereby struck out accordingly.

APPEAL DISMISSED

JULIANA ELEOJO AGBO

EMMANUEL AYODEJI AFOLABI

V.

LINUS AGBO JOSEPH

Appeal No**. FCT/CCA/CVA/19/2011**

HON. JUSTICE A.M.A SADDEEQ, JCCA (Presided)

HON. JUSTICE M.G. GWAGWA, JCCA

HON. JUSTICE (DR.) NGOZIKA UWA OKAISABOR, JCCA (Delivered the Leading Judgment)

HON. JUSTICE USMAN N. AHMED, JCCA

16th December, 2011

COUNSEL-	*Counsel engaged by litigant – duty of – presumption of competence of counsel*
COURTS-	*Rules of Court – Need to obey*
ESTOPPEL PER REM JUDICATUM-	*Doctrine of – effect of on proceedings*
PRACTICE AND PROCEDURE-	*Decisions of court – when a decision is final*
PRACTICE AND PROCEDURE-	*Proceedings at Customary Court -Applicability of the Evidence Act to – FCT Customary Court of Appeal*
PRACTICE AND PROCEDURE-	*Record of proceedings – importance of to proceedings – duty of judge to be guided by*
PRACTICE AND PROCEDURE-	*Right of address- when right becomes necessary*
RES JUDICATA-	*Doctrine of – meaning and elements of – applicability of*
RES JUDICATA-	*Plea of – condition precedent to – lack of knowledge – whether qualifies as defense.*

ISSUES

1. Whether Section 111 of the Evidence Act (now Section 104 (1) and (2) (Amended)) is binding on the FCT Customary Court by virtue of the provisions of Section 65 of FCT Customary Court Act, 2007.
2. Whether the principle of *estoppel per rem judicatam* is applicable in this matter.

3. Whether the Respondent's Brief filed well out of time is competent before this court.

FACTS:

Briefly, the facts leading to this appeal are that on the 19th day of January 2010, the Plaintiff/Respondent instituted an action against the Defendants/Appellants claiming for a dissolution of the marriage between the Plaintiff/Respondent and the 1st Defendant/Appellant, custody of the only issue of the marriage and damages in the sum of N1,000,000.00 (One Million Naira) against the 2nd Defendant/Appellant for marrying the 1st Defendant/Appellant when he knew that the 1st Defendant/Appellant was and is still married to the Plaintiff/Respondent. The Appellants challenged the competence of the action by preliminary objection which was overruled. Aggrieved by that ruling, the Appellants initiated this appeal on three Grounds which are reproduced as follows:

HELD (Allowing the Appeal):

1. **On the provisions of the Evidence Act applicable to the Customary Court of the FCT**.
   Section 65 of the Federal Capital Territory, Customary Court Act, 2007 made specific provisions of the Evidence Act that are applicable to Customary Court. For ease of reference, this Section provides as follows: *"The Customary Court and Customary Court of Appeal FCT Abuja shall in judicial proceedings be bound by the provisions of Section 14, 15, 59, 76, 77, 78, 92, 93, 135, 136, 155, 177 and 227 of the Evidence Act"*
2. **On meaning of the term *res judicata***
   The learned authors of Black's Law Dictionary eight edition at page 1336 defines the term "*res judicata*" otherwise fully known as "*res judicata pro veritate accipitur*" **(**Latin for a thing adjudicated is received as the truth) thus: "*An issue that has been definitely settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions that could have been- but was not- raised in the first suit".* ***Utuks v. Nigerian Ports Authority (2007) ALL FWLR (Pt 387) 809 at 830 Paras a-c (SC)*; *Odeleye v. Adegbanke (2008) WRN (Vol. 4) 44 AT 50, Pp 64-65, lines 45-10 (CA).***
3. **On the elements of *res judicata***
   The three essential elements are:

1. An earlier decision on the issue;
2. A final judgment on the merits and;

3. The involvement of the same party or parties in privity with the original parties.

4. On the condition precedent to a plea of *res judicata*

To sustain a plea of *res judicata* the party pleading it must satisfy the following condition:

a) That the parties (or their privies as the case may be) are the same in the present case as in the previous case;

b) That the issue and subject-matter are the same in the previous suit as in the present suit;

c) That the adjudication in the previous case must have been given by a court of competent jurisdiction; and

d) That the previous decision must have finally decided the issues between the parties. Failure to satisfy any of these conditions means failure to the plea in its entirety. See ***Okposin v. Assam (2005) 14 NWLR (Pt 945) 465 at 505 Paras A-D*; *Nkanu v. Onu (1977) 5SC 13, Dzungwe v. Gbishe (1985) 2 NWLR (Pt 8) 528; Udo v. Obot (1989) 1 NWLR (Pt 95) 59***.

5. **On the duty of the judge to allow himself to be guided by the record of proceedings**.

It is a cardinal principle of law that, it is the duty of the Judge not to close his eyes to the truth contained in the record before him. See ***Badejo v. Min. of Education (1996) 8 NWLR (PT 464) 15 SC***; ***Fagbola v. Titilayo Plastic Ind. Ltd. (2005) 2 NWLR (Pt 909) at 11 (CA)*.**

6. On the importance of Record of Proceedings

Record of Proceedings is the only indication of what took place in court, it is not like minutes of a meeting, it is always the final reference of events, step by step that took place in court'. See ***Fawehinmi Construction Company Ltd v. Obafemi Awolowo University (1998) LPELR-SC 244/1991 Pg 11, Paras A-B***

7. On when a decision is final

The test of finality most adequate for all occasions is whether the court which gave the decision can vary, re-open or set aside the decision. If it cannot, the decision is in the context **"final"**. See Lord Diplock in ***DSV SILO-UND VERWAL TUNGSGESELLSCHAFT MBA v. SENNAR (OWNERS), THE SENNAR (NO. 2) 1985 2 ALL ER 104.***

8.* On the operation of the doctrine of *estoppel per rem judicatum

By the operation of the doctrine of *estoppel per rem judicatam,* parties are precluded from re-litigating the very issue that had been finally determined by a court of competent jurisdiction. See **Afolabi v. Gov. Osun State (2003) 12 NWLR (Pt 836) 119 at 122.**

9. On the effect of estoppel per rem judicatum

The effect of *estoppel per rem judicatum* is that once it is found that the question in litigation is caught by *estoppel per rem judicatam*, there the matter ends. See ***Nofila v. Oluwa (2004) 13 NWLR (Pt 891) 463 at 471, Para E***

10. On when the right of address is necessary

It is well known that where an issue deals with substantive law or rules of practice and procedure there is no need for right of address. It is only when the issue is of fact that it becomes necessary to give the parties opportunity to address it on it

11. On the need to obey rules of court

It is a cardinal principle of law that Rules of Court must be obeyed. This principle was enunciated in ***Mohammed v. Klagester (Nig) Ltd (1996) INWLR (Pt 422) PP 54 at 61***,

12. On duty of a counsel engaged by a litigant

A counsel or legal practitioner before the court is regarded as a minister in the sacred temple of Justice who is required to discharge his obligation both to the court and the litigant with the flavour of professionalism and to ensure this it is the responsibility of counsel briefed by a litigant to conduct the case to the best of his professional ability. See ***Re: Opekun (2002) 6 NWLR (Pt. 870) 594; Alibi v. Oloya (2001) 6 NWLR (Pt 708) 42.***

13. On need for counsel to be conversant with rules of court

Being seized of the case, learned counsel ought to have been aware of the rules of court. Counsel ought to be aware of any fundamental defect in the case and take steps to rectify same: ***Ibori v. Agbi (2004) 6 NWLR (PT 868) 132***; ***Alibi v. Oloya (2001) 6 NWLR (Pt 708) 42.***

14. On presumption of the competence of counsel engaged by litigant

Learned counsel having been engaged by the appellant to handle this appeal is presumed to have the competence to do so to the satisfaction of appellant. See ***A.G. Akwa Ibom State v. Essien (2004) 7 NWLR (Pt 872) 323.***

15. On the need for litigants to attend court proceedings

Of course, it is not mandatory for him to appear before this court since he assumed he is adequately represented by his counsel, however, his presence would have afforded him the privilege to know whether or not his matter is being handled in the way or manner it should or is getting the worth of the services he was paying or paid for. At times it is not enough to remain in the shell of comfort of one's environment assuming all is well since a legal practitioner has been engaged to handle the matter. Even where a litigant is a layman in the law which is the language of the court, being present in the court when his matter is being

heard will certainly afford him the opportunity of accessing if all is well within his camp and if not, it will afford him the basis upon which he can decide to either continue with his counsel or debrief the counsel because since he pays the piper he certainly has the right to some extent to dictate the tune.

16. **On whether the provision of the Evidence Act are applicable to the FCT Customary Court**

    By the provision of section 256 (1) (C) of the Evidence Act, 2011, (amended), the provisions of the Act are not applicable to proceedings in the customary courts unless there exists a specific provision to that effect: ***Kplishi Kousu v. Vanger Udom (1990) LPELR, 32, (1990) 2 S.C. 138*; *Latunde v. Lajinfin (1989) 5 SCNJ 59, 65 – 66.***

17. **On the applicability of the principle of *res judicata***

    In view of the need to have an end to litigation, parties affected are stopped from initiating a fresh action on the same cause or matter already pronounced upon by a court of competent jurisdiction in a previous action: For this plea to be successfully pleaded, the parties must be the same in both the previous and subsequent proceedings, the claim or issue in both actions must be the same, the subject matter must also be the same in the suits and the existence of a valid, subsisting and final decision from a court of competent jurisdiction: ***Onylakin Balogun v. Adedosu Adejobi (1995) 2 NWLR (Pt. 376) 131; Aromba v. Odiese (1990) 1 NWLR (Pt. 125) 178; Adone v. Ikebudu (201)7 MJSC, 190-191.***

18. **On whether a plea of lack of knowledge is a defense to the principle of *res judicatum*.**

    A plea of lack of knowledge of the matter cannot operate to render as none subsisting a valid decision made by a court of competent jurisdiction.

CASES CITED:

A.G. Akwa Ibom State v. Essien (2004) 7 NWLR (Pt 872) 323

Adone v. Ikebudu (201)7 MJSC, 190-191

Afolabi v. Gov. Osun State (2003) 12 NWLR (Pt 836) 119

Alibi v. Oloya (2001) 6 NWLR (Pt 708) 42

Aromba v. Odiese (1990) 1 NWLR (Pt. 125) 178

Badejo v. Min. of Education (1996) 8 NWLR (PT 464) 15 SC

DSV SILO-UND VERWAL TUNGSGESELLSCHAFT MBA v. SENNAR (OWNERS), THE SENNAR (NO. 2) 1985 2 ALL ER 104.

Dzungwe v. Gbishe (1985) 2 NWLR (Pt 8) 528

Fagbola v. Titilayo Plastic Ind. Ltd. (2005) 2 NWLR (Pt 909) at 11 (CA)

Fawehinmi Construction Company Ltd v. Obafemi Awolowo University (1998) LPELR-SC 244/1991 Pg 11, Paras A-B

Ibori v. Agbi (2004) 6 NWLR (PT 868) 132

Kplishi Kousu v. Vanger Udom (1990) LPELR, 32, (1990) 2 S.C. 138

Latunde v. Lajinfin (1989) 5 SCNJ 59, 65 – 66

Mohammed v. Klagester (Nig) Ltd (1996) NWLR (Pt 422) PP 54

Nkanu v. Onu (1977) 5SC 13

Nofila v. Oluwa (2004) 13 NWLR (Pt 891) 463

Odeleye v. Adegbanke (2008) WRN (Vol. 4) 44 AT 50, Pp 64-65 (CA).

Okposin v. Assam (2005) 14 NWLR (Pt 945) 465 at 505

Onylakin Balogun v. Adedosu Adejobi (1995) 2 NWLR (Pt. 376) 131

Re: Opekun (2002) 6 NWLR (Pt. 870) 594

Udo v. Obot (1989) 1 NWLR (Pt 95) 59

Utuks v. Nigerian Ports Authority (2007) ALL FWLR (Pt 387) 809 (SC)

Statutes/Rules of Court/Books referred to in this judgment

Black's Law Dictionary eight edition
Evidence Act, 2011

Federal Capital Territory, Customary Court Act, 2007

APPEARANCES:

Eze Ozor Ajuluchukwu Esq. for the Appellants

Stephen Mandeun Esq. for the Respondent

Hon. Justice Ngozika U. Okaisabor, JCCA (Delivering the Leading Judgment): This is an interlocutory appeal against the ruling in Suit No. FCT/CC/GK/CV/01/10 delivered by the Customary Court Garki, Abuja on 7th June, 2010. The ruling is pursuant to a preliminary objection dated 27/1/2010 and filed on the same date by the Defendants in the trial court now Appellants before this court.

Briefly, the facts leading to this appeal are that on the 19th day of January 2010, the Plaintiff/Respondent instituted an action against the Defendants/Appellants claiming for a dissolution of the marriage between the Plaintiff/Respondent and the 1st Defendant/Appellant, custody of the only issue of the marriage, Master Ishotu Williams Agbo to be given to the Plaintiff/Respondent and damages in the sum of N1,000,000.00 (One Million Naira) against the 2nd

Defendant/Appellant for marrying the 1st Defendant/Appellant when he knew that the 1st Defendant/Appellant was and is still married to the Plaintiff.

The Appellants by virtue of the Notice of their Preliminary Objection challenged the competence of the trial court to entertain the Petition on three grounds:

1. *"That the petition is incompetent before this Honourable Court*
2. *That the petitioner is estopped from bringing this action against the 1st Defendant, the suit having been determined by a court of competent and co-ordinate jurisdiction;*
3. *That the suit is frivolous, vexatious and an abuse of court process'' Sic.*

The Preliminary Objection was supported by a twelve paragraph affidavit deposed to by the 1st Defendant/Appellant stating as follows:

1. That I am the 1st Defendant/Appellant in this petition.
2. That the Plaintiff and the 1st Defendant/Appellant got married on the 3rd and 4th of December, 1999.
3. That the marriage is blessed with a son, Master Ishotu Williams Agbo.
4. That the marriage stopped being peaceful as a result of Plaintiff's brutality and unruliness against me.
5. That in 2005, I instituted an action for divorce against the Petitioner in the Upper Area Court sitting at Okpo in Kogi state.
6. That the Plaintiff was served with the court processes and he refused or elected not to attend the proceeding.
7. That the said Area Court granted the dissolution on the 28th Day of November, 2005 and a certificate of divorce was issued.
8. That as part of the judgment, the custody of the only child of the marriage was given to me.
9. That the court's proceeding that led to divorce and the certificate of divorce are hereby attached and marked as Exhibits ``A'' and ``B'' respectively.
10. That the marriage, the Petitioner seeks to dissolve has long been dissolved.
11. That the Petitioner is aware of the existence of the divorce
12. That I depose to this affidavit in good faith, believing its content to be true and correct and in accordance with the oaths Act, 1990.''

In the cause of hearing the Preliminary Objection at the trial court, O.A. Eze Esq, Learned Counsel for the Appellants contended that the previous cause of action before the Upper Area Court, Okpo, in Kogi State in Suit No CV/39/2005 was dissolution of their marriage. The Record of Proceedings in respect of the said suit was exhibited to the Notice of Preliminary Objection as Exhibit `A' as well as a certificate of divorce no. KGSJ53036 as Exhibit `B'.

At the trial court, learned Counsel for the Appellants submitted that the Respondent was caught up by the doctrine of *res judicata* from bringing the Petition having contended that the parties before the trial court were the same. In summary, he urged the trial court to dismiss the petition and declare same as an abuse of court process minded that the marriage had been previously dissolved by a court of competent jurisdiction.

Stephen Mandeun Esq, Learned Counsel for the Respondent vehemently opposed the preliminary objection contending that Exhibits ``A'' and ``B'' were not signed by the Presiding Judges of the Upper Area Court at Okpo in Kogi State. He further submitted that the parties in Suit CV/39/2005 were not the same as the parties before the trial court.

The Trial Court ruled that both Exhibits ``A'' and ``B'' have not complied with the mandatory provision of Section 111 of the Evidence Act, Cap E 14, Volume 6, Laws of the Federation of Nigeria, 204, (now Section 104 (1) and (2) (Amended) 2011) accordingly, the submissions of the Respondent was upheld by the trial court. Consequently, the Appellants' preliminary objection was overruled.

Aggrieved by that ruling, the Appellants initiated this appeal on three Grounds which are reproduced as follows:

1. "*That the Learned Trial Judge erred in law when he held that Exhibits "A" and "b" attached to the Defendant's preliminary objection was not admissible in law;*
2. *The Learned Trial Judge erred in law when he held that Exhibits "A" and "B" cannot be considered as estoppel.*
3. *The Learned Trial Judge misdirected himself in law when he failed to inquire or rule on whether there was judgment ab initio and whether on the face of the judgment, it meets the requirement of estoppel per rem judicatam (res judicata)'.*

It is imperative for a proper elucidation of the issues for determination before this court to reproduce the interlocutory ruling of the trial court which reads thus:

"The issues for determination is whether exhibits A and B are admissible in law? Whether previous decision of a competent court can operate as estoppels in subsequent proceedings? On issue No. 1, it is trite law that by the combine provision of the Evidence Act Sections 97 and particularly Section 111 (now 104 (1) and (2) (Amended), secondary evidence are admissible in law as public document as proof of the original. However, there is condition to be satisfied in law for such document to be admissible. Succinctly put, the court of Appeal in ***P.D.P v. Sidi Ali 2004, ALL FWLR (pt 212)1666 CA*****,** It was held that the word "shall" in Section 111 (now 104 (1) and (2) (Amended) of the Evidence Act is mandatory and not merely directory. Therefore, that for a public document to be said to be truly certified for it to be admitted in Evidence under that section, it must be shown to exist on such document, the following:

1. Payment of legal fees in respect of certification of the document.
2. A certificate written at the foot of that copy that it is a true copy of such document or part thereof.
3. The date when the certificate was made.
4. The name and official title of the certifying officer and where use of seal is authorized, the affixing of a seal on the document.

On the second issue for determination since the Exhibits A and B did not satisfy the provisions of Section 111 (now 104 (1) and (2) (Amended)) of the Evidence Act, it falls short of being considered an estoppel. The submission of counsel to the petitioner is hereby sustained and learned counsel to Respondent/Applicant's argument and objection is rejected. The document sort to be relied upon has not complied with the provision's of Evidence Act"

The Appellants in their settled brief raised three issues for determination and adopted the argument on issue one and two for issue three. The three issues are as follows:

1. Whether the documents attached to Appellants' preliminary objection *prima facie* meets the conditions for certification as contained in Section 111 (now 104 (1) and (2) (Amended)) of the Evidence Act.
2. Whether the documents attached to Appellants' preliminary objection prima facie constitute valid court proceedings and certificate to warrant it being sufficient to ground *estoppel per rem judicatam*.

3. Whether the learned trial judge was right to have rejected the Appellants' preliminary objection on grounds that the documents attached to it do not meet the condition for certification''.

This court is of the view that Issue Three is subsumed in Issue One of the Appellants' issues for determination. I am of the view that there are three issues for determination inclusive of the issue formulated by the court *suo motu*. For a proper elucidation, this court has reframed the issues for determination as follow:

ISSUE ONE

Whether Section 111 of the Evidence Act (now Section 104 (1) and (2) (Amended)) is binding on FCT Customary Court by virtue of the provisions of Section 65 of FCT Customary Court Act, 2007.

ISSUE TWO

Whether the principle of *estoppel per rem judicatam* is applicable in this matter.

ISSUE THREE

Whether the Respondent's Brief filed well out of time is competent before this court.

On Issue One, in considering the applicability of Section 111 of the Evidence Act Cap E 14 Vol 6, Laws of the Federation of Nigeria 2004 (now 104 (1) and (2) (Amended)) (hereinafter referred to as the Evidence Act) to proceedings before the Customary Court, it is pertinent to reproduce for the purposes of emphasis, Section 1 (2) Paragraph C of the Evidence Act (now Section 256 (1) (c)) Amended which provides as follows:

> ``*This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply- (i) to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President or the Governor of the State by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory Abuja or a state, as the case may be, power to enforce any or all the provisions of this Act''.*

Following the operation of this provision, Section 65 of the Federal Capital Territory, Customary Court Act, 2007 made specific provisions of the Evidence Act that are applicable to Customary Court. For ease of reference, this Section provides as follows:

> *"The Customary Court and Customary Court of Appeal FCT Abuja shall in judicial proceedings be bound by the provisions of Section 14, 15, 59, 76, 77, 78, 92, 93, 135, 136, 155, 177 and 227 of the Evidence Act".*

Having found that the provision of Section 111 of Evidence Act (now 104 (1) and (2) (amended)) is not among the provisions to be applied in the Customary Court, the argument of the Appellants touching on same in their issue one as canvassed in their brief of argument goes to no issue. Therefore, this court does not consider it necessary to consider those arguments that were canvassed in the brief as it relates to this issue. It is important to stress that the trail court should not have allowed itself to be swayed by the erroneous application of Section 111 of Evidence Act (now 104 (1) and (2) (amended)), it would only serve as a guide.

It is in the light of the foregoing consideration, that this court would hold that the trial court misdirected itself in rejecting Exhibits ``A'' and ``B'' on the grounds that it failed to meet the conditions contained in Section 111 of Evidence Act (now 104 (1) and (2) (amended)) since the said section is not applicable to Customary court.

On Issue two which deals with the applicability of the principle of ``*estoppel per rem judicatam*'' to this matter, I would commence by stating what *res judicata* is and proceed to the conditions for a successful plea of the above principle and what the effect is. The learned authors of Black's Law Dictionary eight edition at page 1336 defines the term ``*res judicata''*

Otherwise fully known as ``*res judicata pro veritate accipitur''* **(**is Latin for a thing adjudicated is received as the truth) thus:

> "*An issue that has been definitely settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction or series of transactions that could have been- but was not- raised in the first suit".*

The three essential elements are:

4. An earlier decision on the issue;
5. A final judgment on the merits and;
6. The involvement of the same party or parties in privity with the original parties.

This meaning was also encapsulated in the Supreme Court decision in ***Utuks v. Nigerian Ports Authority (2007) ALL FWLR (Pt 387) 809 at 830 Paras a-c (SC)*** and in the Court of Appeal decision in ***Odeleye v. Adegbanke (2008) WRN (Vol. 4) 44 AT 50, Pp 64-65, lines 45-10 (CA).***

Having defined what *res judicata* is, it is pertinent to consider what the conditions are and under what circumstances a successful plea of *res judicata* can be sustained.

The Supreme Court in ***Mba v. Agu (1999) 12 NWLR (Pt 629) Pp 1 AT 16 Paras D-E*** enumerated the ingredients for a successful plea of *res judicata* or the principle ``*estoppel per rem judicatam* as follows:

1. Same Parties
2. Same Issues and
3. Same Subject-matter

The Supreme Court also in ***Okposin v. Assam (2005) 14 NWLR (Pt 945) 465 at 505 Paras A-D*****,** enumerated extensively the conditions precedent to a successful plea of res judicata as follows:

``*To sustain a plea of res judicata the party pleading it must satisfy the following condition:*

e) That the parties (or their privies as the case may be) are the same in the present case as in the previous case;
f) That the issue and subject-matter are the same in the previous suit as in the present suit;
g) That the adjudication in the previous case must have been given by a court of competent jurisdiction; and
h) That the previous decision must have finally decided the issues between the parties. Failure to satisfy any of these conditions means failure to the plea in its entirety. (***Nkanu v. Onu (1977) 5SC 13, Dzungwe v. Gbishe (1985) 2 NWLR (Pt 8) 528; Udo v. Obot (1989) 1 NWLR (Pt 95) 59*** referred to)''.

It is pertinent to note that the court in exercising its powers under Order 6 Rule 1 of the Federal Capital Territory, Abuja, Customary Court of Appeal Rule, 1996 (hereinafter referred to as the rules of this court) which provides thus:

``*The Customary Court of Appeal may from time to time make any Order necessary for determining the real question in controversy in the appeal and may amend any defect or error in the record of appeal and may direct the court below to inquire into and certify its findings on any question which the Customary Court of Appeal thinks fit to determine before final judgment in the appeal",* directed the Court below to furnish this court with the details of the matter between the parties which it heard and determined in 2005 and following that directive a Certified True Copy of the Record of proceedings in Suit No CV/39/2005 was sent to this court.

In ***Badejo v. Min. of Education (1996) 8 NWLR (PT 464) 15 SC*,** It is a cardinal principle of law that, it is the duty of the Judge not to close his eyes to the truth contained in the record before him. This same principle was enunciated in ***Fagbola v. Titilayo Plastic Ind. Ltd. (2005) 2 NWLR (Pt 909) at 11 (CA*)** where in it was stated inter alia that:

> ``*The importance of a good, clear and full record of proceedings cannot be overemphasized. The justices of this court it goes without saying do not participate in the proceedings at the court below and the only guide legally allowed is the record of proceedings".*

The Supreme Court in ***Fawehinmi Construction Company Ltd v. Obafemi Awolowo University (1998) LPELR-SC 244/1991 Pg 11, Paras A-B*,** held inter alia that ``Record of Proceedings is the only indication of what took place in court, it is not like minutes of a meeting, it is always the final reference of events, step by step that took place in court''.

Looking at the record transmitted and the case before us are those principles discernible in them?

This Court having gone through the records observed that the parties are the same because the 1st Appellant acted as a pointer for the bailiff during the service of processes of the Upper Area Court, Okpo in Kogi State on the Respondent. Invariably, the parties are the same. The only difference is that a third party was joined but that does not alter the situation. From the record of proceedings at the Upper Area Court Okpo in Kogi State and the record of proceedings from the Customary Court Garki, this court is convinced that the parties are the same. The fact that the 1st Appellant was the only Plaintiff in the previous suit at the Upper Area Court Okpo in Kogi State is immaterial; the

estoppel subsists between the parties. See ***Onyeabuchi v. INEC (2002) 8 NWLR (Pt 769) 417 at 423.***

The Court of Appeal in ***Idogierhie v. Oare II (2005) 17 NWLR (Pt 953) 34 at 51, Paras D – G*** has held that in order to invoke the principle of *res judicata*, it has to be shown that the cause of action has been litigated upon and a final decision reached by a court of record of competent jurisdiction.

At the Upper Area Court, Okpo in Kogi State, the cause of action was the marriage between the 1st Appellant and the Respondent, the issue was the dissolution of the marriage and the custody of the only child of the marriage (**Master Williams Ishotu Agbo),** same applies to Customary Court Garki. There is also the subsistence of a valid judgment because the judgment of Upper Area Court, Okpo in Kogi State has not been set aside and the adjudication of the previous decision was given by a court of competent jurisdiction because the Upper Area Court is a court of competent jurisdiction.

There is also a condition of finality. The Supreme Court in ***Onyeabuchi v. INEC (2002) 8 NWLR (Pt 769) 417 at 438 Paras A-B, 440 Paras B-D*** held that:

> *"One of the preconditions for a valid plea of res judicata is that the judgment on which the plea is raised must be* ***final*** *and the self-same question raised in the earlier case must be substantially the same with the issue in a latter case"*

The test of finality most adequate for all occasions is whether the court which gave the decision can vary, re-open or set aside the decision. if it cannot, the decision is in the context ``final'' Lord Diplock in ***DSV SILO-UND VERWAL TUNGSGESELLSCHAFT MBA VS. SENNAR (OWNERS), THE SENNAR (NO. 2) 1985 2 ALL ER 104*** held that ``a decision is final if it is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction".

The judgment of the Upper Area Court Okpo, in Kogi State was the final judgment in the previous suit. By the operation of the doctrine of *estoppel per rem judicatam,* parties are precluded from re-litigating the very issue that had been finally determined by a court of competent jurisdiction. This was held inter alia by the Supreme Court in ***Afolabi v. Gov. Osun State (2003) 12 NWLR (Pt 836) 119 at 122.***

Having gone through the conditions of a successful plea of *res judicata* what then is the effect?

The Court of Appeal in ***Nofila v. Oluwa (2004) 13 NWLR (Pt 891) 463 at 471, Para E*** held that:

> *"the effect of estoppel per rem judicatam is that once it is found that the question in litigation is caught by estoppel per rem judicatam, there the matter ends".*

Minded by this decision, the matter at the Customary Court, Garki, having been caught up by this principle also ends. The suit filed at the court below was not competent and where the suit is not competent the proper order to make is to dismiss the suit. The suit filed before the court below being caught up by *res judicata* is hereby declared incompetent and being so the said suit is hereby dismissed. Issue two is resolved in favour of the Appellants.

Issue Three was formulated by the court *suo motu*. It is pertinent to mention that it is well known that where an issue deals with substantive law or rules of practice and procedure there is no need for right of address. It is only when the issue is of fact that it becomes necessary to give the parties opportunity to address it on it. Having stated the above I would now proceed to consider the issues as stated.

I now come to the third and the last issue which is issue three. This issue was formulated by this court *suo motu* and it relates to the competence of the Respondent's brief having regards to the provision of Order 5 Rule 3 sub rule 1 of the rules of this court which for ease of reference reads thus:

> *Order 5 Rule 3(1) "Where a Respondent is represented by a legal practitioner, the Respondent shall also within thirty (30) days of the service of the Brief for the Appellant on him, file the Respondent's Brief which shall be duly endorsed with an address for service".*

By the provision of Order 5 Rule 3 (1) of the Rules of this Court before now reproduced, the respondent is required to file his Brief within 30 days from the date of being served with the Appellants Brief, which in this case was the 18th July, 2011. Learned Counsel for the Appellant filed his Brief of Argument dated 23rd day of March, 2011 on 13th July, 2011. Despite the service of several Hearing Notices on the Respondent, he failed and or neglected to file the respondent's Brief to the extent that only learned Counsel for the Appellants, Eze Ajuluchukwu Esq. adopted his Brief of Argument on the 25th of October 2011 after which this matter was adjourned for judgment.

The Appellants Brief of Argument served on the Respondent through Msuur Denga, a Legal Practitioner in the Chambers of M.T. STEPHEN & CO., (the Law firm of Solicitors and Advocates

representing the Respondent) whose address is at No. 3 Marakesh Crescent, off Kumasi Crescent Wuse 2, Abuja on 18th July, 2011 is as good as service on the Respondent.

On 5th of July, the Appellants and Respondent's Counsel were in court when leave was granted to the Appellants to appeal. The court also gave thirty (30) days to Appellants to file their Brief and 30 days to the Respondent to file his Respondent's Brief. On 27th September, 2011 Respondent's Counsel was not present in court. On 25th October, 2011 when the Appellants adopted their Brief in court, the Respondent was absent and there was no explanation from him why he was absent. The Respondent filed his Brief of Argument dated 17th day of October, 2011 over three months after the Appellant's Brief of Argument was filed. The filing of the Respondent's Brief on the 27th of October, 2011 is outside the period stipulated by the Rules of this Court. It was therefore filed out of time without any Application for extension of time within which to file.

It is a cardinal principle of law that Rules of Court must be obeyed. This principle was enunciated in ***Mohammed v. Klagester (Nig) Ltd (1996) INWLR (Pt 422) PP 54 at 61***, wherein the Court of Appeal held as follows:

> *"where the Respondent's Brief was not properly filed in other words filed well out of time and no necessary leave was obtained to file the Brief out of time up to the moment that the appeal is being heard and no attempt was made by the Respondent's Counsel to make even an oral application for leave to be allowed to regularize the situation, the supposed Respondent's Brief cannot therefore be considered. Also since no leave was asked for by the counsel for the Respondent to offer an oral argument and none was offered, the appeal was considered solely on the Brief of Argument filed by the Appellant".*

From the above cited *locus classicus* on the issue, I reach the inevitable conclusion that any document that is not properly before the court is incompetent. Since no leave was granted to the Respondent for extension of time within which to file the Respondent's Brief of Argument, the purported brief filed by him is incompetent.

The Court of Appeal also in ***I.F.C. v. D.S.N.L. Offshore Ltd (2008) 9 NWLR (PT 1093) 606 AT 631, Para D-E*** also held that:

> *``Rules of Court must prima facie be obeyed. The Courts have inherent jurisdiction to ensure compliance with the rules by litigant. The Courts always strike out any process not filed in accordance or in compliance with relevant rules''.*

The principle was reemphasized by the Supreme Court in ***Owners of the MV Arabella v. Nigeria Agricultural Insurance Corporation (2008) LPELR-SC 265/2002,*** where is held that:

``*It is now firmly settled that Rules of Court are not mere rules, but they partake of the nature of subsidiary legislations by virtue of Section 18(1) of the Interpretation Act and therefore, have the force of law. That is why Rules of Court must be obeyed. This is because and this is also settled that when there is non-compliance with the Rules of Court, the court should not remain passive and helpless. There must be sanction; otherwise, the purpose of enacting the rules will be defeated''.* This Court also holds the same view

Drawing strength from the above decisions and in the circumstance of this case in which the Respondent filed his brief three and half months later after receiving the Appellants Brief with no application, this court is minded to disregard the Respondent's Brief of Argument. I am particularly saddened by the lack of professional dexterity demonstrated by the Respondent's Counsel in the prosecution of this matter as well as his lackadaisical attitude in the pursuit of this matter. It is also noted that the Respondent did not appear in court all through the proceedings though it is not mandatory in civil matters but it is advisable for a client to monitor the pursuit of a matter in which Counsel has been engaged.

No attempt was made by the Respondent to even make an oral application for leave to be allowed to regularize the situation. The supposed Respondent's Brief cannot therefore be considered. Having observed that it is incompetent the proper thing to do in such situation is to strike it out. The said brief is hereby discountenanced with and accordingly struck out. Having struck out the Respondent's Brief of Argument, it is important to emphasize that the Appellants must succeed on the strength of their own case and not on the weakness of the Respondent's case.

Also since no leave was sought by the Respondent to offer an oral argument, the appeal shall therefore be considered solely on the Brief of Argument filed by the Appellants. Issue three is resolved in favour of the Appellants.

In conclusion, Issues One, Two and Three are resolved in favour of the Appellants. This Appeal hereby succeeds. The Suit before the trial court in Garki is incompetent and is hereby dismissed. There is no order as to cost.

Hon. Justice A.M.A Saddeeq, JCCA: The Appellant was the Respondent at the Grade A, Customary Court, Garki, in the FCT in a petition for the dissolution of her marriage with the present respondent

as the petitioner before the court below. This appeal is as a result of the dissatisfaction of the appellant with the ruling on her preliminary objection to the hearing of the petition at the court below whereat the appellants' objection was overruled. The detailed fact of this matter has been exhaustively captured in the lead judgment just delivered by my brother, Okaisabor, JCCA; I therefore need not repeat same. I shall however make a brief comment on some of the issues that arose in this appeal and to start with, I adopt the issues as formulated by learned counsel to the appellant, however with modification and to this end consider the appellant's issues as two issue by subsuming issue 3 into issue 1 to avoid proliferation of the issues which I think can be adequately dealt with under my modified issues: The two appellants' modified issues and the third issue formulated by the court suo motu are:- whether the provision of the Evidence Act, particularly Section 111 (now 104 (1) and (2) (Amended), is applicable in the Customary Court Act 2007 and the Evidence Act 2011 (Amended).

Whether the principle of Res judicata is applicable to this matter as instituted before the court below.

Whether the Brief by the respondent on the 27th day of October, 2001 two days after the conclusion of hearing of the appeal, in breach of the provision of Order 5 Rule 3 (1) of the Customary Court of Appeal Rules, 1996, is competent. This issue is raised by the court suo motu.

I will only make abridged contribution touching on the above issues as same have been adequately dealt with in the lead judgment. I will start with the last issue which relates to the brief filed by the respondent but before considering the issue, I think the conduct of counsel attracted the courts' observation.

A counsel or legal practitioner before the court is regarded as a minister in the sacred temple of Justice. In ***Re: Opekun (2002) 6 NWLR (Pt. 870) 594;*** who is required to discharge his obligation both to the court and the litigant with the flavour of professionalism and to ensure this "… it is the responsibility of counsel briefed by a litigant to conduct the case to the best of his professional ability"**. *Alibi v. Oloya (2001) 6 NWLR (Pt 708) 42.*** I am deeply saddened with great respect, to observe that this required standard has not been demonstrated by the respondents' counsel, who in his own imagination thinks this court can be cowed by his ploy or should wait for him to awake from his more than 90 day slumber or trance before it can proceed with the hearing of this appeal. Counsel "… is not left at large willy nilly to feign a practice in legal procedure … he… should… always endeavour to file document bearing in mind the requirement of the law…**" *Adisa v. Teno***

Engineering Ltd (2001) 1 NWLR (Pt 695) 650. Being seized of the case, learned counsel ought to have been aware of the rules of court: ***Ibori v. Agbi (2004) 6 NWLR (PT 868) 132*.** This is not what has been demonstrated by learned counsel who after waking from his slumber of more than 90 days from the date he was served with the appellants' brief, only deemed it appropriate to file the respondents brief at a time convenient to him, regardless of the rules of this court. Counsel ought to be aware of any fundamental defect in the case and take steps to rectify same: ***Alibi v. Oloya (supra) 42.***

Returning to the third issue which I have earlier indicated I will start with, the brief was filed after more than 90 days from the day the appellants' brief was served on the respondent instead of within the period of 30 days allowed by rule 3 (1) of Order 5 of this courts' Rules, without taken steps to rectify the anomaly. No order extending time was sought and obtained from this court by the respondents' counsel before filing the respondents' brief on the 27th day of October, 2001, neither was there any application before this court for the extension of time within which to file the respondents' brief. Even as at today, the judgment would have been arrested had learned counsel realized that fundamental error by filing the said application to reggularise the defect, but having failed to do that has rendered as incompetent or improperly filed the supposed respondents' brief. This is a very unfortunate development. The consequence of this defect is that the filed bundle of papers called ``RESPONDENT'S BRIEF OF ARGUMENT'' do not qualify for the courts' consideration*:* ***Mohammed v. Klargester (Nig) Ltd (1999) 1 NWLR (Pt 422) 61.*** Learned counsel having been engaged by the appellant to handle this appeal is presumed to have the competence to do so to the satisfaction of appellant: ***A.G. Akwa Ibom State v. Essien (2004) 7 NWLR (Pt 872) 323;*** *this competence I cannot vouch has been displayed by learned counsel to the respondent in this appeal.*

Before leaving this issue, due to the conventional frequent absence of the respondent whenever this matter comes up, the matter cannot be salvaged. Of course, it is not mandatory for him to appear before this court since he assumed he is adequately represented by his counsel, however, his presence would have afforded him the privilege to know whether or not his matter is being handled in the way or manner it should or is getting the worth of the services he was paying or paid for. At times it is not enough to remain in the shell of comfort of one's environment assuming all is well since a legal practitioner has been engaged to handle the matter. Even where a litigant is a layman in the law which is the language of the court, being present in the court when his matter is been heard will certainly afford him the opportunity of accessing if all is well within his camp and if not, it will afford him the basis upon which he can decide to either continue with his counsel or debrief

the counsel because since he pays the piper he certainly has the right to some extent to dictate the tune. I have said enough on conduct of both counsel and the litigant.

The brief of the respondent filed out of time without extension of time to do that is regarded by me as a worthless bundle of sheets of papers which is not competent before this court, to put it mildly, and that being so, the proper order to make in this circumstance is to strike it out. I accordingly hereby strike our same. I must hasten to state that the address of counsel on this issue raise by the court suo motu was not called for because being an issue related to the provision of the rule of court, the situation with not be altered by counsels' address as distinct to an issue which related to facts simplicita. This issue is resolved in favour of the appellant.

Coming to issue **1**, I am of the opinion that the resolution of this issue will adequately deal with the appellants Issues **1** and **3**. For the Customary Court to take shelter under the provision of Section 111 (now 104 (1) & (2) of the Evidence Act, 2011, (amended), it must be a law that is applicable in that court. Therefore in the consideration of this issue, recourse is had to the provisions of the Evidence Act, 2011, (Amended) and the relevant applicable law which in this case is the Customary Court Act, 2007.

I will restrict myself only to the application of the Evidence Act in the Customary Court and in that regard I do not think the submisions of the appellant as canvassed in paragraphs 5.0 to 5.22 of his brief will be relevant for consideration without first determining whether or not the provisions of the Evidence Act are applicable in the court below. Without much ado, by the provision of section 256 (1) (C) of the Evidence Act, 2011, (amended), the provisions of the Act are not applicable to proceedings in the customary courts unless there exists a specific provision to that effect: ***Kplishi Kousu v. Vanger Udom (1990) LPELR, 32, (1990) 2 S.C. 138*** which relied on ***Latunde v. Lajinfin (1989) 5 SCNJ 59, 65 – 66.*** The specific provision contemplated in section 256 (1) (c) under reference leads me to the provision of section 65 of the Customary Court Act, 2007, wherein the provision of the Evidence Act to be applicable to judicial proceedings in the Customary Court and this court have been specifically mentioned and section 11 (now 104) incidentally is not one of those provisions.

Going through the appeal record, I am convinced that the court below erroneously bound itself with the provision of (now 104 (1) and (2) of the Evidence Act 2011, (Amended)), to declare that the Record of Proceedings of the Upper Area Court, Okpo, Kogi state attached to the preliminary objection raised before it to ground a plea of *estoppel per res judicata*, did not meet the stipulations

or requirements of a Certified True Copy, therefore it rejected the document. I find the court below to be in gross error to have embarked on that wild goose chase which I view as a worthless academic exercise in futility, because that provision is not amongst those specifically provided for under the provision of section 65 of the Customary Court Act, 2007 which is the enabling enactment via which the court below came into existence, and this being the case, I am left with no option than to set aside that finding. I will therefore not bother to go into the merits or demerits of the submissions of the appellant as contained in paragraphs 5.0 to 5.22 of her brief as they relate to the findings of the court below in relation to the inapplicability of the provision of section 111 (now 104 (1) and (2) of the Evidence Act, 2011, (Amended)). This issue is hereby resolved in favour of the appellant on this ground.

Finally on the 2nd issue which relates to the applicability of the principle of res judicata to this matter, I think it is pertinent to first know what it connotes. In view of the need to have an end to litigation, parties affected are stopped from initiating a fresh action on the same cause or matter already pronounced upon by a court of competent jurisdiction in a previous action: ***Onylakin Balogun v. Adedosu Adejobi (1995) 2 NWLR (Pt. 376) 131, Aromba v. Odiese (1990) 1 NWLR (Pt. 125) 178.*** For this plea to be successfully pleaded, the parties must be the same in both the previous and subsequent proceedings, the claim or issue in both actions must be the same, the subject matter must also be the same in the suits and the existence of a valid, subsisting and final decision from a court of competent jurisdiction: ***Adone v. Ikebudu (201)7 MJSC, 190-191.***

From the appeal record inclusive of the record of proceedings from the Upper Area Court Okpo, in Kogi State, I am satisfied that the constituents of a successful plea of *res judicata* have been established by the appellant. Perusing the civil summons from the court below issued on 19th January, 2010, the plaintiffs' (now respondent) claim therein is "Dissolution of marriage" between the defendant (now appellant), and 'Child Custody". This was the same cause of action at pages 2 and 3 of the Upper Area Court Record. No evidence that the judgment is not subsisting or was not given by a court of competent jurisdiction. Reliefs sought by respondent on 19th January, 2010 were already granted by the Upper Area Court since 28th November, 2005 almost 5 years before the institution of this suit by the respondent at the court below. The court below was in error to have been blindfolded by the requirement in the provision of section 111 (now 104 (1) and (2) of the Evidence Act, 2011, (Amended)), which it was not empowered to apply by virtue of the Evidence Act section 256 (1) (c) of the Evidence Act, 2011 (Amended) and section 65 of the Customary Court Act, 2007. This had resulted to wrong overruling of the respondents' plea of res judicata. Invoking

the powers of this court under the provision of Order 6 rule 1 of this courts' Rules, the Upper Area Court was directed to certify and forward a copy of the proceeding between the parties and sequel to the receipt of the record from that court below, I also will come to the conclusion that this matter is caught up by the principle. A plea of lack of knowledge of the matter at the Upper Area Court cannot operate to render as none subsisting a valid decision made by a court of competent jurisdiction. Having been caught by the principle of estoppel per res judicata, I hold that the action before the court below was incompetent following a successful plea of *res judicata*, and this been so, I hereby dismiss the action at the court below. It is frivolous, vexatious and an abuse of the courts' process. The respondent can explore any available option if he has any complaints against the existing valid judgment of the Upper Area Court, Okpo, in Kogi State. Again this issue is resolved in favour of the appellant.

In summation, this appeal is allowed by me too. The Order of the court below is hereby set aside and in substitution the respondents suit before the said court below is hereby dismissed having been caught by the doctrine of Res judicata. I make no order as to cost.

Hon. Justice M.G. Gwagwa, JCCA: I read, in advance, the lead judgment prepared by my learned brother Ngozika Okaisabor, JCCA and I agree entirely with the reason and conclusion that the appeal succeeds. The suit before the trial court Garki is incompetent and is also hereby dismissed.

Hon. Justice Usman N. Ahmed, JCCA: Having been privileged to read before now the judgment of my learned brother, Hon. Justice Ngozika Okaisabor, JCCA just delivere, I am in agreement with the reasoning in the said judgment, the appeal is allowed by me in all the terms set out therein.

APPEAL ALLOWED

AMAECHI NWATU

V

EVELYN ORAEGBUNAM

Appeal No**. FCT/CCA/CVA/33/2010**

HON. JUSTICE S. ADEKUNLE LAWAL, JCCA (Presided)

HON. JUSTICE USMAN N. AHMED, JCCA

HON. JUSTICE ISTIFANUS GANDU, JCCA (Delivered the Leading Judgment)

26th October, 2011

APPEAL-	*Issues for determination on appeal – determination by appellate court – where subject matter not within jurisdiction of court.*
COURT-	*FCT Customary Court of Appeal- Jurisdiction of – Jurisdiction over monetary claims*
JURISDICTION-	*Jurisdiction of the FCT Customary Court of Appeal – Source of – Extent of – jurisdiction over monetary claims*
WORDS AND PHRASES-	*Question or issue of customary law – meaning of – what amounts to*

ISSUE

Whether this court has jurisdiction to entertain this appeal in view of the provision of the section 267 of the Constitution.

FACTS

The facts of this case are not in dispute. The Respondent in this appeal was the Plaintiff at the trial Customary Court Karimo. The Respondent on the 12th day of August, 2010 filed a claim against the Defendant (Appellant) for the following:

(1) The sum of N750,000.00 (Seven Hundred fifty Thousand naira only)
(2) The return of the specimen Diamond cutting disk

(3) The sum of N20,000.00 for 12 months payable to the Reynolds Construction Company (RCC)
(4) 5% interest on the sum of N750,000.00 for 12 months, making a total of N450,000.00

On the 22nd November, 2010 the trial court after hearing the matter gave judgment in favour of the plaintiff in which the defendant was ordered to pay to the plaintiff the sum of N750,000.00 (Seven Hundred and Fifty Thousand naira) only on or before the 22nd December, 2010 and the payment may be in installments. The trial court further ordered a return of the Diamond cutting disk on or before the 22nd December, 2010 and assessed cost of N5,000.00 (Five Thousand naira) only in favour of the plaintiff.

Dissatisfied with the decision, appellant herein has field this appeal.

HELD (Striking out the Appeal):

1. **On whether a court can determine issues raised in an appeal where the subject matter is not within its jurisdiction.**
   If this court does not have jurisdiction to entertain this matter the jurisdiction to entertain the ground and the issues raised before us will equally be absent see ***Ajamole v. Yaduat (NO.1) (1991) 5 SCNJ 172*****.**
2. **On source of jurisdiction of the FCT Customary Court of Appeal**
   The jurisdiction of a court is a creation of statute. The jurisdiction of the FCT Customary Court of Appeal is not an exception.
3. **On extent of the jurisdiction of the FCT Customary Court of Appeal**
   Section 267 off the Constitution empowers this court to hear appeals and review the decisions of lower courts in civil proceedings provided they involve questions of customary law in the first part. In the second part, it gives room for the National Assembly to give additional jurisdiction to this court.
4. **On meaning of the phrase "*question or issue of customary law"***
   On what is question or issue of Customary Law, there are diverse authorities in which the question has been answered to mean and include:-
   (1) When the controversy involves a determination of what a relevant customary Law is;
   (2) The application of the Customary Law so ascertained to the question in controversy;
   (3) Where there is a dispute as to the extent and manner in which such applicable Customary Law determines and regulates the rights, obligations or relationship. Such

dispute can be regarded as a decision in respect to question of Customary Law. **See *Pam v. Gwom (2000) 2 NWLR (PART 644); Hirnor v. Yongo (2003) 9 NWLR (PART 824) Pp 98-99.***

5. **On whether questions other than applicable customary laws amounts to issue or question of law**

   Where the decision turns on question of facts purely, or on question of procedure and this court does not need to resolve any dispute as to what the relevant or applicable Customary Law is, no issue or question of Customary Law arises. ***Hirnor v. Yongo Yongo (2003) 9 NWLR (PART 824) Pp 98-99..***

6. **On whether the Customary Court of Appeal can has jurisdiction over monetary claim**

   This court can hear and determine an issue of prove of monetary claim, as jurisdiction over monetary claim if it germinates from proceeding involving question of Customary Law. See Sec.,267 (1) of the 1999 Constitution; ***Nwaigwe v. Okere (2008) NWLR PART 1105 445***.

Cases cited in this Judgment

Ajamole v. Yaduat (NO.1) (1991) 5 SCNJ 172.
Customary Court of Appeal Edo State v. Aguele (2006) 12 NWLR pt 995 at 545
Hirnor v. Yongo (2003) 9 NWLR (PART 824) Pp 98-99
Ndaeyo v. Ogunya (1977) 1 IMSLR 300
Nwaigwe v. Okere (2008) NWLR PART 1105 445
Odukwe v. Achebe (2008) 1 NWLR PART 1067 page 40
Pam v. Gwom (2000) 2 NWLR (PART 644)
Zubusky v. Isreali Aircraft Industries (2008) 2 NWLR PART 1070 at 109

Statutes/Rules of Court/Books referred to in this Judgment

Federal Capital Territory Customary Court Act, 2007
Halbury's Law of England vol. 10, 4th Edition, paragraph 715

Appearances:

C.A. Nwachukwu Esq, for the appellant
Udeogu Obinna Esq, for the Respondent.

Hon. Justice I. Gandu, JCCA (Delivering the Leading Judgment): The facts of this case are not in dispute. The Respondent in this appeal was the Plaintiff at the trial Customary Court Karimo. The

Respondent on the 12th day of August, 2010 filed a claim against the Defendant (Appellant) for the following:

(5) The sum of N750,000.00 (Seven Hundred fifty Thousand naira only)
(6) The return of the specimen Diamond cutting disk
(7) The sum of N20,000.00 for 12 months payable to the Reynolds Construction Company (RCC)
(8) 5% interest on the sum of N750,000.00 for 12 months, making a total of N450,000.00

On the 22nd November, 2010 the trial court after hearing the matter gave judgment in favour of the plaintiff in which the defendant was ordered to pay to the plaintiff the sum of N750,000.00 (Seven Hundred and Fifty Thousand naira) only on or before the 22nd December, 2010 and the payment may be in installments. The trial court further ordered a return of the Diamond cutting disk on or before the 22nd December, 2010 and assessed cost of N5000.00 (Five Thousand naira) only in favour of the plaintiff.

DISSATIFIED WITH THE WHOLE DECISION THE DEFENDANT VIA HIS COUNSEL C.A. Nwachukwu Esq., has appealed to this Court by a notice and a ground of Appeal dated the 10th December, 2010 and filed on the 16th day of December 2010. The Notice, as I said, contains only one ground of Appeal, the general or the omnibus ground of Appeal. The ground of appeal is as follows:

> *"The Whole judgement is unreasonable and cannot be supported having regard to the weight of evidence adduced*"

There was an impression that further grounds of Appeal shall be filed on receipt of record of the court below. No such further ground (s) was or were filed. Based on this sole and omnibus ground of Appeal, both parties through their counsel exchanged written briefs of arguments. On behalf of the Appellant the Appellant's brief was filed on the 18th April, 2011. Udeogu Obinna Esq on behalf of the Respondent's filed the Respondent brief on the 18th June, 20111.

In the appellant's brief, the following issues are raised for the consideration of this Court:-

"ISSUES FOR DETERMINATION

1. *Whether the lower court has jurisdiction to entertain and hear this case and if so, whether the plaintiff proved that she was entitled to the whole sum of N750,000.00 or the goods already imported?*
2. *Whether the trial Judges discharged their duty to evaluate well the evidence put forward by the appellant"*

The Respondent did not adopt the appellant's issues, for determination. In total disregard to the Rules of this court and Rule of good practice, formulated four different issues for determination thus:

a. *Whether the proper parties were before the court? If the answer is no, does that alone rob the court of jurisdiction?*
b. *Whether the plaintiff/Respondent need to prove her case in the light of the plea of the Defendant/Appellant which amounted to an admission."*
c. *Whether the Defendant/Appellant can introduce new evidence in the appellant's brief as against what is contained in the record of proceedings*
d. *Whether judgement of the lower court is sustainable in the light of the totality of the evidence brought before the court."*

Both parties at the hearing of this appeal adopted their briefs written and argued based on these issues formulated. At the close of hearing this court *suo motu* raised the following issue thus:

> "whether this court has jurisdiction to entertain this appeal in view of the provision of the section 267 of the Constitution"

Both counsel in this matter were called upon to further address this court on this issue.

C.A. Nwachukwu Esq, of the counsel to the appellant addressing this court on this issue, submitted that jurisdiction is very important and is the cornerstone or tough light in the judicial process. He referred us to Halbury's Law of England vol. 10, 4th Edition, paragraph 715, wherein jurisdiction is defined as the authority which the court has to decide matter(s) that are litigated before it. On this he further referred this court to the cases of ***Ndaeyo v. Ogunya (1977) 1 IMSLR 300, Odukwe v. Achebe (2008) 1 NWLR PART 1067 page 40 and Zubusky v. Isreali Aircraft Industries (2008) 2 NWLR PART 1070 at 109.*** He referred us to section 267, 1999 Constitution.

Counsel submitted that the provision of section 267 is very clear that the Customary Court of the Federal Capital Territory, Abuja has appellate and supervisory jurisdiction over Customary Court in civil proceedings involving questions of customary Law and that this is in addition to such other jurisdiction as may be conferred by an Act of National Assembly. Counsel posited that such additional jurisdiction has been given by the Act of National Assembly. He referred to sections 19 and 20 Federal Capital Territory Customary Court Act, 2007. He also referred us to Order 6 Rules 1, 3 and 7 (1) Customary Court of Appeal Rules, 1996 to the sole effect that this court has jurisdiction to entertain this matter. He finally urged us to look into the case or rehear it or even send it back for retrial as the case may be.

In response to these arguments counsel to the Respondent Udeogu Obinna Esq, submitted that jurisdiction is a creation of statute and that the jurisdiction of this court is conferred by section 267 of the 1999 Constitution. He argued that by the provision of this section the jurisdiction is limited to appeals in civil proceeding involving questions of Customary Law. He said that it is trite that appellate jurisdiction is based on the grounds of Appeal filed before it. He contended that the ground of Appeal filed herein and the issues formulated in the appellant's brief does not by any manner of interpretation raised, questions of Customary law. He further submitted that Section 267 mentions other jurisdiction as may be conferred by National Assembly but that there is no such Act known to him. That even if such Act is made, it cannot confer jurisdiction that does not bother on question of Customary Law. He referred us to the case of ***Customary Court of Apeal Edo State v. Aguele (2006) 12 NWLR PART 995 at 545 particularly at 564 and 565 para E.*** He concluded that this court lack jurisdiction to entertain this matter and urged us to strike out this matter.

I shall postpone the consideration of the merit or the propriety of the ground and the issues raised by the parties for the determination of this appeal. I shall first proceed to consider the issue of jurisdiction raised *suo motu* by this court. This is necessarily so because if this court does not have jurisdiction to entertain this matter the jurisdiction to entertain the ground and the issues raised before us will equally be absent see ***Ajamole v. Yaduat (NO.1) (1991) 5 SCNJ 172.*** The jurisdiction of a court is a creation of statute.The jurisdiction of this court is not an exception. The jurisdiction of this court is clearly set out in section 267 of the Nigerian constitution, 1999.

The Section provides as follows:

> "The Customary Court of Appeal of the Federal Capital Abuja shall in addition to such other jurisdiction as may be conferred upon it by an Act of National Assembly,

exercise such appellate and supervisory jurisdiction in civil proceedings involving question of Customary Law."

I have considered the submission of both counsel and the import of section 267 of the 1999 Constitution. Section 267 off the Constitution empowers this court to hear appeals and review the decision of lower courts in civil proceedings provided they involve questions of customary law in the first part. In the second part, it gives room for the National Assembly to give additional jurisdiction to this court. This leads to the consideration of the following issues:

i. What is question or issue involving Customary Law?
ii. Whether this appeal involves question of Customary Law
iii. Whether this National Assembly has by an Act given additional jurisdiction to this court.

On what is question or issue of Customary Law, there are diverse authority in which the question has been answered to mean and include:-

(4) When the controversy involves a determination of what a relevant customary Law is;
(5) The application of the Customary Law so ascertained to the question in controversy;
(6) Where there is a dispute as to the extent and manner in which such applicable Customary Law determines and regulates the rights, obligations or relationship. Such dispute can be regarded as a decision in respect to question of Customary Law. **See *Pam v. Gwom (2000) 2 NWLR (PART 644); Hirnor v. Yongo (2003) 9 NWLR (PART 824) PP98-99.***

Where the decision turns on question of facts purely, or on question of procedure and this court does not need to resolve any dispute as to what the relevant or applicable Customary Law is, no issue or question of Customary Law arises. ***Hirnor v. Yongo (supra).***

As to whether this appeal involves question of Customary Law. It is pertinent to look at the Ground of Appeal filed and the issues formulated there from for the determination of this court. In doing this I wish to point out that I cannot look at the issues formulated by the Respondent in this appeal because the Respondent did not seek the leave of this court or filed a Respondent Notice as to enable him raise issues different from those of the Appellant. Having said this, I am left with only the issues formulated by the Appellant to consider whether they involve question of Customary Law.

For ease of reference, the issues formulated from the sole ground of appeal and filed before this court are:

i. *whether the lower court has jurisdiction to entertain and hear this case and if so whether the plaintiff was entitle to the whole sum of N750,000.00 (Seven Hundred and Fifty Thousand) or the goods already imported.*
ii. *whether the trial judges discharged their duty to evaluate the evidence put forward by the Appellant,*

The claim before the trial court as agreed by both parties is for N750,000.00 (Seven Hundred fifty thousand only), return of Diamond cutting Disk, claim of N20,000.00 (Twenty thousand Naira only) monthly for as 12 months loss of used to Reynold Construction Company (RCC) and 5% interest on the N750,000.00 (Seven Hundred fifty thousand only) being the money paid for the supply of the Diamond cutting Disk.

It is the evaluation of the evidence led in the trial of this claim that the issue formulated relates. I do not see how this falls within the definition of what constitute an issue or question of Customary Law as set out herein before. This court can hear and determine an issue of prove of monetary claim, as jurisdiction over monetary claim if it germinates from proceeding involving question of Customary Law. See Sec.,267 (1) of the 1999 Constitution; ***Nwaigwe v. Okere (2008) NWLR PART 1105 445***. It is my candid view that a commercial transaction, as it is in the instant case does not fall within the category.

On whether the National Assembly has by any Act, given additional jurisdiction to the court. We have been urged by the counsel to the Appellant that section 19 (1) and 20 of the Customary Court Act 2007 allow us to assume jurisdiction in this matter. With due respect to learned counsel, these section are blatantly cited out of context. The sections are not helpful in the determination of this appeal. Section 19 deals with requirement that evidence at customary Court should be in accordance with the rules of Customary Law and the overriding consideration of substantial justice. Section 20, provides that practice and procedures shall be in accordance with Customary Law.

Counsel further urged us to assume jurisdiction because the matter emanates from a Customary Court (Customary Court Karimo). He cited Order 6 Rule 1,3 and 7 (1). I wish to say that the entire Order 6 deals with the general powers of this Court over cases involving question of Customary Law. There is no where it is provided in the Order cited that this court is allowed to hear appeal

outside its jurisdiction as defined in section 267. The argument of counsel to the Appellant that since this matter emanates from Customary Court Karimo, it is this Court that has jurisdiction to hear and determine the Appeal appears to find favour from Section 48 (1) F.C.T Customary Court Act, 2007. But sub-section 2 of section 48 has unambiguously dealt with the merit of this argument as it is made subject to existing laws regulating the practice and procedure and more strongly the Constitution. See Section 1(3) of the 1999 Constitution.

On the whole, it is my candid position that this court does not have jurisdiction to entertain this appeal, the appeal must fail and same is hereby struck out.

Hon. Justice S. K. Lawal, J.C.C.A: I have had the advantage to preview the judgement of my learned brother Hon. Justice Istifanus Gandu and I entirely agree with the reason given by him I also agree with the conclusion.

Hon. Justice Usman N. Ahmed, J.C.C.A: I agree with the judgement just delivered by my learned brother, Hon. Justice Istifanus Gandu. I have nothing more to add.

APPEAL STRUCK OUT

MR. MARTIN IKI

EMMANUEL IKI

V

AISHA (JULIET) USHANG

Appeal No.: **FCT/CCA/CVA/29/2010**

HON. JUSTICE A.M.A. SADDEEQ, JCCA (Presided)

HON. JUSTICE M.G. GWAGWA, JCCA

HON. JUSTICE ISTIFANUS GANDU, JCCA (Delivered the Lead Judgment)

9th February, 2012

COURT- *Jurisdiction of – exercise of- subject not within its jurisdiction*

JURISDICTION- *FCT Customary Court of Appeal – Territorial Jurisdiction of – scope of*

ISSUE

Whether the trial Customary Court has jurisdiction to hear the Appellant's case vide originating civil complaint before it.

FACTS

The Appellants herein at initiated an action for injunction against the Respondent and a declaration that the Respondent was not the daughter of their late brother Denis Iki and therefore not entitled to the house at Kwankwashe, Niger State the Customary Court, Mpape on the 22nd March, 2010 or in the alternative, a declaration that even if the Respondent was the daughter of Denis Iki, the estate of the late Denis Iki shall devolve in accordance with the native Law and Custom of Bidia village in Cross River State which vest ownership of the estate on the 1st Plaintiff as head of the family, in trust for the Iki family. In response to this action, the Respondent via her Counsel filed a preliminary objection challenging the jurisdiction of the trial court to hear and determine the suit. After the hearing of the objection, the trial court upheld the objection and struck out the suit on ground of incompetence.

Dissatisfied by the said ruling, the appellant has filed this appeal.

Cases cited in this Judgment

A.G. Federation v. Guardian Nigeria Newspaper Ltd. (1999) 9 NWLR (PART 618) 187;

Abacha v. Fawehinmi (2000) 6 NWLR (PT 660) 228

Action Congress v. INEC (2007) 18 NWLR (PART 1065) 50.

Alphonsus Nkuma v. A. G. Federation (2007) 148 LRCN 1282 at 1308

Chief Michael Okonyia v. Nnamdi Ikengah & Anor (2001) 2 NWLR (PT 697) 336

Dairo v. Union Bank of Nigeria PLC. & Anor (2007) 11, NWLR (PT 1059) 99

Dr. T.E.A. Salubu v. Mrs. Benedicta Nwariaku & Ors (1997) 5 NWLR (PART 505) 442

Ina v. UBA PLC (1997) 4 NWLR PART 498 @ 188.

Ogunro & Ors v. Ogedemgbe & Ors (1960) NSCC at 98

Okonyia v. Ikengah (2001) PART 697 at 362 SCC 98 at 100;

Salubi v. Nwariaku (1997) 5 NWLR (PART 505) at 468.

U.B.A. Plc v. BTC Industries Limited (2007) 148 LRCN 1189

Statute/Rules of Court/Books referred to in this Judgment

FCT Customary Court Act, 2007

HELD (Dismissing the Appeal)

1. **On the territorial jurisdiction of the Customary Court of FCT**
   By the provision of Section 14 (1) of the Customary Court Act, 2007**,** the Customary Courts of the FCT, Abuja have jurisdiction over person within the territorial limit of the Court who submits to it.
2. **On whether the Customary Court of FCT can exercise jurisdiction over persons outside its territorial jurisdiction.**
   In such a situation, the best the Court can do is to make declaration as to the entitlement of the beneficiaries. It cannot validly pronounce that parties be given estate outside jurisdiction. ***Ogunro & Ors v. Ogedemgbe & Ors (1960) NSCC at 98 Okonyia v. Ikengah (2001) PART 697 at 362 SCC 98 at 100; Salubi v. Nwariaku (1997) 5 NWLR (PART 505) at 468.*** In the instant case, the Defendant and 2nd Plaintiff are outside jurisdiction of the trial Court. By section 14 (i), the Court cannot assume jurisdiction over them.
3. **On whether a court can assume jurisdiction on a case subject of which is not within its jurisdiction**.
   It is trite Law that if a subject matter is not within the jurisdiction of the Court, the Court cannot rightly under any canopy of interest assume jurisdiction. See ***Action Congress v. INEC (2007) 18 NWLR (PART 1065) 50.***

APPEARANCES:

Bassey O. Ewang Esq. for Appellants

M.S. Bashir Esq. or the Respondent

Hon. Justice Istifaus Gandu, JCCA (Delivering the Lead Judgment): The Appellants in this appeal were the Plaintiffs and the Respondent the Defendant at the trial Customary Court, Mpape, FCT, Abuja. The Appellants at Customary Court, Mpape on the 22nd March, 2010 initiated an action for injunction against the Respondent and a declaration that the Respondent was not the daughter of their late brother Denis Iki and therefore not entitled to the house at Kwankwashe, Niger State. Alternatively, a declaration that even if the Respondent was the daughter of Denis Iki, the estate of the late Denis Iki shall devolve in accordance with the native Law and Custom of Bidia village in Cross River State which vest ownership of the estate on the 1st Plaintiff as head of the family, in trust for the Iki family.

In response to this action, the Respondent via her Counsel filed a preliminary objection challenging the jurisdiction of the trial court to hear and determine the suit. After the hearing of the objection, the trial court upheld the objection and struck out the suit on ground of incompetence.

The Appellants have via their Counsel on 28th September, 2010 filed this appeal against the Ruling of the Trial Court. The Notice of Appeal contains two Grounds of Appeal thus:

"GROUNDS OF APPEAL:

1. ***Ground 1***

   The Learned Judges of the Customary Court erred in law when they held thus: "if you look at the complain BEFORE THE Court by the Learned Plaintiffs/Appellants' Counsel, it is quite clear it falls within the confines of the jurisdiction of this Court… to try" but still went ahead to uphold the objection of the Defendant/Respondent.

Particulars of Error:

(i) The Learned Judges of the Customary Court did not properly scrutinize the Appellants' originating civil complaint to determine whether the subject matters of the Suit are such

that the Court could assume jurisdiction over. They exercised their discretion arbitrary and hereby occasioned a miscarriage of justice".

Ground 2

The Learned Judges of the Customary Court erred in law when they failed to properly evaluate the Defendant/Appellant's preliminary objection vis-à-vis the argument of Counsel for both sides thereby upholding the objection of the Defendant/Respondent and striking out the Plaintiff/Appellant's case.

Particulars of Error:

The Learned Judges failed to abreast themselves with the material placed before the Court by parties including judicial authorities relied upon by Counsel to the parties and thereby exercised their discretion arbitrarily. This occasioned a miscarriage of justice.

Based on these Grounds of Appeal, Counsel to the parties exchanged their briefs of argument. The Appellants on the 10th June, 2011 via their Counsel filed the Appellant's brief. The Respondent's brief dated 22nd June, 2011 was filed on the same day. The Appellants reply brief dated 8th day of July was filed on 12th day of July, 2011.

Counsel to the Appellants has formulated only one issue for determination of this Court, which issue the Respondent's Counsel has adopted with addition of territorial. I can now safely say the issue formulated by both Counsels for determination is as follows:

"*Whether the trial Customary Court has jurisdiction to hear the Appellant's case vide originating civil complaint before it".*

This issue relates only to ground one. There is no issue formulated on ground two, I take it as being abandoned accordingly. See the case of ***Ina v. UBA PLC (1997) 4 NWLR PART 498 @ 188.***

I agree with Appellant's Counsel on the issue formulated for consideration because it is wider. If it is resolved, it will settle this appeal either way. The appellant's Counsel in his brief submitted that what gives a Court jurisdiction is the Plaintiff's claim (the Plaintiff's civil complaint at the trial court). He referred us to the following cases: ***Attorney General of the Federation v. Guardian Nigeria Newspaper Ltd. (1999) 9 NWLR (PART 618) 187; Abacha v. Fawehinmi (2000) 6 NWLR (PT 660) 228; Alphonsus Nkuma v. Attorney General of the Federation (2007) 148 LRCN 1282***

at 1308; United Bank for Africa Plc v. BTC Industries Limited (2007) 148 LRCN 1189 AT 1213 – 1214.

Based on these cases, he argued that the moment the subject matter and the reliefs sought are within the jurisdiction of the Court, the Court can assume jurisdiction. He referred us to the claim filed at the trial court which contains two categories of reliefs, namely: injunctive relief of tort against the Defendant and a declaratory relief touching on the administration of late Denis Iki's estate at Kwankwashe, Niger State. It is the contention of Counsel to the Appellants that the tort of harassment and intimidation occasioned against the Plaintiffs occurred at both Suleja and Kuje, Abuja, and this gives the Trial Court Jurisdiction. He referred this Court to the case of ***Dairo v. Union Bank of Nigeria PLC. & Another (2007) 11, NWLR (PT 1059) 99*** to the effect that the proper venue for determining a case bothering on tort is the place where the tort was committed. He argued that the tort of intimidation and harassment of the 1st Plaintiff for which the 1st relief related, occurred in Kuje, within the Jurisdiction of this Court; and that one of the Plaintiffs (1st Appellant) resides and does business in Kuje, Abuja within the jurisdiction of trial court.

He concluded by contending that even if the subject matter were to be located at Kwankwashe, the trial court will still have jurisdiction to grant the reliefs sought in this suit because the Court has jurisdiction over land outside its territorial jurisdiction. He referred us to the cases of ***Dr. T.E.A. Salubu v. Mrs. Benedicta Nwariaku & Ors (1997) 5 NWLR (PART 505) 442 at 450 ratio 6 and 468 Paras E – G; Chief Michael Okonyia v. Nnamdi Ikengah & Anor (2001) 2 NWLR (PT 697) 336 at 342 RATIO and 362 Paras F – H.*** He urged us to dismiss the objection.

In response to the Appellants Counsel's argument, the Respondent's Counsel submitted that before a Court can assume jurisdiction, the subject matter must be within the jurisdiction of the Court. He referred us to the case of ***Bawa v. Itag M. (2007) 8 WRN 57,*** he also agreed that the Court derived its jurisdiction from the Plaintiff's claims at the trial court and the affidavit filed in opposition to the preliminary objection show clearly that the trial Court lack territorial jurisdiction to entertain the matter because the case is on distribution of the estate of late Denis Iki in accordance with the Bidia Native Law and Custom of Obudu Local Government of Cross River State where he lived and died and the estate is at Kwankwashe, Niger State. That the 2nd Plaintiff and the Defendant also lived in Niger State. On these, he referred us further to the case of ***Adetoyo & Ors v. Ademola & Ors (2011) 193 LRCN 190 AT 195.*** He submitted further that section 14 and 18 of the Customary Court Act, 2007 did not empower the Lower Court to assume jurisdiction in cases of this nature. According to

him, Customary Courts only have jurisdiction to try cases that arise from Customary Practices of the area under its jurisdiction. He said the trial Court was right to decline jurisdiction because the case did not arise from FCT, and parties do not live in FCT. He referred us to the case of ***Ladimeji v. Solomon 1973 NLR 60.***

He submitted that the deceased whose property is sought to be distributed in accordance with Native Law and Custom of River State has never lived in Abuja but lived and died in Kwankwashe Niger State and the house, and the 2nd Plaintiff and the Defendant both lived in Niger State.

He further submitted that the case at the trial was a case of succession of the property of late Denis Iki, was purely a case of customary inheritance and not a tort. He denied that the Respondent has ever threatened the Appellants.

He concluded by saying that the appropriate place to institute this action is in Niger State and that by virtue of Section 14 and 18 of the Customary Court Act, 2007 the trial Court was right to have declined jurisdiction.

From the foregoing, it is common ground that the Plaintiffs claim at trial Court is as contained in paragraph 35 of the complaint. It is also common ground that the 1st Plaintiff lives at Kuje, in the Federal Capital Territory and the 2nd Plaintiff and the Defendant live in Niger State. It is further a common ground that the house which is one of the subject matter in the action is situated and lying in Kwankwashe, Niger State and the late Denis Iki lived and died there. It is also not in contention that Customary Court, Mpape has jurisdiction over inheritance and succession.

The issue in contention is whether Customary Court, Mpape, Federal Capital Territory, has jurisdiction over inheritance of property situated and lying at Kwankwashe, Suleja Local Government, Niger State.

In view of the issues in contention, I wish to straight away say that Section 18 of the Customary Court Act, 2007 is not central to the proper determination of this appeal. The Section deals with the binding Customary Law between parties which is not directly in issue here. Secondly, it is also my candid opinion that the Respondent Counsel's argument that a Customary Court has jurisdiction only to try cases that arise only from the customary practices of the area under its jurisdiction cannot stand taking into consideration the provision of Section 17(1) of the Customary Court Act, 2007. The case of ***Ladimeji v. Solomon (Supra)*** is cited out of context. In that case, the Court of Appeal held that by virtue of Section 20 (i) (a) Area Court Edict, a trial Area Court was required to

apply either the native law or custom prevailing in the area of the Court or the Native Law and Custom binding on the parties.

I shall now turn to **Section 14(1) and (2) of the Customary Court Act, 2007.**

The Section provides as follows:

> *"(1) A Customary Court shall have and exercise jurisdiction over all persons within the territorial limit of Federal Capital Territory, Abuja who submit to the jurisdiction of the Court.*
>
> *(2) A Customary Court shall have and exercise jurisdiction over causes and matters set out in the schedule to this Act."*

The schedule referred to in subsection 2 of the section has vests the Customary Courts with jurisdiction in 5 items. The relevant items direct to this appeal are items 4 and 5 thereof. Item 4 deals with jurisdiction over causes and matters in succession and inheritance under Customary Court of diverse grades with jurisdiction in civil cases and matters under any Law (other than Customary Law) including Bye Laws, where the demand or damage does not exceed the amount indicated in the colum appropriated to the three different grades of the Customary Courts.

I have already said that the issue in contention is not whether the trial Court has jurisdiction to entertain the issue of succession or inheritance. The issue is, like I have said, whether the trial Court has territorial jurisdiction. That being so, I hereby dispense with consideration of item 4 of the schedule as it relates to subject jurisdiction of succession.

I shall proceed to consider the issue of jurisdiction in relation to items 5 and territorial jurisdiction being contested by both parties.

I now turn my focus on Section 14 (1) of the Customary Court Act, 2007**,** herein before reproduced. For case of reference, I shall reproduce it again thus:

> *(i) A Customary Court shall have and exercise jurisdiction over persons within the territorial limit of the Federal Capital Territory, Abuja who submit to the jurisdiction of the Court."*

This Section is clearly straight forward in its application. The Customary Courts of the FCT, Abuja have jurisdiction over person within the territorial limit of the Court who submits to it. The question to ask is, were all the parties before the trial court within the jurisdiction of the Court? I have already set out clearly that the Defendant and 2nd Plaintiff are not within the territorial limit of the trial Court and this fact is also not contested by both parties. The only person within the territorial limit of the Court is the 1st Plaintiff who resides at Kuje. This clearly shows that the parties at the trial Court are not within the jurisdiction of the Trial Court. This situation is clearly different from a situation where all parties are within the jurisdiction of the Court and action is taken on the administration of estate of property outside the jurisdiction of the Court. A Court will have jurisdiction to administer estate but all the parties first and foremost must be within its jurisdiction as required by Section 14 (i) of the Customary Court of Appeal Act, 2007. See also the cases of ***Ogunro & Ors v. Ogedemgbe & Ors (1960) NSCC at 98 Okonyia v. Ikengah (2001) PART 697 at 362 SCC 98 at 100; Salubi v. Nwariaku (1997) 5 NWLR (PART 505) at 468.*** In such a situation, the best the Court can do is to make declaration as to the entitlement of the beneficiaries. It cannot validly pronounce that parties be given estate outside jurisdiction. In this case, the Defendant and 2nd Plaintiff are outside jurisdiction of the trial Court. By section 14 (i), the Court cannot assume jurisdiction over them and I so hold.

The last issue in contention is on item 5 of the schedule to the Section 14 (2) which gives an opening to the tort claim of intimidation and harassment being pressed by the Appellant. We have been urged by the Appellant's Counsel that jurisdiction over torts is determined by where the tort was committed; he referred us to the case of ***Dairo v. Union Bank of Nigeria PLC &Anor (2000) 16 NWLR PART 1059 at 9.*** He contended that the tort of harassment and intimidation of the 1st Plaintiff by the Defendant took place in Kuje, within the jurisdiction of the trial Court. He argued that the Court was wrong in declining jurisdiction. In response to this argument, the Respondent's Counsel said that the Respondent at the material time was a minor and lack capacity to harass or issue threat to the Plaintiff. I do not think it is the issue of capacity. The issue is whether the trial Court has jurisdiction to try tortuous cases allegedly committed in Kuje and or whether item 5 of the schedule covers torts.

From the briefs filed, none of the Counsel adverted their minds to the subject matter angle of the jurisdiction of the Court below as it relates to torts. It is trite Law that if a subject matter is not within the jurisdiction of the Court, the Court cannot rightly under any canopy of interest assume jurisdiction. See ***Action Congress v. INEC (2007) 18 NWLR (PART 1065) 50.*** Item 5 gives the Court

below jurisdiction in civil cases and matters under any law (other than Customary Law) including Bye Laws where the amount of debt, demand or damages does not exceed the amount indicated in the Colum hereof. In the present case, the issues to be tried are tortuous acts of intimidation and harassment. I am unable to see how these raise issues of Customary Law. I am heavily persuaded by the decision of this Court in ***Suit No. FCT/CCA/CVA/14/2011 Ariremako Femi v. Michael Korie*** and the FCT High Court in ***Suit No. FCT/HC/CV/1078/2010 Profote Ltd v. President of Customary Court of Appeal & Ors*****,** to the effect that the jurisdiction allowed for Customary Courts relates only to issues or questions of Customary Law except if there exists any Customary Law torts which has been established before the Court below.

In conclusion, I am of the candid view that the trial Court was right to decline jurisdiction by virtue of Section 14 (i) of the Customary Court Act, 2007, because the parties to the suit, particularly the 2nd Plaintiff and the Defendant are not within the territorial jurisdiction of the Court. There is no question of Customary Law related issues in the tortuous claims of the Plaintiffs/Appellants before the Court below therefore the trial Court was right in declining jurisdiction. The result is that the appeal lacks merit. It is accordingly dismissed.

Hon. Justice A. M. A. Saddeeq, JCCA: I had the privilege of reading in advance the draft of the lead judgment just delivered by my learned brother Istifanus, JCCA. The reasoning and conclusions arrived at are resonant of my opinion of this appeal. I adopt same in it's entirely as mine. I too will dismiss this appeal. Accordingly, the appeal lacks substance and same is also dismissed by me.

Hon. Justice M.G. Gwagwa, JCCA: I agree with my learned brother Istifanus Gandu, JCCA, that this appeal lacks merit. I hereby dismiss it without cost.

APPEAL DISMISSED

PAT OKEREKE

(SUING BY HIS ATTORNEY LADY IF MBANEFO)

V.

MRS. ABIOLA OLUBUSI

Appeal No**. FCT/CCA/CVA/16/2009**

HON. JUSTICE M.A BELLO (JP) OFR, PCCA (Presided)

HON. JUSTICE S. ADEKUNLE LAWAL, JCCA (Delivered the Lead Judgment)

HON. JUSTICE (DR.) NGOZIKA OKAISABOR. JCCA

6th July, 2011

APPEAL-	*Uncontested appeal – duty of appellant*
FUNCTUS OFFICIO-	*Meaning of – Effect on the jurisdiction of a court*
JUDGEMENTS AND ORDER-	*Judgment of courts – effect of – power of court to set aside*
JUDGEMENTS AND ORDERS-	*Judgment of courts - Correctness of – Need to comply with –party who seeks to alter – duty on such party*
PRACTICE AND PROCEDURE-	*Respondent's Brief – Filing of – failure to file – attitude of court to*

ISSUES

1. On whether a court can overrule itself and in what circumstances
2. When will a court become functus officio
3. What is the effect of a decision of a competent court not appealed against?

FACTS

The appellant/petitioner commenced a suit against the respondent at the Customary Court, Jikwoyi, Abuja asking for an order of the court to give custody of the child, name David Okereke to the petitioner. The respondent filed a noticed of preliminary objection dated 7th October, 2009 and filed on the 8th of October, 2009 seeking for an order dismissing and/or striking out the name of the 2nd petitioner for lack of *locus standi* to institute the action. The lower court in its ruling and ordered that the name of the 2nd petitioner be struck out so that the hearing of the substantive suit can commence. Consequently, the petitioner's counsel applied for the leave of the lower court to withdraw the Plaint having filed a fresh plaint date 19th October, 2009. The lower court after listening to both parties granted the prayers of the petitioner's counsel and ordered that the fresh plaint be given a new suit number accordingly.

The respondent filed a Notice of Preliminary Objection as couched by the respondent's counsel on the 12th November, 2009, praying the lower court to overrule its ruling/order of 22nd October, 2009 and order the petitioner to comply with the order of the lower court delivered on the 12th October, 2009 by removing the name of the 2nd petitioner from the suit.

The lower court overruled its earlier decision delivered on the 22nd October, 2009 and ruled that the name of the 2nd petitioner be struck out, and the old suit No. FCT/CC/JIK/CV/016/2009 remains.

It is against the ruling of the lower court delivered on the 17th day of November, 2009 that the petitioner/appellant has now appealed to this court.

HELD (Allowing the Appeal)

1. **On the implication of the failure to file a respondent's brief**.
   The respondent did not file respondent's brief and openly said in court that he's not opposing the appeal, the legal implication is that the appeal of the appellant before this court is uncontested and it so held. See ***Oluwaseun v. Olayiwola Abubakar (2004) 10 NWLR Pt. 549 at 565 – 566.***
2. **On attitude of court where no respondent brief is filed**.
   Where a respondent was duly served with the appellants' brief, but filed no brief, he would be deemed to have admitted the truth of everything said in the appellants' brief. The appeal would be considered on appellants' brief alone but the court will consider the appeal on merit. See the case of ***Lovina Ifeoma Ebe v. Edwin Ebe (2004) 3 NWLR Pt. 860, page 233.***
3. **On whether an uncontested appeal absolves the appellant of his duty to establish his case**
   Although, the appellants' appeal remain unchallenged or uncontested but the appellant must discharge the duty bestowed on him to establish his case to the satisfaction of the court. In ***Nigerian Agricultural Co-operative Bank Ltd v. John Bull Obadiah (2004) 4 NWLR Pt. 863, 326 at page 335.***
4. **On powers of court to set aside its judgments.**
   There are plethora of cases to the effect that a court has inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases. A court only exercise its inherent power and jurisdiction to set aside its own judgment or decision when it is established that the judgment or decision was obtained by fraud, when the judgment is a

nullity, when the court was misled into giving the judgment, the court lacks jurisdiction and where there is a defective procedure that deprive the decision or judgment of the character of a legitimate adjudication. In the absence of any of these conditions, a court has no inherent power or jurisdiction to set aside its own judgment or decision. ***Hon. C.N. Ukachukwu v. Senator Ugochukwu Uba (2004) 10 NWLR Pt. 881, 294 at 308 – 309; Chief Kalu Igwe & Ors v. Chief Okuwa Kalu & Ors (2002) 14 NWLR Pt. 87, 435 at 453 – 454; Senator I. G. Abana v. Chief Ben Obi & Ors (2005) 6 NWLR Pt.***

5. **On when a court becomes functus officio**

   The court becomes *functus officio* once an order or judgment has been completed and acted upon. At this stage the judge who made it cannot review same. It is a trite law that the Judge has no jurisdiction to do this. In the case of ***Hon. C.N. Ukachukwu v. Senator Ugochukwu Uba (2004) 10 NWLR Pt. 881, 294 at 308.***

6. **On meaning of the phrase "*functus officio"***

   The Latin phrase *functus officio* means that a court cannot give a decision or make an order on a matter twice. In other words, it means that one a court gives a decision or makes an order on a matter; it no longer has the competence or jurisdiction to give another decision or order on the same matter. See ***Fortune International Bank Plc & Ors v. City Express Bank Limited & Anor (2004) 6 NWLR Pt. 869, 226 at page 243***

7. **On the effect of a court becoming *functus officio***

   When a court makes a final decision or order in a suit, it generally becomes functus officio with respect to the suit and that order cannot be reviewed again as it amounts to its sitting on appeal over its earlier decision which it has no jurisdiction to do. See the case of ***Bassey Bassey Okon & Anor v. Mrs. Rebecca P. E. Eknew (2002) 15 NWLR Pt. 89, 106 at page 138*.**

8. **On the effect of a court judgment**

   It is trite that an order or judgment of court no matter how badly or wrongly decided remains valid and enforceable until set aside on appeal by a superior or an appellate court. See the case of ***Chief Ada Odeh v. John Engume Ameh (2004) 4 NWLR Pt. 863, 309 at 322. Also A.G. Anambra State v A.G. Federation &Ors (2005) 9 NWLR Pt. 931, 572 at 615; Chief Oyelakin Balogun V Moses OlayioyeAdedosu&Anor (1995) 2 NWLR Pt. 376, 131 at 163.***

9. **On the presumption of correctness of a court judgment**

There is always the presumption of correctness of a court's judgment or order. Therefore, the judgment or order subsists and must be obeyed except where such presumption is rebutted and the judgment or order is set aside. See ***Nigeria Bank of Commerce & Industry v. Kumbo Furniture Coy Ltd. (2004) 17 NWLR Pt. 903, 572 at 600; Chief Ada Odeh v. John Enyime Ameh (supra); Gonzee Nigeria Ltd. v. Nigerian Educational Research & Development Council & Ors (2005) 13 NWLR Pt. 943, 634*.**

10. On compliance with Court orders

It is legally mandatory for every person against or in respect or whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged or set aside on appeal. See ***Mobil Oil Nig. Ltd. & Anor v. S.T. Assan (1995) 8 NWLR Pt. 412, 129 at 143*.**

11. On the effect of a court order not appealed against

A party who has not appealed against a judgment or order given against him is bound by the judgment or order. Where there is no appeal against the decision of a competent court that decision stands and the same is binding not only on the parties thereto but also their privies. See ***Fortune International Bank Plc v. Pagasus Trading Office & Ors (2004) 4 NWLR Pt. 863, 369 at 392; A.G. Anambra State & Ors v. National Inland Waterways Authority (2004) 3 NWLR Pt. 861, 640 at 657.***

12. **On the only available option for a party who seeks to alter a judgment**.

that those seeking to alter recorded judgment must invoke appellate jurisdiction as may apply The only available option or remedy for the respondent in the instant case is to appeal against the ruling of the lower court dated 22nd October, 2009. See ***Stirling Civil Engineering Nig. Ltd v. Ambassandor Mahmood Yahaya (2005) 11 NWLR Pt. 935, 181 at 202***.

Cases cited in this Judgment

A.G. Anambra State v A.G. Federation &Ors (2005) 9 NWLR Pt. 931, 572 Bassey Okon & Anor v. Mrs. Rebecca P. E. Eknew (2002) 15 NWLR Pt. 89, 106 at page 138.

Chief Ada Odeh v. John Engume Ameh (2004) 4 NWLR Pt. 863, 309 at 322.

Chief Kalu Igwe & Ors v. Chief Okuwa Kalu & Ors (2002) 14 NWLR Pt. 87, 435

Chief Oyelakin Balogun v. Moses Olayioye Adedosu & Anor (1995) 2 NWLR Pt. 376, 131

Fortune International Bank Plc & Ors v. City Express Bank Limited & Anor (2004) 6 NWLR Pt. 869, 226 at page 243

Gonzee Nigeria Ltd. v. Nigerian Educational Research & Development Council & Ors (2005) 13 NWLR Pt. 943, 634.
Hon. C.N. Ukachukwu v. Senator Ugochukwu Uba (2004) 10 NWLR Pt. 881, 294 at 308 – 309
Lovina Ifeoma Ebe v. Edwin Ebe (2004) 3 NWLR Pt. 860, page 233
Mobil Oil Nig. Ltd. & Anor v. S.T. Assan (1995) 8 NWLR Pt. 412, 129 at 143.
Nigeria Bank of Commerce & Industry v. Kumbo Furniture Coy Ltd. (2004) 17 NWLR Pt. 903, 572
Nigerian Agricultural Co-operative Bank Ltd v. John Bull Obadiah (2004) 4 NWLR Pt. 863, 326 at page 335
Oluwaseun v. Olayiwola Abubakar (2004) 10 NWLR Pt. 549 at 565
Senator I. G. Abana v. Chief Ben Obi & Ors (2005) 6 NWLR Pt.
Stirling Civil Engineering Nig. Ltd v. Ambassador Mahmood Yahaya (2005) 11 NWLR Pt. 935, 181 at 202

APPEARANCES:

Victoria Francis (Miss) Esq. for the Appellant
Paul Sule Esq. for the Respondent

Hon. Justice S. A. Lawal, JCCA (Delivering the Lead Judgment): The appellant/petitioner commenced a suit against the respondent at the Customary Court, Jikwoyi, Abuja asking for an order of the court to give custody of the child, name David Okereke to the petitioner. The respondent filed a noticed of preliminary objection dated 7th October, 2009 and filed on the 8th of October, 2009.

The Notice of Preliminary Objection is praying for an order dismissing and/or striking out the name of the 2nd petitioner for lack of locus standi to institute the action. The lower court on the 12th October, 2009 delivered a well-considered ruling and ordered that the name of the 2nd petitioner be struck out so that the hearing of the substantive suit can commence. The case was adjourned to 22nd October, 2009 and on the 22nd October, 2009, the petitioner's counsel applied for the leave of the lower court to withdraw the Plaint dated 6th October, 2009 having filed a fresh plaint date 19th October, 2009.

The lower court after listening to both parties granted the prayers of the petitioner's counsel and ordered that the fresh plaint be given a new suit number accordingly.

The respondent filed a Notice of Preliminary Objection as couched by the respondent's counsel on the 12th November, 2009, praying the lower court to overrule its ruling/order of 22nd October, 2009 and order the petitioner to comply with the order of the lower court delivered on the 12th October, 2009 by removing the name of the 2nd petitioner from the suit.

The lower court on the 17th day of November, 2009, as contained in page 45 of the record of proceedings of the lower court, overruled its earlier decision delivered on the 22nd October, 2009 and ruled that the name of the 2nd petitioner be struck out, and the old suit No. FCT/CC/JIK/CV/016/2009 remains.

Aggrieved with the ruling of the lower court delivered on the 17th day of November, 2009 the appellant/petitioner appealed to this court via a notice of appeal dated 24th day of November, 2009 and filed on the 25th day of November, 2009. The appellant also filed before this court appellant's brief of argument dated the 29th July, 2010.

On the 7th day of June, 2011, the respondent's counsel said that having gone through the grounds of appeal, the issues formulated in the appellant's brief of argument and the record of proceedings of the lower/trial court agree that the matter be sent back to the trial court for trial of the substantive suit.

The appellant's counsel said that since the respondent is not opposing the appeal, the appellant intend to go on with the appeal or alternatively the court should deem the appeal as argued and heard.

The respondent did not file respondent's brief and openly said in court that he's not opposing the appeal, the legal implication is that the appeal of the appellant before this court is uncontested and it so held. See the case of ***Oluwaseun v. OlayiwolaAbubakar (2004) 10 NWLR Pt. 549 at 565 – 566.***

Where a respondent was duly served with the appellants' brief, but filed no brief, he would be deemed to have admitted the truth of everything said in the appellants' brief. The appeal would be considered on appellants' brief alone but the court will consider the appeal on merit. See the case of ***Lovina Ifeoma Ebe v. Edwin Ebe (2004) 3 NWLR Pt. 860, page 233.***

In the case of ***Emeka Akas v. The Manager & Receiver of the Estate of Benjamin Gillett Anwadike (2001) 8 NWLR Pt. 715 page 436 at 442*** the court held that the fact that an appeal is uncontested does not relieve the Court of Appeal of its responsibility to do justice between the parties.

Although, the appellants' appeal remain unchallenged or uncontested but the appellant must discharge the duty bestowed on him to establish his case to the satisfaction of the court. In ***Nigerian Agricultural Co-operative Bank Ltd v. John Bull Obadiah (2004) 4 NWLR Pt. 863, 326 at page 335*** the court held that where the respondent fails to appear or file a brief, the appeal shall with the leave of the court be determined solely on the Appellant's Brief.

On the 19th of October, 2009, the appellant/petitioner filed a plaint and claims from the respondent and same is herein reproduced for ease of reference as follows:

WHEREOF THE PETITIONER CLAIMS FROM THE RESPONDENT

(a) AN ORDER directing the Respondent to immediately release and deliver custody of the child, named David Okereke to the petitioner.

(b) AN ORDER vesting sole custody of the named child with the petitioner.

(c) AND FOR SUCH FURTHER ORDER or other Orders as the Honourable court may deem fit to make in the circumstances.

On the 12th day of October, 2009, upon an application via notice of preliminary objection filed on the 8th October, 2009 by the respondent, the court struck out the name of the 2nd petitioner. See pages 22 – 28 of the record of proceedings at the lower court.

As contained in page 30 – 31 of the record of proceedings, on the 22nd day of October, 2009 the lower court upon an application of the appellant/petitioner ordered that the plaint dated 6th October, 2009 be withdrawn and struck out and a fresh plaint dated 19th October, 2009 be filed and given a new suit No. accordingly.

On the 13th day of November, 2009 the respondent filed a Notice of Preliminary Observation praying the trial court to overrule its ruling delivered on the 22nd day of October, 2009 and the lower court upon the said application of the respondent as contained in page 44 of the record of proceedings overruled its ruling delivered on the 22nd October, 2009.

The appellant/petitioner aggrieved and dissatisfied with the ruling of the lower court appealed to this court. Filed a notice of appeal dated 24th November, 2009.

The four Grounds of Appeal filed read thus:

1. The learned trial Judge erred in law when he proceeded to overrule its decision/ruling of the 22nd of October, 2009.

2. The learned trial Judge erred in law when he revived plaint No. FCT/CC/JIK/CV/016/09 which was withdrawn and struck out by leave of court upon application by the Plaintiff.

3. The learned trial Judge erred in law when he struck out a valid Plaint with No. FCT/CC/IK/CV/023/09 when same was commenced with leave of court.

4. The Learned trial Judge misdirected himself when he considered and ruled upon an application which was grossly incompetent as it was neither a motion nor a preliminary objection.

RELIEFS SOUGHT

a. That the decision/ruling of the learned trial Judge, delivered on the 17th November, 2009, be set aside and plaint No. FCT/CC/JIK/CV/023/09 ordered to continue.

b. That the matter be transferred to another court for a retrial.

The appellant filed his brief of arguments and formulated 2 issues for determination as follows:

1. Whether the lower court rightly exercised its discretion when the learned trial Judge overruled its previous ruling which was delivered on the 22nd October, 2009 and delivered a second ruling on the 17th day of November, 2009 on the same subject matter.

2. Whether the trial Judge was right when he revived plaint No. FCT/CC/JIK/CV/023/2009 upon an application of the plaintiff.

On issue 1, the appellant in the said brief of argument argued that after delivering a judgment/ruling in a matter, the court becomes functus officio. It cannot revisit the judgment/ruling by a second judgment /ruling on the same subject matter. He refers the court to

the case of ***Onwunchekwa v. Co-operative & Commerce Bank Plc (1999) 5 NWLR pt. 603, 409; Chieshe v. Nicon Hotels Ltd (2008) 16 WRN 137, 150.***

Appellant submited that the learned trial court lacked the power to revisit its earlier decision and overrule same. He further submits that the trial court exercised discretion without relying on any law upon which the exercise of same was based. Refers the court to the case of ***M.V. Lupex v. NOCS (2003)9 MJSC 156 at 168; Williams v. Williams (1987) 2 NWLR Pt. 54, 66.***

Appellant's counsel finally submitted in his brief of argument that the ruling of trial court delivered on the 17th November, 2009 be set aside as same amounted to a capricious exercise of the court's discretion as the court had become functus officio at the time of the exercise.

On issue 2, the appellant argued that the lower court having exercised its dicretion functus officio lacked the competence to revive plaint No. FCT/CC/JIK/CV/016/2009 which was earlier struck out by the lower court in its ruling delivered on the 22nd October, 2009 and replaced same with plaint No. FCT/CC/JIK/CV/023/09**.** He referred the court to the case of ***Mohaammed v. Hussein (1998) 14 NWLR Pt. 584, 108*****.**

The appellant also argued that the trial court was wrong when the trial Judge revived Plaint No. FCT/CC/JIK/CV/016/2009 on the Preliminary Objection brought by the respondent after same has been struck out and replaced with another Plaint No. FCT/CC/JIK/CV/023/2009 upon an application of the petitioner.

The appellant urged this court to set aside the ruling of the lower court delivered on the 17th November, 2009 and allow the appeal.

ISSUES FOR DETERMINATION

1. When can a court overrule itself?
2. When will a court become functus officio
3. What is the effect of a decision of a competent court not appealed against?

ISSUE 1:

There are plethora of cases to the effect that a court has inherent power and jurisdiction to set aside its own judgment or decision in appropriate cases. In the case of ***Hon. C.N. Ukachukwu v. Senator***

Ugochukwu Uba (2004) 10 NWLR Pt. 881, 294 at 308 – 309 the court held that the court has power and jurisdiction to set aside its own judgment or decision;

(i) Where the judgment was obtained by fraud or deceit.

(ii) When the judgment is a nullity

(iii) When it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it.

(iv) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

See also the cases of ***Chief Kalu Igwe & Ors v. Chief Okuwa Kalu & Ors (2002) 14 NWLR Pt. 87, 435 at 453 – 454; Senator I. G. Abana v. Chief Ben Obi & Ors (2005) 6 NWLR Pt. 920, 183 at 203.***

From the cited and many other judicial authorities, a court only exercise its inherent power and jurisdiction to set aside its own judgment or decision when it is established that the judgment or decision was obtained by fraud, when the judgment is a nullity, when the court was misled into giving the judgment, the court lacks jurisdiction and where there is a defective procedure that deprive the decision or judgment of the character of a legitimate adjudication. In the absence of any of these conditions, a court has no inherent power or jurisdiction to set aside its own judgment or decision.

ISSUE 2:

The court becomes *functus officio* once an order or judgment has been completed and acted upon. At this stage the judge who made it cannot review same. It is a trite law that the Judge has no jurisdiction to do this. In the case of ***Hon. C.N. Ukachukwu v. Senator Ugochukwu Uba (2004) 10 NWLR Pt. 881, 294 at 308.***

In ***Fortune International Bank Plc & Ors v. City Express Bank Limited & Anor (2004) 6 NWLR Pt. 869, 226 at page 243*** the court held that the Latin phrase *functus officio* means that a court cannot give a decision or make an order on a matter twice. In other words, it means that once a court gives a decision or makes an order on a matter; it no longer has the competence or jurisdiction to give another decision or order on the same matter.

When a court makes a final decision or order in a suit, it generally becomes functus officio with respect to the suit and that order cannot be reviewed again as it amounts to its sitting on appeal over its earlier decision which it has no jurisdiction to do. See the case of ***Bassey Bassey Okon & Anor v. Mrs. Rebecca P. E. Eknew (2002) 15 NWLR Pt. 89, 106 at page 138*.**

In the instant case, after careful perusal of the proceedings and the order of the trial court dated 22nd October, 2009 it was discovered that the mandatory pre-requisites that may give the trial court the inherent power and jurisdiction to set aside its earlier decision are conspicuously absent.

The trial/lower court having made an order that a new suit number be given the suit and a new number FCT/CC/JIK/CV/023/2009 was given to the suit, the court cannot set aside the order because the said order has been completed. See pages 30 – 31 of the record of proceedings. Once an order has been completed the court become functus officio and the order cannot be reviewed by the judge who made it. See the case of ***Hon. C.N. Ukachukwu v. Senator Ugochukwu Uba (supra)*.** I agree with the appellant's counsel that the lower/trial court does not have inherent power and jurisdiction to set aside its earlier decision or order dated 22nd October, 2009.

The Supreme Court held in the case of ***Stirling Civil Engineering (Nig.) Ltd* v. *Ambassador Mahmood Yahaya (2005) 11 NWLR Pt. 935, 181 at 22*** that where a court had decided an issue and the decision or the order has been effective, the court cannot re-open the matter and cannot substitute a different decision of the one which had been recorded.

For the foregoing considerations, I resolve issue 2 in favour of the appellant.

ISSUE 3:

Since the lower/trial court was functus officio of its order in its ruling dated 22nd October, 2009, the said order subsists and remains valid until set aside by the process of law. In ***A.G. Anambra State v. A.G. Federation &Ors (2005) 9 NWLR Pt. 931, 572 at 615,*** the Supreme Court per **Justice Katsina-Alu JSC** held that a judgment of a court from which there is no appeal subsists and remain valid until set aside by due process of law. ***Hon. Justice Onu JSC in Chief Oyelakin Balogun v. Moses Olayioye Adedosu & Anor (1995) 2 NWLR Pt. 376, 131 at 163*** held that it is trite that a ruling or order of the court remains final and valid until set aside by the higher court.

It is trite that an order or judgment of court no matter how badly or wrongly decided remains valid and enforceable until set aside on appeal by a superior or an appellate court. See the case of ***Chief***

Ada Odeh v. John Engume Ameh (2004) 4 NWLR Pt. 863, 309 at 322. Also A.G. Anambra State v A.G. Federation &Ors (supra).

There is always the presumption of correctness of a court's judgment or order. Therefore, the judgment or order subsists and must be obeyed except where such presumption is rebutted and the judgment or order is set aside. See the cases of ***Nigeria Bank Commerce & Industry v. Kumbo Furniture Coy Ltd. (2004) 17 NWLR Pt. 903, 572 at 600; Chief Ada Odeh v. John Enyime Ameh (supra); Gonzee Nigeria Ltd. v. Nigerian Educational Research & Development Council & Ors (2005) 13 NWLR Pt. 943, 634*.*** **Hon. Justice Onu JSC** held that the judgment of a court is presumed to be correct until the contrary is proved.

The legal implication of this legal assertion and authorities is that such judgment or order cannot be ignored or circumvented by the institution of another similar proceeding or suit in the same court.

In the instant case, the Notice of Preliminary Objection dated 12th day of November, 2009 and filed by the respondent on the 13th November, 2009 is an abuse of court process and the lower/trial court ought not to allow or act on it. Since there is an order of the trial court and the respondent is aware of that order, unless and until the order is set aside, he cannot be permitted to disobey it by instituting another similar proceeding in the same court. See the case of ***Chief Ada Odeh v John Enyime Ameh (supra)*.**

It is legally mandatory for every person against or in respect or whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged or set aside on appeal. In ***Mobil Oil Nig. Ltd. & Anor v. S.T. Assan (1995) 8 NWLR Pt. 412, 129 at 143*,** Hon. Justice Uwais, JSC (as he then was), held that it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order it discharged or set aside on appeal. Also held that this extends even to case where the person affected by an order believes it to be irregular or even void.

A party who has not appealed against a judgment or order given against him is bound by the judgment or order. See the case of ***Fortune International Bank Plc v. Pagasus Trading Office & Ors (2004) 4 NWLR Pt. 863, 369 at 392.***

In the instant case, since there is no appeal against the ruling of the lower/trial court delivered on the 22nd October, 2009, the order of the lower court as contained in pages 30-31 of the record of proceedings striking out the earlier plaint dated 6th October, 2009 and replaced it with the new

plaint dated 19th October, 2009 and ordered that the case file be given a new Suit Number accordingly stands and is subsisting. In ***A.G. Anambra State &Ors v. National Inland Waterways Authority (2004) 3 NWLR Pt. 861, 640 at 657*** the court held that where there is no appeal against the decision of a competent court that decision stands and the same is binding not only on the parties thereto but also their privies.

The only available option or remedy for the respondent in the instant case is to appeal against the ruling of the lower court dated 22nd October, 2009. The Supreme Court in ***Stirling Civil Engineering Nig. Ltd v. Ambassandor Mahmood Yahaya (supra) at page 202*** held that those seeking to alter recorded judgment must invoke appellate jurisdiction as may apply.

Going by the enunciated principle of law and cited authorities the lower court has no power and jurisdiction to overrule its earlier ruling dated 22nd October, 2009 having become functus officio. Since there is no appeal against the ruling, the ruling and the order stands and subsists, the lower court cannot revive Plaint No. FCT/CC/JIK/CV/016/2009 which was earlier struck out. In other words plaint No. **FCT/CC/JIK/CV/023/2009** stands. The lower court lacks the power, the competence and jurisdiction to revive the earlier plaint which had been struck out by its order dated 22nd October, 2009.

I am therefore in complete agreement with the submission of the appellant's counsel on issue 3 formulated in their brief of argument. Consequently, issue 3 is also hereby resolve in favour of the appellant.

Hon. Justice M.A. Bello, OFR, PCCA: I have had the opportunity of reading in advance the lead judgment of Hon. Justice S. Adekunle Lawal (Hon. Judge III) of Customary Court of Appeal in this case. I entirely agree with the reasons adduced in the said lead judgment and agree with the said judgment and his order of re-trial by Customary Court, sitting in Nyanya.

Hon. Justice (Dr.) N.U. Okaisabor, JCCA: This is an appeal against the Ruling of the Customary Court, Jikwoyi, Abuja dated 17th day of November, 2009 in which the trial court ruled in favour of the Respondent by striking out the Petitioner/Appellant's Attorney (Lady Ify Mbanefo) and substituting the old Suit No. Appeal No. FCT/CCA/CVA/16/09 that had been struck out on 22nd October, 2009 in place of Suit No.FCT/CC/JIK/CV/023/2009 given to the present suit on Appeal.

Briefly, the facts leading to this appeal are that on the 19th of August 2009, the Appellant as Plaintiff at the court below initiated a suit against the Respondent claiming the sole custody of a child named David Okereke. The named parties reads as follows:

"SUIT NO FCT/CCA/CVA/16/09

BETWEEN

PAT OKEREKE
LADY IFY MBANEFO - PLAINTIFFS

AND

MRS ABIOLA OLUBISI - DEFENDANT"

Before the determination of the substantive suit, the Plaintiff/Appellant sought via an ex parte application dated 19th of August "2008" (Sic) and filed on 20th of August 2009 before the trial court to have interim access to the child. The Court on the 25th of August 2009 granted the Plaintiffs/Appellant an interim access to the said child named David Okereke. The Court on the 18th of September 2009, upon the application made by the Respondent that the interim access be under supervision, ordered that the interim access be supervised by a police officer between 2pm -4pm.

On 29th of September, 2009 when the Motion the Plaintiffs/Appellant filed came up for hearing, the Plaintiff/Appellant applied for a withdrawal of the said Motion and same was struck out.

On the 8th October 2009, the Plaintiff/Appellant, sought the leave of the Court to withdraw their earlier plaint dated 19th of August, 2009 and replace it with a new plaint dated 6th of October, 2009. Since the Respondent did not object to the application, same was struck out and the matter was adjourned for Hearing. The Respondent Counsel raised a preliminary objection dated 7th of October on the jurisdiction of the court to entertain the suit in view of the fact that the 2nd Plaintiff had no *locus standi*.

On the 12th of October, 2009, the trial Court upheld the Preliminary Objection of the Respondent and ordered that the name of the 2nd Plaintiff be struck out of the proceedings so that the hearing of the substantive suit could commence in the name of the 1st Plaintiff only. On the same date, the

Plaint was thereafter read to the Respondent in which she denied all the paragraphs and only accepted that the Plaintiff is the father of the said child.

On the 22nd of October 2009, the Plaintiff sought the leave of the Court to withdraw their Plaint dated 6th October 2009 as they had filed a fresh Plaint dated 19th October, 2009, which read **PAT OKEREKE SUING BY HIS LAWFUL LADY IFY MBANEFO.** The Respondent raised an objection to the Plaintiff application that it was an abuse of Court process. On hearing the argument from both counsel, the court struck out the earlier Plaint dated 6th October, 2009 and ordered as follows "*…therefore the earlier Plaint dated 6th October, 2009 is hereby withdrawn and struck out and the fresh Plaint dated 19th October, 2009 be filed as prayed and the case file should be changed and given a new Suit No. accordingly.*"

On the 17th of November, 20009, when the matter came up for hearing, the Respondent moved a Preliminary Objection dated 12th November, 2009 urging the Court to determine whether or not the Petitioner/Appellant's Mother Lady Ify Mbanefo could legally appear in a representative capacity on behalf of the Petitioner for the purpose of custody of the said child; secondly, that the Power of Attorney exhibited was not duly executed, thirdly; that the leave of court must be sought and fourthly, that the trial court had ruled on 12th October, 2009 that the 2nd Petitioner/Respondent has not and cannot show sufficient/special interest.

I hereby reproduce the ruling of the trial court dated 17th November, 2009 which precipitated the Appeal in this matter.

"*This court after listening to the submission of both learned counsel discovered an error in its previous ruling delivered on the 22nd October, 2009 as regards granting the application of the Petitioner's Counsel to amend this Pliant dated 19th October, 2009 which reflected among other things that the petitioner is suing by his Attorney Lady IfyMbanefo whose name had already been struck out which resulted in the Honourable Court erroneously allocating a new Suit No FCT/JIK/CV/023/2009to the case on the belief that, it was now a new suit which was obviously untrue as the facts are substantially the same with the earlier Suit No FCT/CC/JIK/CV/016/2009. And the purported Power of Attorney from Pat Okereke is also hereby rejected since it has not been duly executed as well. In view of the above, this court hereby exercise its direction and overrules its ruling delivered on the 22nd of October, 2009 as same was given in error and since the name of the 2nd Petitioner has already been struck out, it will only be tantamount to an abuse of court process for same to be brought back under the guise of being a Lawful Attorney….on the whole this court hereby, orders that the name of Pat Okereke's*

Attorney Lady IfyMbanefo be struck out while the old Suit No. FCT/CC/JIK/CV/016/2009 remains accordingly and appropriately. "

The Petitioner/Appellant being dissatisfied with the above ruling filed an appeal to this court via their Notice of Appeal dated 24th day of November, 2009. The Notice of Appeal which contained four Grounds of Appeals read thus:

> "…. (1) *The learned Trial Judge erred in Law when he proceeded to overrule its Decision/Ruling of the 22nd October, 2009.*
>
> *(2) The Learned Trial Judge erred in law when he revived Plaint No. FCT/CC/JIK/CV/016/2009 which was withdrawn and struck out by leave of Court upon application by the Plaintiff.*
>
> *(3) The Learned Trial Judge erred in law when he struck out a valid Plain No. FCT/CC/JIK/CV/023/09 when same was commenced with leave of court.*
>
> *(4) The Learned Trial Judge misdirected himself when he considered and ruled upon an application which was grossly incompetent as it was neither a motion nor a preliminary objection,"*

RELIEFS SOUGHT

The following Reliefs were sought by the Appellant:

> "…… (1) *That the Decision/Ruling of the Learned Trial Judge delivered on the 17th November, 2009 be set aside and Plaint No. FCT/CC/JIK/CV/023/09 ordered to continue.*
>
> *(2) That the matter be transferred to another court for a retrial.*"

On the 7th day of June, 2011, the Appellant through his Learned counsel Victoria Francis having filed his Brief of Argument dated 29th day of July 2010 on same day, adopted same while the Respondent, through his Learned Counsel Paul Sule informed the Court that he had not filed any Respondent's Brief of Argument and does not intend to file any as he was not opposing the Appeal since it did not touch on the substance of the issue that brought them to the lower court but a relief for the reversal of the order of the trial court.

Before delving into the Appellant's Settled Brief, it is imperative to categorically state that the fact that the Respondent did not oppose the appeal as stated in his oral submission does not prelude this court, being a Superior Court of Record from hearing the appeal on its merit. The Appellant should succeed on the strength of his case and not on the weakness of the Respondent's. This principle was encapsulated in ***Ojo v. Azama (2001) 4 NWLR (Pt. 702)*** Wherein the Supreme Court held that "*It was the duty of the Appellant to prove his case on the strength of his own case not on the weakness of the Respondent's case.*" **Per UWAIFO JSC** as he then was also in ***Onwuama v. Ezeokoli (2005) 5 NWLR (Pt. 760) pp 13, paras. B-C*** stated as follows: "*The burden on the Plaintiff to prove, title to land does not shift. That remains of course, a correct principle which goes further to say that a Plaintiff must succeed on the strength of his case for title and not on the weakness of the defence.*"

In his settled Brief, the Appellant formulated two issues for determination namely:

> *"... (1) Whether the lower court rightly exercised its discretion when the Learned Trial Judge overruled its previous ruling which was delivered on the 22nd October, 2009 and delivered a second ruling on the 17th day of November 2009 on the same subject matter.*
>
> *(2) Whether the Trial Court Judge was right when he revived Plaint No. FCT/CC/JIK/CV/016/2009. Having earlier struck out same and replaced it with the Plaint No. FCT/CC/JIK/CV/023/2009 upon an application of the Plaintiff."*

Looking at the Grounds of Appeal and the two issues formulated thereof, it is clear that Issue 1 relates to Ground 1 of the Appeal while issue 2 relates to Ground 2 and 3. However, as no arguments were canvassed in relation to Ground 4, it is deemed to have been abandoned in so far as it cannot be distilled from issues set down by Learned Counsel. It is accordingly struck out.

The general principle is that a ground of appeal upon which no issue has been formulated is deemed abandoned and liable to be struck out. Per **Mohammed JSC** in ***W.A.E.C v. Adeyanju (2008) 9 NWLR (Pt. 1092) 270 at 291, Paras A-C (SC)*** said "*A ground of appeal from which an issue for determination was not formulated is deemed abandoned and liable to be struck out or ignored by an appellate court. In the instant case, the Supreme Court struck out Ground 3 of the Appellant's ground of appeal from which no issue for determination was formulated. (**Afegabi v. Attorney – General Edo State (2001) 14 NWLR (Pt. 733) 425; Ogundiyan v. State (1991) 3 NWLR (Pt. 151)519**).*" There

are plethora of cases on the above principle that a ground on which no issue was raised by the parties will be ignored/discountenanced on the settled law and practice of the appellate courts. The Supreme Court in ***Agbareh & Anor v. Mimra & Ors (2008) Vol. 2 MJSC 134 AT 154 Para C-E, (2008) 1 SC (Pt. 111) 88 at 108 – 109*** re-emphasized the above principle and gave the following reasons:

"(a) *The courts consider only the issues and not the grounds of appeal.*

(b) A ground of appeal, not having any argument proffered to cover it, is deemed abandoned and will be struck out. ***Sabina v. Yassin (2002) 2 SCNJ 14; Ezemba v. Ibeneme & Anor (2004) 7 SCNJ 136; Alhaji Aree & Anor v. Ipaye & Anor (1986) 3 NWLR (Pt. 29) 416; Ochukwuogor v. Obuora (1987) 3 NWLR (Pt. 61) 454; Ndime v. Okocha (1992) 7 NWLR (Pt. 252) 129; Ngilari v. Motherlat Ltd (1995) 8 NWLR (Pt. 311) 377***" as well as the Court of Appeal in ***Abdelraheem v. Oloruntobe-Oju (2007) Vol. 2 WRN 28 at 56-57 LINES 45-10 (CA) and in Onisese v. Oyeleye (2008) WRN (Vol. 21) 43 at 47, P 47 LINES 15 -20 (CA).***

At critical look at the two issues formulated by the Appellant shows that they are interwoven and the effect is the same. The substance of the issues canvassed is the effect of the court overruling itself, which was the revival of Suit No. *FCT/CC/JIK/CV/016/2009* which it had struck out and substituting it with Suit No.*FCT/CC/JIK/CV/023/2009.*

I am of the view that the issue before the court to determine is "*whether the trial court overruled itself in its ruling of 17th November, 2009 when it revived Suit No FCT/CC/JIK/CV/016/2009 having previously struck out same in its ruling of 22nd October, 2009.*"

Before delving into a consideration of the arguments canvassed by Learned Counsel to the Appellant, it is imperative to note that the Appellant is seeking the relief of the court to set aside the entire ruling. The aspect that deals with striking out the name of the Attorney was never canvassed by Learned Counsel to the Appellant. Looking at the 3 Grounds of Appeal now before the court, there is nothing stating that the trial court erred in striking out the name of the Attorney. Since it is not part of the appeal, it means he is contented or satisfied with that aspect of the ruling. He cannot be saying that the entire ruling be set aside. The ruling of the lower court, in my view has two PRONGS: Firstly, striking out of the name of the Attorney (Lady IfyMbanefo) representing Pat Okereke and secondly, reviving Suit No. FCT/CC/JIK/CV/016/2009 to substitute Suit No.FCT/CC/JIK/CV/023/2009.

The next step is to look at the only leg he is challenging which is to the resuscitation of Suit No. FCT/CC/JIK/CV/016/2009.

Looking at the 2nd prong which relates to revival of Suit No. FCT/CC/JIK/CV/016/2009, Grounds 1, 2, and 3 are the only related Grounds to Issues 1 and 2. Issues 1 and 2 seems to be saying the same thing which means that they substantially cover the same subject and perhaps this accounts for the reason why Appellant's Counsel seems to be repetitious on Issues 1 and 2. The sum effect of Issues 1 and 2 is for the Court to determine whethere the trial court overruled itself in its ruling of 17/11/2009 when it revived Suit No. FCT/CC/JIK/CV/016/2009 having previously struck out same in its ruling of 22nd October, 2009,

Having made this clarification, I will now reproduce the argument of Learned Counsel. The Appellant argued that is only the Supreme Court that is vested with the power to reverse and or overrule its previous decisions, where inter alia the previous decision is held to be perverse and occasioning injustice and that the Court of Appeal cannot exercise a similar jurisdiction to reverse its previous decision, even if same was perverse. He then submitted that the Trial Judge erred in law when he held thus:

"*This Court hereby exercises its discretion and overrules its ruling delivered on the 22nd October, 2009 as same was given in error…*"

Placing reliance on ***Onwuchekwa v. Cooperative & Commerce Bank Plc (1999) 5 NWLR (PT. 603) Pg. 409 CA; Chieshe v. NICON Hotels Ltd (2008) 16 WRN 137 at 150, CA*** to buttress his argument, the Appellant submitted further that after delivering a judgment/ruling in a matter, the court becomes functus officio and cannot revisit the judgment/ruling by a second judgment/ruling on the same subject matter and that the only remedy available to an aggrieved party is to appeal.

The Appellant also submitted that the trial court having become *functus officio*, lacked the power to revisit its earlier decision in a bid to review same and that when the lower court entertained the Preliminary Objection filed by the Respondent's counsel, the court sat on appeal in respect of its earlier decision. He relied on ***Williams v. Williams (1989) 2 NWLR (Pt. 54) 66 and on MV Lupex v. NOCS (2003) 9 MJSC 154 at 168 Pars. E-F; Chieshe v. NICON Hotels Ltd (supra) at 148 to 149 to 149*** to buttress his argument.

The Appellant submitted further that the trial court erred in law when it revisited the ruling that was delivered on 22nd October, 2009 and relied on the decisions in ***Umunna v. Okwuraiwe (1978)***

11 NSCC 319 at 325 Pars 45 -50; Gov. Kogi State v. Yakukbu (2001) 16 WRN 98 at 106 *and* ***Mohammed v. Hussein (1998) 14 NWLR (Pt. 584) 108*** to buttress his argument.

He further submitted that the lower court did not rightly exercise its discretion when the court revisited its previous ruling and overruled same at the instance of the Respondent's Counsel, Ashibel M. Ogar, Esq. without it being justified with any statutory or judicial authority and thereby giving a second ruling on the same matter and cited the cases of ***Williams v. Williams (supra)*** *and* ***Ekwunife v. Wayne (WA) Ltd (1989) 5 NWLR (Pt. 122) 422.***

The Appellant submitted that the Trial Court having exercised its discretion become functus officio, the lower court lacked the competence to revive Plaint No. FCT/CC/JIK/CV/016/2009 which it earlier struck out in its ruling delivered on the 22nd October 2009 and replaced same with Plaint No. FCT/CC/JIK/CV/023/2009. Counsel further submitted that once a Judge gives a decision or makes an order on a matter, he no long has the competence or jurisdiction to give another decision or order on the same matter. Counsel submitted that the power and competence to revive the earlier Plaint that had been struck out can only be exercised upon an application of the Plaintiff and not that of a Defendant. Counsel relied on the decision in ***Eastern Breweries PLC v. Inuen*** **(2000) 3 NWLR Page 673 Paragraph G,**

From the submission of the Appellant, the power of a court to overrule itself by reviving, reviewing or altering or varying any Judgment or Order after it has been entered or drawn up is decided in a plethora of cases.

The general principle is that the court has no power to rehear, review, alter or very any judgment or order after it has been entered or drawn up. Per **Belgore JCA** as he then was in ***Abah v. Jabusco (Nig) Ltd (2008) 2 NWLR (Pt. 1075) 526 at 546, Paras B-C*** said "*Generally, a court has no power to rehear, review, alter or vary any judgment or order after it has been entered or drawn up. A court becomes functus officio in relation to an issue on which an order has been made. [****Ekerete v. Eke 6-10 NLR 11****]."*The argument of Appellant that the trial court lacked power to revisit its earlier decision and to overrule itself is in order.

I also uphold the argument of the Appellant that the trial court becomes functus officio when it struck out Suit No. FCT/CC/JIK/CV/016/2009 on the application of the Plaintiff/Appellant. However, it is only where there is an accidental omission in which all necessary facts or evidence are already in its record that the court can go under the slip rule. ***Gov. Ogun State v. Kelani (2007)***

ALL FNLR (Pt. 359) 138 at 1393 Paras A-H wherein the court of Appeal held that "*the failure of the learned trial Chief Judge to make an order as to payment of interest is to my mind an accidental omission.*"

In the Suit No FCT/CC/JIK/CV/016/2009 that was struck out by the trial court, there was no omission by the trial court. An application was made by the Plaintiff to withdraw a Suit which he instituted and it was struck out. The latter Suit instituted at the trial court which is on Appeal before this court (FCT/CC/JIK/CV/023/2009) was brought in the name of **PAT OKEREKE** suing on behalf of his Attorney Lady IfyMbanefo. The parties in both suits has an entirely different nomenclature. The trial court erred by reviving the suit No. FCT/CC/JIK/CV/016/2009 which it had struck out and substituted it with Suit No.FCT/CC/JIK/CV/023/2009.

It is a trite law that "*a court while able to correct a misnomer or misdescription under the slip rule will not under that rule whether in the exercise of its inherent jurisdiction or by the powers conferred by the rules or court vary a judgment or order which correctly represents what the court decided, nor will it vary the operative and substantive part of its judgment so as to substitute a different form. A party who seeks to alter an operative and substantive part of a judgment must invoke the appellate jurisdiction as may apply"* see ***Minister of Lagos Mines & Power v. Akin-Olugbade (1974) ALL NLR 226.***

The Supreme Court, per KARIBI-WHYTE JSC in ***Alao v. African Continental Bank Ltd (2000) 9 NWLR (Pt. 672)*** re-emphasized the principle and stated that "*the following three principles appear to be enshrined in the provision of the rule. First the court shall not review any judgment once delivered. See* ***Adefulu v. Okulaja (1900) 5 NWLR (Pt. 550)435.*** *The exception to this prohibition where it is intended to correct any clerical mistakes or some error arising from accidental slip or omission or to vary the judgment or order as to give effect to its meaning or intention. This is known as the "slip rule". Secondly there is a total prohibition from review of a judgment which correctly represents what the court decided. Such a judgment shall not be varied. Thirdly the operative and substantive part of judgment shall not be varied and a different from substituted.*" there are plethora of cases decided by the Supreme Court on the above principle: ***Mark & Anor v. Eke (2004) 5 NWLR (Pt. 685); Ibe v. Onuora (1996) 9 NWLR (Pt. 474).***

In view of the above, I endorse the argument of the Plaintiff/Appellant that the lower court by reviving Suit No. FCT/CC/JIK/CV/016/2009 and substituting it with Suit No.

FCT/CC/JIK/CV/023/2009 has revived a suit number which had been struck out and has erred by its decision.

On the argument canvassed by the Learned Counsel to the Appellant that the trial court should not have entertained the preliminary objection of the Respondent, I totally disagree as the court is bound to rule on any application/issue before it one way or the other. The Supreme Court in ***Afro-Cont. Ltd. v. Co-Op. Assoc. of Prof. Inc (2003)5 NWLR (Pt. 813) Pp 303 at 317 paras F –G*** held that "*it is settled law and mandatory that a court must make a decision and pronounce on every application which is before it and failure to do so is a breach of fair hearing.*" The Court of appeal in ***Ikono L.G. Vs. De Beacon Fin.& Sec. Ltd. (2003) 4 NWLR (Pt. 756) Pp 128 at 138*** also held that "*where an application is brought before the court, it is the duty of the court to consider the application before it and make a specific ruling on it."*

In conclusion, the trial court erred in the revival of Suit No. FCT/CC/JIK/CV/016/2009 but I have already noted that this challenges one aspect of the ruling and the court cannot disturb the aspect of ruling that relates to the striking out of the name of the Attorney. In the light of the consideration, one would uphold the submission of counsel to the Appellant that the trial court erred in reviving Suit No FCT/CC/JIK/CV/016/2009 and substituting it with Suit No FCT/CC/JIK/CV/023/2009 and the aspect of the ruling be set without prejudice to the trial court's decision to the striking out of the name of the Attorney in the latter Suit No FCT/CC/JIK/CV/023/2009, the case should proceed through the normal course of trial. The effect is that there is a disclosed principal which is the Plaintiff who has right of audience to sue on his own.

The sum effect of striking out of the name of Attorney is analogous to the case of a disclosed Principal whose agent has been struck out. The legal right of the Plaintiff to proceed with the case is unfettered.

It is important to note that the appellate court has power to vary decision of trial court even when not required by a party. The Supreme Court in ***Etajata v. Ologbo (2007) ALL FWLR P 618, Para D (SC), (2008) 6 SC (Pt. 11) 1 AT 32 – 35 Lines 25 -10,*** held that "*By virtue of Section 16 of the Court of Appeal Act, 1976 and Order 3, Rule 23 of the Court of Appeal Rules (as amended), it is not a novelty for the Court of Appeal to revisit any decisions/order in the course of its consideration of an appeal brought before it, to review, vary or amend or even make a further order as orders earlier made by the trial court even where not requested for by a party so long as, in its opinion, the justice of the ease demands for that. In the instant case, the court of Appeal was correct in exercising its powers in*

*effecting a variation to the earlier order made by the trial court.**Onuaguluchi v. Ndu (2001) FWLR (Pt. 45) 740, (2001) 3 SCNJ 110".*** The Customary Court of Appeal by virtue of Section 49(a) of the Federal Capital Territory Customary Court Act 2007**,** can reverse, very or confirm the decision of the lower court. I hereby reproduce the provision of Section 49(a) of the Federal Capital Territory Customary Court Act 2007 for purposes of emphasis. It provides Section 49(a), "*The Customary Court of Appeal in exercise of its appellate jurisdiction in civil matters under this Act may:*

(a) Whether after hearing the whole case or not reverse, vary or confirm the decision of the lower court and may make any such order as the court of first instance could have made in such cause or matter or as it considers that the justice of the case requires."

In conclusion, it is my conclusion that this Appeal succeeds in part to the extent that the orders made that Suit No. FCT/CC/JIK/CV/016/2009 which was ordered to be revived is hereby set aside. The appeal fails to the extent that the order made by the trial court in respect of striking out the name of the Attorney (Lady IfyMbanefo) representing Pat Okereke still stands and the case is hereby ordered to be remitted back to the Trial Court, Customary Court, Jikwoyi to be heard on its merit. The case remitted by this judgment shall be titled thus:

PAT OKEREKE Vs. MRS. ABIOLA OLUBISI

SUIT NO. FCT/CC/JIK/CV/023/2009

APPEAL ALLOWED

PASTOR FEMI STEVE

V.

1. MR. AUSTIN EBOHO

2. MR JOEL EFFIONG

Appeal No.: **FCT/CCA/CVA/17/2010**

HON. JUSTICE A.M.A SADDEEQ, JCCA (Presided)

HON. JUSTICE M.G. GWAGWA, JCCA

HON. JUSTICE (DR.) NGOZIKA OKAISABOR, JCCA (Delivered the Lead Judgment)

HON. JUSTICE USMAN N. AHMED, JCCA

18TH JANUARY, 2011

AUDI ALTERAM PATEM-	*Meaning of - scope of maxim*
COURT-	*FCT Customary Court – Composition of*
COURT-	*Rules of Court – compliance with – need to further the cause of justice*
FAIR HEARING-	*Rule of fair hearing – fundamental nature of*
INTERPRETATION OF STATUTES-	*Duty of Court to interpret – Extent of*
PRACTICE AND PROCEDURE-	*Proceedings at Customary Court of Appeal – Applicability of Evidence Act in*
PRACTICE AND PROCEDURE-	*Record of proceeding – transmission of to appellate court – duty to ensure exact record is transmitted*
PRACTICE AND PROCEDURE-	*Record of Proceedings – Need to certify – unsigned record of proceeding – implication of*
PRACTICE AND PROCEDURE-	*Reply – Order 9 Rule 2 FCT Customary Court Rules*
WORDS AND PHRASES-	*Certified copy – meaning of*

ISSUES:

1. Whether the proceedings leading to this appeal as reflected in the said ``Certified True Copy'' of the Record of proceedings was heard by a duly constituted court having regard to section 2 of the Customary Court Act 2007 read with Rule 4 of Order 26 of the Customary Court Rules, 2007.
2. Whether having regard to the provision of Order 26 of the Customary Court Rules, 2007**,** the trial Court was right to have struck out the Appellants' written statement of Defense.

FACTS

Briefly, the facts leading to this appeal are that on the 5th of February 2010 the plaintiff initiated a suit against the Defendant claiming the balance of part-payment of One Hundred and Fifteen Thousand Naira only (N115,000.00) being the balance of the agreed sum of Three Hundred Thousand Naira only (N300,000.00) to do polystine work in an uncompleted building in addition to the sum of Twenty Thousand Naira only (N20,000.00) they claimed to have spent in the removal of panel and replacement with pieces of polystine under the instruction of the Defendants. The Defendant on receipt of the statement of claim by the plaintiff filed a motion on notice dated 9th March 2010 on 10th March 2010, praying the trial court for an order striking out or transfer of Suit No FCT/CC/CV/K/01/2010 for lack of jurisdiction. Counsel for the Plaintiffs raised an objection to the plea of the Defendant.

The court struck out the Statement of Defence ruled that the Defendant has failed to make out a plea to jurisdiction. The Defendant/Appellant being dissatisfied with the said ruling delivered on 29th April, 2010 filed an appeal to this court via their notice of Appeal dated 11th May, 2010 on 12th May, 2010.

HELD (*Allowing the Appeal*):

1. **On the value a court places on the Record of Proceedings**.
   Record of proceedings is the only indication of what took place in court; it is not like minute of a meeting, it is always the final reference of events, step by step that took place in court. It would not be proper for the court to substitute such a record. See ***Fawehinmi Construction Company Ltd. v. Obafemi Awolowo Univ (1998) LPELR – SC 244/1991, PAGE II Paras A-B***.
2. **On whether the issue of jurisdiction is an issue of technicality.**
   Anything that goes to the competence of a court is not an issue of technicality but one of jurisdiction of that court. See ***Madukolu v. Nkemdilim (1962)1 ALL NLR Pp 587 AT 594*.**
3. **On a properly constituted Customary Court of the FCT**

Per Okaisabor, JCCA:

By the combined provision of Rule 4 of Order 26 of the Customary Court Rules and Section 2(1), (2), (3) of the Customary Court Act, I am of the view that in subsection 1, three persons shall form a properly constituted court, in subsection 3 at least two by implication can hear a cause or matter where a member did not participate in the entire hearing. **Order 26 Rule 4** makes it mandatory for all members to sign the record book at the end of the proceedings in each cause or matter and at the end of each day's business. The combined effect of **Section 2(1) (2) and (3) of the Act** read with **Order 26 Rule 4** is duly complied with. The provision of **Section 2 of the Act** touches on the composition of the trial Court when hearing any matter or cause and the only way the appellate court can satisfy itself that **Section 2** of the Act has been complied with is when it sees in the record of proceedings that the provisions of **Order 26 Rule 4 of the Rules**, has been adhered to. If the court is not duly constituted applying the ratio of the Supreme Court's decision in ***Madukolu v. Nkemdilim 1962)1 ALL NLR Pp 587 AT 594***, it goes to the jurisdiction of the court. The above provision makes it mandatory for all the members of the trial court to sign the proceedings of each day.

Per Saddeeq, JCCA:

Rule 4 which require that the Record Book should be signed by all the members at the end of each day's business is not an administrative obligation as a learned counsel would want this court to hold. This is purely a judicial requirement because it provided the proof by which the provision of Section 2 of the enabling Act can be said to have been met as regards the quorum while hearing this matter. This in turn touches on the trial courts' jurisdiction which we all know is pivotal to adjudication. So where as reflected in the purported document said to be a "Certified True Copy", that the proceeding on the various dates were not signed as required by rule 4, the competence of the trial court when it heard the matter is put to question because for the court to be competent, it must inter alia be "properly constituted with respect to the number of its members…" ***See Madukolu v. Nkemdilim (1962) 2 NSCC, 379*** *and* ***Sken Consult (Nig.) ltd. v. Ukey (1981) 12 NSCC, 12.***

4. **On the essence of certificating a record of proceedings.**

   Certification is an administrative exercise intended to show that nothing was added or removed and that what is sent is the same as what is contained in the original Record Book. This goes to ensure that there is no alteration in the record or the court's proceedings.

5. **On the implication of an unsigned record book**

Where we have a record that is not signed can it not be legitimately raised as an issue touching on the jurisdiction of the trial court? By implication, the inexorable conclusion one may legitimately draw on the face of the said "Certified True Copy" of Record of proceedings is that proceedings was heard by faceless invincible members of the trial court, a situation which negates the express provisions of **Section 2(1), (2) of the Act and Order 26 Rule (4) of the Rules**.

6. **On the meaning of the phrase "Certified Copy"**

   Webster's Law Dictionary defines Certified copy is a duplicate of an original document certified as an exact reproduction by the offices responsible for issuing or keeping the original.

7. **On duty of the court to rely on the record of proceedings**

   It is a cardinal principle of law that it is the duty of the judge not to close his eyes to the truth contained in the record before him. See ***Badejo v. Fed. Min. of Education (1996) 8 NWLR (Pt 464) 15 SC; Fagbola v. Titilayo Plast Ind. Ltd. (2005) 2 NWLR (PT 909), at II (CA),***

8. **On the need to ensure exact record of proceedings at the trial court gets to the appellate court**

   It is the duty of the Registrar of the lower court and the parties to the case or their Counsel to ensure that this court is served with the exact reproduction of record of proceedings of the Lower Court as stated in the Rules. See ***CBN v. Okojie (2004) 10 NWLR, (PT 882) 501***

9. **On what the Appellate Court relies on to do justice**.

   The court of Appeal does not conduct trial. All it does is to act on the record of proceedings being public documents which must be certified within the purview of Section 111 and Section 112 of Evidence Act, CAP E14 Laws of Federation of Nigeria. See ***Guinness (Nig.) Plc. v. Ufot (2008) 2 NWLR (PT 1070) 51 AT P. 71, paras D-F***

10. **On whether Customary Court can apply Evidence Act**

    Even though Section 111 of the Evidence Act CAP E 14**,** Laws of the Federation, 2004 is not applicable to Customary Court by virtue of Section 65, of the Act, where the court chooses to apply it, it can be used as a guide. Where the court chose to implement what Section 111 of the Evidence Act provided for a document to qualify as Certified True Copy, it then becomes mandatory on the court to comply with the provision of section 111 as it relates to the Certification of the Record. Order 26 Rule 4 read with Section 2 of the Act must be strictly complied with by the trial court.

11. On whether Evidence Act is applicable in Customary Courts

Section 2(c) of the Evidence Act provided specifically for the non-application of provisions of the Evidence Act to proceedings before the Customary Court or Customary Court of Appeal except as provided therein as follows

12. On whether court can visit inadvertence of counsel on litigants

It is an elementary principle of our adjectival law that the court would not ordinarily visit the inadvertence of Counsel on the litigant where the inadvertence does not border on the issue of jurisdiction but such irregularity or default that the court in the exercise of its discretion can cure. See ***Norwood Nig. Ltd. v. Stahlbau GMBH & Co. (1991) 5 NWLR (PT 194) 767 CA at 772H-773.***

13. On acceptable mode of reply under Order 9 Rule 2 Customary Court of FCT Rules

Applying the ordinary rule of interpretation, the above rule required the defendant to ``reply'' to the substance of claim when read to him. The term ``reply'' was not qualified by expressly providing for how it should be i.e. either orally or in writing. Therefore a defendant before the lower court has the latitude to choose how he intends to reply to the claim against him. Restricting the mode the reply should be made to oral reply alone will be reading in the provision extraneous meaning it never intended. A written reply can be reduced into writing into the record book or cause book by the Chairman just as it has been done at the High Court. In the instant case, the only possible meaning that will be in accordance with rationality, common sense and decency is to say that the provision cannot be interpreted to have specifically tied down the mode of reply to only oral reply, therefore the only available interpretation that can be ascribed to the provision of Order 9 Rule 2 is that both oral and written reply can be accommodated under it.

Per Saddeeq, JCCA:

Therefore if the construction of rule 2 of Order 9 by the trial court is the correct interpretation, which I do not think so, then the rule will be shutting out the defendant or his counsel from presenting his matter in the best manner he deems fit and the best way chosen to reply to the claim is via a written defense which the trial court struck out because it considered it to be alien to this rule. I view this as a denial of the appellants' right to fair hearing contrary to our Constitution. I must therefore regard this as an appropriate situation to set aside the Order of the trial court following its misconceived interpretation of rule 2 of Order 9.

14. On the extent of the duty of court in interpretation of statute

The trial court's duty in this regard is to expound the law/rule and it has no business in attempting to rewrite it. See ***Amadi v. Military Administrator of Imo State, (2000) 4NWLR (Pt 652) 328 at 330*.**

15. **On when misdirection is said to have occurred**.

Misdirection is said to occur when a judge makes mistakes in the law applicable to the issues in the case. See ***Abisi v. Ekwealor (1993) 6 NWLR (PT302) 643 AT 66; Fasina v. Ogunkayode (2005) 12 NWLR (PT 938)*** *147.*

16. **On the import of the latin maxim "audi alteram patem"**

The Latin maxim ``*Audi Alteram Patem''* is not merely a legal slogan in the context of the Constitution of the Federal Republic of Nigeria 1999, it is a constitutional right pursuant to Section 36 (1) and it is to be observed and enforced in all courts were justice is expected to be administered including the lower court.

17. On the fundamental rule of fair hearing

To give adequate opportunity to each party in litigation to state his case is clearly in the area of fundamental rules of fair hearing. It cannot be waived or compromised. After all fair hearing is nothing but what appears to be a fair trial to every right thinking observer in the circumstances of the particular hearing. See ***Olowu v. Nigerian Navy (2007) ALL FWLR (PT 350) 1278 at 1305 Paras A-B (CA).***

Per Saddeeq, JCCA:

It is trite that all procedure must conform to the ``...basic rules of fair trial and fair trial includes the rule for fair hearing. Any rule of procedure which has the effect of shutting out a party from presenting his case or inhibits counsel in presenting his case to best of his ability is inconsistent with the rule of fair hearing and Section 36 of the Constitution... ``See ***NVA v. Odiri (2007) 8 NWLR (PT 1035) 219.***

18. On effect of non compliance with rues of court

It is a trite law that rules (of court) must be obeyed and any non-compliance ought to be explained. Any non-compliance with a rule which is fundamental and relates to the precondition for the courts' jurisdiction will render the entire proceedings incompetent: See ***Williams v. Hope Rising Voluntary Fund Society (1982) 1 ALL NLR (pt 1) 1; Johnson v. Osaye (2001) 9 NWLR (Pt 719); Katsina v. Makudawa (1971) NWLR, 100, Chukwuogor v. Chukwuogor (2006) 7 NWLR (Pt 979) 319.***

19. **On the need not to use the rules of court to defeat justice**

Rules of Court must not be treated lightly, however its rigid application must be avoided: Every rule of court is meant to assist the cause of justice and not to defeat it, and this is why courts should not blindly follow the rules of procedures without considering the justice of the case: ***See See Joseph Afolabi & Ors v. John Adekunle & Anor. (1983) 14 NSCC, 405*** cited in ***Melifonwu v. Ebunike & Ors (2001) 1 NWLR (Pt 964) 281.*** See also ***Simetequip Ltd v. Omega Bank Plc (2001) 16 NWLR (Pt 739) 340; Banana v. Telepower (Nig) Ltd (2006) 15NWLR (Pt 1001) 224 AND 225.***

Cases cited in this Judgment

Abisi v. Ekwealor (1993) 6 NWLR (PT302) 643

Amadi v. Military Administrator of Imo State, (2000) 4NWLR (Pt 652) 328

Badejo v. Fed. Min. of Education (1996) 8 NWLR (Pt 464) 15 SC

Banana v. Telepower (Nig) Ltd (2006) 15NWLR (Pt 1001) 224

CBN v. Okojie (2004) 10 NWLR, (PT 882) 501

Chukwuogor v. Chukwuogor (2006) 7 NWLR (Pt 979) 319.

Fagbola v. Titilayo Plast Ind. Ltd. (2005) 2 NWLR (PT 909), at II (CA)

Fasina v. Ogunkayode (2005) 12 NWLR (PT 938) 147

Fawehinmi Construction Company Ltd. v. Obafemi Awolowo Univ (1998) LPELR – SC 244/1991, PAGE II Paras A-B.

Guinness (Nig.) Plc. v. Ufot (2008) 2 NWLR (PT 1070) 51 at 71

Joseph Afolabi & Ors v. John Adekunle & Anor. (1983) 14 NSCC, 405 Melifonwu v. Ebunike & Ors (2001) 1 NWLR (Pt 964) 281

Katsina v. Makudawa (1971) NWLR, 100

Madukolu v. Nkemdilim (1962)1 ALL NLR Pp 587 AT 594.

Norwood Nig. Ltd. v. Stahlbau GMBH & Co. (1991) 5 NWLR (PT 194) 767 CA

NVA v. Odiri (2007) 8 NWLR (PT 1035) 219.

Olowu v. Nigerian Navy (2007) ALL FWLR (PT 350) 1278 (CA).

Simetequip Ltd v. Omega Bank Plc (2001) 16 NWLR (Pt 739) 340

Sken Consult (Nig.) ltd. v. Ukey (1981) 12 NSCC, 12

Williams v. Hope Rising Voluntary Fund Society (1982) 1 ALL NLR (pt 1) 1 Johnson v. Osaye (2001) 9 NWLR (Pt 719)

***Hon. Justice (Dr) Ngozika Uwa Okaisabor (delivering the lead judgement)*:** This is an appeal against the Ruling of the Customary Court, Karmo, Abuja dated 29th April, 2010 in which the trial

court ruled in favour of the plaintiffs now Respondents by striking out the Defendant now Appellant's Statement of Defence dated 28th day of April 2010 and filed on the 29th day of April, 2010.

Briefly, the facts leading to this appeal are that on the 5th of February 2010 the plaintiff initiated a suit against the Defendant claiming the balance of part-payment of One Hundred and Fifteen Thousand Naira only (N115,000.00) being the balance of the agreed sum of Three Hundred Thousand Naira only (N300,000.00) to do polystine work in an uncompleted building in addition to the sum of Twenty Thousand Naira only (N20,000.00) they claimed to have spent in the removal of panel and replacement with pieces of polystine under the instruction of the Defendants.

The Defendant on receipt of the statement of claim by the plaintiff filed a motion on notice dated 9th March 2010 on 10th March 2010, praying the trial court for an order striking out or transfer of Suit No FCT/CC/CV/K/01/2010 for lack of jurisdiction.

Counsel for the Plaintiffs raised an objection in the trial Court on 29th April 2010 as to the plea of the Defendant thus:

> "The Defendant has just taken his plea denying liability of the claims put forward by the plaintiff and has equally filed a counterclaim and statement of defence. We are saying that the statement of defence is alien to the rules of the court".

Counsel for the Defendant responded that the substance of claim should not have been filed by the plaintiff. Having listened to the submissions of both counsel, the court struck out the Statement of Defence and pronounced that:

> "In the absence of any objection from the counsel to the plaintiff to the counterclaim of the Defendant, the plaintiff shall make his reply. The court went further to state that the filing of the Substance of Claim by the plaintiff which ought not to have been filed is a mere irregularity from the Registry and its hereby noted and would be treated accordingly".

On 14th day of April 2010, the trial court ruled that the Defendant has failed to make out a plea to jurisdiction and thus failed to show that the court has no jurisdiction over him or over the matter. The Court in its ruling pursuant to Order 10 rule 3 (b) of the Customary Court (Civil Procedure) Rules 2007 (hereafter referred to as "the Rules") ordered that the hearing should continue and that

the defendant shall take his plea and adjourned the matter to 29th day of April 2010 for further mention.

The Defendant/Appellant being dissatisfied with the said ruling delivered on 29th April, 2010 filed an appeal to this court via their notice of Appeal dated 11th May, 2010 on 12th May, 2010. The Notice of Appeal which contained three Grounds of Appeal read thus:

1) "The court below misdirected itself in law and facts when it ruled and made Order striking out the Defendant's Defence to Plaintiffs claim dated 28th April, 2010 and filed on 29th April, 2010.
2) The court below erred in law when it held that the Defendant's Defense is not known to the Customary Court Rules 2007 and Act but the Defendant could go ahead with the counter claim
3) The court below lacks jurisdiction to entertain the suit for lack of fair hearing".

On the 7th day of October, 2010, the Appellant through his learned counsel, Kola Oyedotun and Dotun Akinsola having filed his Brief of Argument dated 10th August 2010 on 11th August 2010, adopted same while the Respondents through their learned counsel Ben Akpan, having filed their Respondent's Brief of Argument dated 6th day of September 2010 on 8th September 2010, also adopted same on the said date. After the adoption of their Brief, the court observed that only the Ruling of the court below being contested was signed while the rest of the proceedings on various dates were unsigned. The court raised the issue *suo motu* and asked counsel to address it on the import of Rule 4 of Order 26, as it relates to the trial court's competence to hear the mater on the various dates before the ruling as shown in the said "Certified True Copy" of the record of proceedings.

In his settled Brief, the appellant formulated two issues for determination namely:

1) "Whether or not the Lower Court was not in grave error by striking out the Defendants Defence to Plaintiff's claim and painstaking way and manner the said trial court allowed the Defendant's counterclaim and arrived at its ruling.
2) Whether or not the trial court lacks jurisdiction to entertain the suit for lack of fair hearing having struck out Defendant's Defence".

However, the Respondent having adopted the Appellant's 2nd issue for determination recapitulated the 1st issue as follows:

``was the lower court right in its ruling in striking out the written Defense of the Defendant?"

Upon reading the adopted Briefs of the parties and their submissions on the issue raised by the Court, the Court is of the view that two issues arose for determination, these are:

3. Whether the proceedings leading to this appeal as reflected in the said ``Certified True Copy'' of the Record of proceedings was heard by a duly constituted court having regard to section 2 of the Customary Court Act 2007 read with Rule 4 of Order 26 of the Customary Court Rules, 2007?
4. Whether having regard to the provision of **Order** 26 of the Customary Court Rules, 2007**,** the trial Court was right to have struck out the Appellants' written statement of Defense?

On the 27th of October, 2010, the Appellant on issue one above, argued that even though the Rules of court are to be obeyed, this court has inherent jurisdiction to ensure compliance since the appeal is an interlocutory appeal against the Ruling of the trial court dated 29th day of April, 2010 and the Ruling was signed by all the members of the trial court. He further argued that the court has the power to invoke Section 50 of the Customary Court Act 2007 by calling for the original record for inspection and submitted further that the Record before the court that fails to comply with the rules of the court was a mere ``administrative irregularity'' and referred the court to the case of ***Adetoun Oladeji Nig Ltd v. Nig. Breweries Plc (2007) 3 MJSC 29 ratio 5*****.** Counsel further in his argument referred the court to the case of ***Steven O. Abarton v. Momodu Awudu (2005) 8 WRN PG 131 RATIO 9*** and submitted that the court has power to presume by law that the record of proceedings is correct until the contrary is proved. He also maintained that once the Appellant has paid his fees for the record of Appeal and filed NOTICE of Appeal, the appeal is deemed to have been properly filed and the court is bound to entertain same. Counsel to the appellant urged the court to presume the unsigned record to be true until the contrary is proved. He therefore prayed the court to use its discretion by allowing the appeal to go on.

The Respondents' counsel in his opening submission stated that the attitude of the court is deviating more by adhering to technicalities rather than to doing substantial justice and cited ***Smurfit Cases Nig. Ltd. & Anor. v. Gongola Hope & Anor. (2002) FWLR (Pt 103), 311 AT 325*****,** in support. The Respondent, upon relying on ***Okoye & Anor. v. C P Merchant Bank Ltd. (208) Vol. 164 LRCN page I at 10 ration 13*** accepted that rules of court must be obeyed, but argued that the non-compliance with the provision of order 26 rule 4 is a curable defect which can be remedied by

the invocation of Section 50 of the Customary Court Act (Hereinafter referred to as "the Act"), which allows the appellate court to call for the Record Book for inspection.

In consideration of the first argument canvassed by learned counsel to the Appellant, Kola Oyedotun, the question one may postulate from the learned counsel's submission is, would it be proper for the court to substitute the record if it is discovered that the content of the said "Certified True Copy" of Record submitted is different from that contained in the record book, the court cannot substitute it. See ***Fawehinmi Construction Company Ltd. v. Obafemi Awolowo Univ (1998) LPELR – SC 244/1991, PAGE II Paras A-B***, wherein it was stated that "*Record of proceedings is the only indication of what took place in court; it is not like minute of a meeting, it is always the final reference of events, step by step that took place in court".* It would not be proper for the court to substitute such a record.

This Court does not share the view on technicality as canvassed by the learned counsel to the Respondent because it is not merely an issue of technicality per se as argued by him. This is because anything that goes to the competence of a court is not an issue of technicality but one of jurisdiction of that court. See the Supreme Court decision in ***Madukolu v. Nkemdilim (1962)1 ALL NLR Pp 587 AT 594*.** This Court must be satisfied that when the lower court heard the matter, it has jurisdiction. The learned counsel's submission appears to suggest that this court is relying on technicalities rather than doing substantial justice is a clear demonstration of his inability to know what technicality is. This is reprehensible coming from a lawyer of so many years standing. The court views it as a myopic appreciation of the law which as a minister in the temple of justice should be in his chest. The issue as to whether the record book was signed as required by the rule is an issue that touches on the jurisdiction of the trial court thus its judicial power to adjudicate on the matter. The signature of the members of the trial court are important, though none of the parties have raised the issue but the court can suo motu raise the issue and ask the parties to address it.

The operative word in Order 26 Rule 4 is "SHALL", and for ease of reference, it is reproduced as follows: *"The Chairman and Members of the Customary Court shall sign the record book at the end of the proceedings in each cause or matter at the end of each day's business"*.

For the proper appreciation of Rule 4 of Order 26 of the Rules, it should be read with the provision of Section 2(1), (2), (3) of the Act, which spelt out the composition of the trial Court. I take the liberty for a proper elucidation of what I am saying to reproduce the provisions. It states:

"*2 (1) A Customary Court shall consist of a Chairman and two (2) other members who shall be referred to as Customary Court Members, all of whom shall be appointed by the Judicial Service Committee.*

2 (2) For the purpose of hearing any cause or matter, three (3) Members shall constitute a quorum; (underline for emphasis)

2 (3) A member who did not take part in the entire hearing of a cause or matter shall not participate in the judgment of the court".

From the above quoted provision, I am of the view that in subsection 1, three persons shall form a properly constituted court, in subsection 3 at least two by implication can hear a cause or matter where a member did not participate in the entire hearing. Order 26 Rule 4 makes it mandatory for all members to sign the record book at the end of the proceedings in each cause or matter and at the end of each day's business. The combined effect of Section 2(1) (2) and (3) of the Act read with Order 26 Rule 4 is duly complied with. The provision of Section 2 of the Act touches on the composition of the trial Court when hearing any matter or cause and the only way the appellate court can satisfy itself that Section 2 of the Act has been complied with is when it sees in the record of proceedings that the provisions of Order 26 Rule 4 of the Rules, has been adhered to. If the court is not duly constituted applying the ratio of the Supreme Court's decision in **Madukolu v. Nkemdilim** supra, it goes to the jurisdiction of the court. The above provision makes it mandatory for all the members of the trial court to sign the proceedings of each day.

Where only the ruling as shown in the said Certified True Copy of the trial court was signed as required by Rule 4, how can it be determined that the proceedings leading to the ruling conducted on various dates though unsigned by anybody, was heard by a duly constituted court as required by Section 2 of the Act? Certification by the registrar cannot in my view, take the place of due composition of a court. Certification is an administrative exercise intended to show that nothing was added or removed and that what is sent is the same as what is contained in the original Record Book. This goes to ensure that there is no alteration in the record or the court's proceedings. Where we have a record that is not signed can it not be legitimately raised as an issue touching on the jurisdiction of the trial court? By implication, the inexorable conclusion one may legitimately draw on the face of the said "Certified True Copy" of Record of proceedings is that proceedings was heard by faceless invincible members of the trial court, a situation which negates the express provisions

of Section 2(1), (2) of the Act and Order 26 Rule (4) of the Rules. The Court would not have been properly constituted if such was the case.

Order 26 Rule 5 of the Rules has nothing to do with the mandatory requirement of section 2 of the Customary Court Act and Order 26 Rule 4 which deals with the composition of the court. When court's processes and records are required as public documents to be certified, the question one may ask is: WHAT IS CERTIFICATION? Certification as defined by Webster's Law Dictionary states that:

> *"Certified copy is a duplicate of an original document certified as an exact reproduction by the offices responsible for issuing or keeping the original".*

In ***Badejo v. Fed. Min. of Education (1996) 8 NWLR (Pt 464) 15 SC,*** it is a cardinal principle of law that it is the duty of the judge not to close his eyes to the truth contained in the record before him. This same principle was enunciated in ***Fagbola v. Titilayo Plast Ind. Ltd. (2005) 2 NWLR (PT 909), at II (CA),*** wherein it was stated inter alia that:

> *"The importance of the good clear and full record of proceeding cannot be overemphasized. The Justices of this court, it goes without saying do not participate in the proceedings at the court below and the only guide legally allowed is the record of proceeding. Where record of proceedings is not properly settled, this court is than deprived the benefit of knowing in details what transpired in the court below which may inadvertently lead to miscarriage of justice".*

The court in invoking its power under the provision of Section 50 of the Act, ordered and inspected the original record book. It is of the view that from the foregoing and with particular reference to the earlier decision from the Appellate Court in ***CBN v. Okojie (2004) 10 NWLR, (PT 882) 501,*** it is the duty of the Registrar of the lower court and the parties to the case or their Counsel to ensure that this court is served with the exact reproduction of record of proceedings of the Lower Court as stated in the Rules. The principle enunciated in ***Guinness (Nig.) Plc. v. Ufot (2008) 2 NWLR (PT 1070) 51 AT P. 71, paras D-F*** is that the court of Appeal does not conduct trial. All it does is to act on the record of proceedings being public documents which must be certified within the purview of Section 111 and Section 112 of Evidence Act, CAP E14 Laws of Federation of Nigeria.

However it is important to note that Section 2(c) of the Evidence Act provided specifically for the non-application of provisions of the Evidence Act to proceedings before the Customary Court or Customary Court of Appeal except as provided therein as follows:

> *"This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply – to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area court or Customary Courts in the Federal Capital Territory, Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act".*

Even though Section 111 of the Evidence Act CAP E 14**,** Laws of the Federation, 2004 is not applicable to Customary Court by virtue of Section 65, of the Act, where the court chooses to apply it, it can be used as a guide. Where the court chose to implement what Section 111 of the Evidence Act provided for a document to qualify as Certified True Copy, it then becomes mandatory on the court to comply with the provision of section 111 as it relates to the Certification of the Record. Order 26 Rule 4 read with Section 2 of the Act must be strictly complied with by the trial court.

I have no doubt that it is an elementary principle of our adjectival law that the court would not ordinarily visit the inadvertence of Counsel on the litigant where the inadvertence does nor border on the issue of jurisdiction but such irregularity or default that the court in the exercise of its discretion can cure. ***Norwood Nig. Ltd. v. Stahlbau GMBH & Co. (1991) 5 NWLR (PT 194) 767 CA at 772H-773.*** It is for this reason that this court exercised its discretion under the provision of Section 50 of the Act by ordering for the production of the original record book of the trial court for inspection. This was done in order as it were, to salvage the hearing of the instant appeal by preserving the constitutional right of access of the parties to be heard in the matter. For ease of reference, the said Section of the law states:

> "Where an appeal lies from an order or decision of a Customary Court the Customary Court of Appeal shall have power to inspect the records or books of such Customary Court relating to the appeal".

On inspection, this court discovered that the alleged ``Certified True Copy'' of the record of proceedings transmitted to this Court is not in fact a reflection of what is in the original Record Book. It was discovered upon inspection that the original record of proceedings of the trial Court were duly signed by all the three members at the end of each day's proceedings but the transmitted copies were not shown to be so signed. Consequently, the transmitted copy of the Record of Proceedings cannot qualify as a ``Certified True Copy'' of the original Record book as it is not a correct reproduction or prototype of the original. The original record therefore complied with the requirement of Order 26 Rule 4 of the Rules.

All said and done with, this issue would have been resolved in the negative, had reliance been squarely placed on the purported ``Certified True Copy'' supplied, but for the invocation of Section 50, the answer to this issue is in the affirmative i.e. the proceedings leading to this appeal was heard by a duly constituted court as shown by the compliance with the provision of Rule 4 of Order 26 of the trial courts' Rules.

On the 2nd issue, the Appellant submitted that the Lower Court committed a grave error when it struck out the written Statement of Defence of the Appellant after referring the Court to Order 2 Rule 2 and Order 2 Rule 3 of the Rules, he submitted that the Court below having accepted the Plaintiff's claim ought to have accepted the Defendant's Defence.

He contended that the Lower Court ought to have invoked the provisions of Order 2 Rule 5 and Order 28 Rule 1 of the Rules. Placing reliance on ***Abisi v. Ekwealor (1993) 6 NWLR (PT 302) 643 AT 661*** and ***Fasina v. Ogunkayode (2005) 12 NWLR (Pt 938) 147*** counsel argued that misdirection is said to occur when a Judge misconceives the issues or summaries the evidence inadequately or incorrectly for one side or the other or make mistakes in the law applicable to the issues in the case.

On Section 66 of the Act**,** he maintained that the court below ought to have interpreted it with Order 2 Rule 5 and Order 28 Rule 1 of the Rules before coming to its conclusion. Making further submission, learned counsel for the appellant opined that the lower court should have invoked the provision of Order 28 Rule 1 in assuming jurisdiction and power over the case before it and not strictly adhering to Order 9 Rule 2 of the Rules.

In his final submission that the striking out of the Appellant's Defence is a denial of fair hearing, he referred the Court to ***Alamieyeseigba v. Igoniwari (2007) 15 W.R.N PAGE 174 at 178 ratio 5 & 7*** and ***Ceekay Traders v. General Motors Co. Ltd. (1992) 2NWLR (Pt 222) 132 at 139*****.**

Responding, the Respondents submitted that the lower court was right in striking out the Defence of the Appellant. Referring to Order 9 Rule 2 of the Rules**,** he argued that the provision contemplated that when the claim/complaint is read to the Defendant he is expected to be present in court to take his plea and that the Defendant is to reply orally. To further buttress his position, he stated that had the Rules contemplated a written defence, the provisions of Order 10 rule3 (c) of the Rules would have been rendered impotent. Respondent further stressed that the provisions of

Order 10 Rule 3 (c) of the Rules only gave force to Order 9 Rule 2 of the Rules and that the lower court was right in striking out the written defence.

Arguing further, learned Counsel stated that to appreciate the provision of Order 9 Order 2 of the Rules, same should be read in conjunction with Section 66 of the enabling statute, stressing that by the rules of interpretation, an interpretation section of an Act refers to words and terms used in that Act and any recourse to interpretation section of any Act ought to be corroborated with instances where the terms are used in the body of the Act.

He also contended that if the court had assumed the filing of the substance of claim by the Respondent as a mere irregularity and thereafter proceeded to allow the claim and for the Appellant to latch on it to argue that the written defence ought to be allowed as what is good for the goose is also good for the gander is reducing the issue for determination before this court to triviality and that pleadings are not filed in Native Courts. To buttress this argument, he referred to ***Major Gen. Ishaya Bamaiyi & Ors v. Major Gen. Musa Bamaiyi & Ors (2005) ALL PWLR (PT 288) 1142, at 1162*** *and* ***Cyprain Onwuama v. Louis Ezekoli (2002) FWLR (PT 100) 1213 RATIO 1.*** Having relied on Order 2 Rule 2, Order 2 Rule 3 and Order 26 he stated that two wrongs do not make a right and that the purported filing of the substance of claim which the court held that it ought not to have been filed and treated it as an irregularity goes to no issue.

On Order 2 Rule 3 of the Rules**,** he maintained that non compliance with the said rule does not vitiate the action of the Respondents and the court was right in striking out the written defence and urged the court to uphold the decision of the lower court because according to him, the provision of Order 9 Rule 2 of the Rules overrides the provisions of Order 28 Rule 1 of the Rules which contemplates a situation where provisions are not made to cover certain proceedings. He is of the view that the provision of Order 2 Rule 5 of the Rule urged on the court by the Appellant is totally irrelevant to the issue before this court.

Stressing further on Order 9 Rule 2 of the Rules, he submitted that the court below has unfettered jurisdiction to entertain the matter before it and the fact that the lower court struck out the defence of the Appellant does not strip it off its jurisdiction and that the Appellant was given ample opportunity to make his plea.

He submitted that lack of fair hearing connotes a situation where the other party is not given an opportunity to state his own side of the case and that in the instant case, the Appellant's plea was taken and he denied liability.

Learned Counsel maintained that Section 14 (1) and (2) of the Act vested the trial court with jurisdiction, therefore ground 3 of the Appellants Ground of Appeal is incompetent as it does not constitute a ground in law and should therefore be struck out together with the issues formulated there from. He referred to ***Balonwu v. Governor of Anambra State (2009) LRCN VOL. 177, 2 at 6 Ratio 1*** to buttress his argument.

The submission of both parties touching on the point of lack of jurisdiction and fair hearing will be treated by the court under this issue as they appear to relate to the issue of striking out of the defence.

From the submissions of the parties, undoubtedly, this issue revolves around the construction of the provision of Order 9 Rule 2 which must be reproduced at this juncture to ease reference. This rule provides thus:

> *``After the claim or compliant has been read and explained to the defendant in accordance with Rule 1 and he has signified that he understands it, the Chairman shall then call upon the defendant to reply to the claim or complaint in accordance with the native law and custom applicable thereto, and the defendant's answer shall be entered in the Civil Cause Record Book'' (Underlined for emphasis).*

Applying the ordinary rule of interpretation, the above rule required the defendant to ``reply'' to the substance of claim when read to him. The term ``reply'' was not qualified by expressly providing for how it should be i.e. either orally or in writing. Therefore a defendant before the lower court has the latitude to choose how he intends to reply to the claim against him. Restricting the mode the reply should be made to oral reply alone will be reading in the provision extraneous meaning it never intended. A written reply can be reduced into writing into the record book or cause book by the Chairman just as it has been done at the High Court. I therefore do not agree with the submission of the counsel to the respondent that the mode of reply contemplated by the rule is only oral. The trial court's duty in this regard is to expound the law/rule and it has no business in attempting to rewrite it. See ***Amadi v. Military Administrator of Imo State, (2000) 4NWLR (Pt 652) 328 at 330.*** Wherein the court of appeal stated inter alia that:

``When a statute makes a provision which on the face of it is incomprehensible because of its vagueness or equivocative language the court will interpret it in a beneficial way''. Difficulties are sometimes encountered trying to construe certain provisions particularly where there appears to be some inconsistency. In that case the court should avail itself of its liberal attitude to give interpretation that would give life and meaning to the provision''.

In the instant case, the only possible meaning that will be in accordance with rationality, common sense and decency is to say that the provision cannot be interpreted to have specifically tied down the mode of reply to only oral reply, therefore the only available interpretation that can be ascribed to the provision of Order 9 Rule 2 is that both oral and written reply can be accommodated under it.

Further, the act of the trial court is a misdirection of the law having made an error as to the construction of the applicable rule to the issue before it. See ***Abisi v. Ekwealor (1993) 6 NWLR (PT302) 643 AT 66*** where it was held inter alia that ``*a misdirection is said to occur when a judge makes mistakes in the law applicable to the issues in the case''.* See also ***Fasina v. Ogunkayode (2005) 12 NWLR (PT 938)*** *147.* The court is of the view that trial court misapplied the provisions of Order 9 Rule 2 of the Rules by holding that the rule did not provide for a written statement of Defence and therefore went ahead to strike it out. Since the Defendant has chosen to reply in writing, he has complied with the provision of Order 9 Rule 2 of the Rules**.** The trial court was wrong to say it was not proper. In construing Order 9 Rule 2, the trial court for a reason best known to it considered it worthy to condone the irregularity of the plaintiff, however viewed with extreme bitterness, the same irregularity, if it is at all irregularity. This lopsided appreciation of the Appellant written Defence has blindfolded the lower court to the application of the principle of natural justice. This court views with all seriousness this kind of position taken by the lower court and condemns it in totality as justice should be seen to be done to all the parties which is not the case in the instant matter where one party's irregularity is condoned and the other party's alleged irregularity is penalized.

The lower court in its Ruling clearly stated that the substance of claim filed by the plaintiff before it was not in accordance with the Rules of Customary Court nevertheless it was considered as irregularity to be dealt with later when the Defence in the same status was struck out. This would definitely pitch the Appellant in a disadvantaged position. It is my view that when Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 is read and applied to this peculiar fact, the scale of justice must be held evenly balanced between both parties.

The Latin maxim ``*Audi Alteram Patem''* is not merely a legal slogan in the context of the Constitution of the Federal Republic of Nigeria 1999, it is a constitutional right pursuant to Section 36 (1) and it is to be observed and enforced in all courts were justice is expected to be administered including the lower court. In ***Olowu v. Nigerian Navy (2007) ALL FWLR (PT 350) 1278 at 1305 Paras A-B (CA),*** it was held that to give adequate opportunity to each party in litigation to state his case is clearly in the area of fundamental rules of fair hearing. It cannot be waived or compromised. After all fair hearing is nothing but what appears to be a fair trial to every right thinking observer in the circumstances of the particular hearing.

In the Respondents' attempt to mislead the court, he misled himself on his understanding of Section 66, Order 9 Rule 2, Order 10 Rule 3(c), Order 2 Rule 2, Order 2 Rule 3, Order 26 and the court is of the view that learned counsel did not appreciate the section and those orders as spelt out and therefore misled himself, just as noted in ***Afribank (Nig.) v. Akwara (2006 5 NWLR (Pt 974) 630 AT 637 - 638, paras. H-A*** where the Supreme Court stated inter alia ``*I must express my surprise here that appellant's counsel placed reliance on* ***Auto Import v. Adebayo (2002) 18 NWLR 554.*** *It is either that counsel had not read the report before citing it before us or that he meant to mislead the court. I think it is kind to assume it's the former. It is however regrettable that counsel would cite before this court a case that is clearly against the principle being urged on the pretext that the case supports the principle''.*

The court does not agree with the submission of the Respondents' counsel with respect to his argument on Section 66 of the Act, 2007 where he said:

> ``*It is our submission that by the rules of interpretation and interpretation section of an Act refers to words and terms used in that Act and any recourse to the interpretation section of any Act ought to be corroborated with instances where the terms are used in the body of the Act''.*

Both Counsel and the court have raised so much dust on Section 66 of the Act as it relates to the interpretation of the of word pleading, in support or against their understanding of Order 9 Rule 2 of the Rules**.** With a view to determine the context in which the word ``pleading'' was used in the Act, the entire provisions of the Act was thoroughly perused and it was surprising to discover that though the word ``pleading'' was interpreted under Section 66 of the Act the very word never appeared in any section of the Act**.** The court is unable to know why the drafters of the Act decided to interpret word that was never used in any section of the Act. Therefore, the court is of the strong

opinion that the interpretation will serve no useful purpose to the understanding of Order 9 Rule 2 of the Rules.

In response to the Respondent's argument in relation to Order 10 Rule 3 **(c)** of the Rules it is pertinent to note that there is no Order 10 Rule 3 (c) in the rules of the lower court. If we can assume that the Respondent is referring to Order 10 Rule 2 (c), the question then is how can the written Defence render the said Rule impotent? Can't the written reply be recorded in the record book or even where the pleadings are recognized in the court, is it not always the practice to lift such written pleas into the Record Book? This submission of learned Counsel to the Respondent is unbelievably outrageous.

Order 2 Rule 2 of the Rule states that complain should be in person and if the trial court said that it is an irregularity, it should have struck it out and not proceeded on the irregularity. Therefore, having allowed the irregularity to persist, also caused the purported misleading of the Appellant/Defendant to also file his Defence in writing.

Order 2 Rule 3 of the Rules referred to has nothing to do with this appeal as it only relates to what the court Registrar should do upon the receipts of a compliant which should be in accordance with Order 26 Rule 1 of the Rules which is that the court shall cause to be kept a cause book and a civil record book.

Similarly Order 26 of the Rules has no relevance to the issue touching on the striking out of the Statement of Defence by the lower court. Therefore, all the submissions touching on this Order are irrelevant and therefore goes to no issue.

It is worthy of note that in this appeal, the Appellant has expressed fear of fair hearing and had sought from this court for an order transferring this matter to a District or Customary Court for trial.

In summary, this court upholds the appeal and sets aside the Ruling of the Customary Court Karmo dated 29th April, 2010 wherein it struck out the Statement of Defence and order that the matter shall be sent back to the trial court for Hearing.

Hon. Justice A.M.A. Saddeeq, JCCA: I have had before now, the advantage of reading in advance the lead judgment of my learned brother, Okaisabor N. JCCA, which has just been delivered. I am in

entire agreement with my skeletal contribution on the two issues yearning for resolution without having to reproduce them, as they have been contained in the lead judgment.

Adopting the 1st issue for determination as formulated by the court, it is pertinent at this point to reproduce the provision of Order 26 rule 4 of the Customary Court Civil Procedure Rules 2007, which this court raised suo motu and called for the address off counsel to the parties. This rule reads as follows:-

> *"1. The Chairman and members of the Customary Court shall sign the record book at the end of the proceedings in each cause or matter and at the end of each day's business" (underlined for emphasis)*

With the above provision in mind, upon a closer perusal of what is said to be the "Certified True Copy" of the lower courts' record of proceedings, this court observed that the proceedings of 10/02/2010, 17/02/2010, 10/03/2010, 15/03/2010. 14/04/2010 and 29/04/2010 did not satisfy the provision of rule 4, having not been signed by the Chairman and Members of the court below. The court was therefore unable to ascertain whether the trial court was duly constituted when it heard this matter on the various dates noted above, having regard to the provision of section 2(1) (2) and (3) of the Customary Court Act, 2007. It therefore called for counsels' address on this issue.

Section 2 of the enabling law, provides as follows:-

1. *A customary Court shall consist of a Chairman and two other members …*
2. *For the purpose of hearing a cause or matter, three members shall constitute a quorum.*
3. *a member who did not take part in the entire hearing of a cause or matter shall not participate in the judgment of the court"*

Learned counsel to the appellant contended that though there is non-compliance with rule 4 of Order 26, it was an administrative lapse which ought not to be visited on the appellant since the record was stamped as a 'Certified True Copy' as required by rule 5. The Respondent saw the court's call for address as a tilt more towards what he considered as technicality even though he maintained that the provision of rule 4 is mandatory and should therefore be complied with. He nevertheless holds the view that the non-compliance apparent on the face of the alleged 'Certified True Copy' is curable by the invocation of the provision of section 50 of the Customary Court Act, 2007.

Regrettably, am not swayed by the line of argument towed by both counsel. Their submission is a vivid illustration of their lack of comprehension of the rationale behind the issue raised by the court either due to their failure to appreciate the gravity of the non-compliance or because they are unable to distinguish the purpose of rule 4 from that of the provision of Section 50 of the Act and rule 5 of Order 26.

With great respect, Section 50 could not have provided the remedy for the non-compliance it after its invocation, the contravention of the provision of rule 4 is discovered to exist in the Record Book as shown in the said Certified True Copy. Rule 5 on the other hand is a rule independent of Rule 4 in that it relates to the certification of a record supplied on request by the trial courts' Registrar irrespective of whether or not the mandatory requirement in rule 4 was complied with. Therefore compliance with rule 5 cannot operate to take the place of the requirement of rule 4 neither can the invocation of section 50.

Rule 4 which require that the Record Book should be signed by all the members at the end of each day's business is not an administrative obligation as a learned counsel would want this court to hold. This is purely a judicial requirement because it provided the proof by which the provision of Section 2 of the enabling Act can be said to have been met as regards the quorum while hearing this matter. This in turn touches on the trial courts' jurisdiction which we all know is pivotal to adjudication. So where as reflected in the purported document said to be a "Certified True Copy", that the proceeding on the various dates were not signed as required by rule 4, the competence of the trial court when it heard the matter is put to question because for the court to be competent, it must inter alia be "properly constituted with respect to the number of its members…" ***See Madukolu v. Nkemdilim (1962) 2 NSCC, 379*** *and* ***Sken Consult (Nig.) ltd. v. Ukey (1981) 12 NSCC, 12.***

This rule like any other rule, regulates the practice of the trial court in the exercise of its powers which it derived from section 2 of the Act: ***See Dada v. Ogunremi (1962) 2 SCNLR 417,*** referred to in **Afribank** ***(Nig.) Plc v. Akwara (2006) 5 NWLR (PT 974) 654***. It follows therefore that as a trite law, the rule must be obeyed and any non-compliance ought to be explained. ***See Williams v. Hope Rising Voluntary Fund Society (1982) 1 ALL NLR (pt 1) 1.*** Any non-compliance with a rule which is fundamental and relates to the precondition for the courts' jurisdiction will render the entire proceedings incompetent: ***See Johnson v. Osaye (2001) 9 NWLR (Pt 719),*** and ***Katsina v. Makudawa (1971) NWLR, 100, Chukwuogor v. Chukwuogor (2006) 7 NWLR (Pt 979) 319.***

Being an appellate court, the provision of Section 2 of the Act can only be presumed to have been complied with if the provision of rule 4 has been satisfied in the Record Book, the absence of which will have a fatal consequence on the competence of the trial court when it heard this matter. The invocation of the Section 50 of the Act will not have salvaged the situation if it turned out that the Record Book was not signed as required by rule 4.

Having invoked its power under the provision of Section 50 of the Act, this court discovered that the Record Book of the trial court was signed at the end of this matter on the various dates it was heard, thus complying with rule 4. This sharply contrasts with the document said to be a "Certified True Copy". This therefore goes to show that the document which the court is expected to presume to be a certified true copy and act on it, is in fact not a reflection of what is contained in the Record Book due to the omission of the signatures or any indication that the proceedings of each day was signed by all the members.

Furthermore, the non-signing will also not have afforded this court with the fact that all the members that signed the trials courts' ruling participated in the entire proceedings as envisaged under the provision of subsection 3 of Section 2 of the Act.

On this issue, having discountenanced with the purported documents said to be a certified true copy upon the invocation of the provision of section 50 of the Act, I will also resolve this issue in favour of the appellant by answering in the affirmative and hold that the trial court was duly constituted when it heard this matter on the various dates prior to the date the ruling was delivered.

Due to the irrelevancy of the provisions of Order 26, rule 3(1) and rule 5 to this issue, I do not consider it worthy to make any finding on them because the issue is neither on authentication of the record nor on certification of same, therefore any submission touching on these provisions goes to no issue.

I now come to the 2nd issue which covers all the three grounds of appeal. This issue relates to the trial courts' consideration of the provision of Rule 2 of Order 9 which provide Thus:-

> *"2. After the claim or complaint has been read and explained to the defendant … and he signifies that he understands it. The Chairman shall then call upon the defendant to reply to the claim or complaint … and the answer shall be entered*

in the civil Cause Record Book".

Rules of Court must not be treated lightly, however its rigid application must be avoided: ***See Joseph Afolabi & Ors v. John Adekunle & Anor. (1983) 14 NSCC, 405*** cited in ***Melifonwu v. Ebunike & Ors (2001) 1 NWLR (Pt 964) 281.*** Every rule of court is meant to assist the cause of justice and not to defeat it, and this is why courts should not blindly follow the rules of procedures without considering the justice of the case: ***See Simetequip Ltd v. Omega Bank Plc (2001) 16 NWLR (Pt 739) 340; Banana v. Telepower (Nig) Ltd (2006) 15NWLR (Pt 1001) 224 AND 225.***

With the above principle as guide, I now consider the provision of Order 9 rule 2 above. Simply put, this rule requires a 'reply' from the defendant who must have understood the claim when read out. This rule did not expressly provide the mode of replying, i.e. whether it should be oral or written. Ascribing that only an oral reply is contemplated by this rule is tantamount to reading it out of context. Even where such meaning can be deducted, it will amount to a rigid application which should be avoided as stated in ***Melifonwu v. Ebunike (supra).*** Instead of the ruling being a means to aiding the realisation of the cause of justice, the rigid construction of this rule by the trial court had defeated it…..``Justice is supposed to be for both sides and not only for the convenience of one side''. ***SEE Banana v. Telepower (Nig) Ltd (supra).***

It is trite that all procedure must conform to the ``…basic rules of fair trial and fair trial includes the rule for fair hearing. Any rule of procedure which has the effect of shutting out a party from presenting his case or inhibits counsel in presenting his case to best of his ability is inconsistent with the rule of fair hearing and Section 36 of the Constitution… ``See ***NVA v.. Odiri (2007) 8 NWLR (PT 1035) 219.*** Therefore if the construction of rule 2 of Order 9 by the trial court is the correct interpretation, which I do not think so, then the rule will be shutting out the defendant or his counsel from presenting his matter in the best manner he deems fit and the best way chosen to reply to the claim is via a written defence which the trial court struck out because it considered it to be alien to this rule. I view this as a denial of the appellants' right to fair hearing contrary to our Constitution. I must therefore regard this as an appropriate situation to set aside the Order of the trial court following its misconceived interpretation of rule 2 of Order 9.

A mountain has been made out of a mole hill concerning the interpretation of this rule by resort to section 66 wherein the word `pleading' was interpreted, in order to give credence to or against rule 2 of Order 9 by both counsel and trial court. The interpretation would have provided a safe landing ground for my earlier finding on the said rule, however, I was cautious not to employ the

interpretation following the result of my search for the section in the Act to ascertain the context in which the word was used and finding none. I therefore do not consider the interpretation to be important for the purpose of appreciating the rule because the word interpreted under section 66 was never used in any section of the Act, let alone relate it to the rule in focus.

In the light of my findings as above on this issue my answer will be in the affirmative i.e. the trial court was in error to have struck out the written defence pursuant to its wrong comprehension of the provision of Order 9 Rule 2.

Other aspects in this appeal have been adequately covered in the lead judgment and I will add nothing to it.

For all I have found and the more detailed reasons given in the lead judgment for allowing this appeal, I also allow the appeal and abide by the orders made before now in the lead judgment.

Hon. Justice M.G. Gwagwa, JCCA: I have had the opportunity of reading before now the lead judgment just delivered by my learned brother, Hon. Justice (Dr.) Ngozika Uwa Okaisabor, JCCA. I agree with his reasoning and conclusion. I abide by the order so made and I do not have anything to add.

Hon. Justice Usman N. Ahmed, JCCA: I have read in draft the judgment of my learned brother, Hon. Justice (Dr.) Ngozika Uwa Okaisabor, JCCA, just delivered. I agree with his reasoning and conclusion and I abide by the order so made.

APPEAL ALLOWED

ARIREMAKO FEMI

V

MICHEAL KORIE

Appeal No.: **FCT/CCA/CVA/14/2011**

HON. JUSTICE MOSES A. BELLO (JP), PCCA (Presided)

HON. JUSTICE A.M.A. SADDEEQ, JCCA (Delivered the Lead Judgment)

HON. JUSTICE ADEKUNLE S. LAWAL, JCCA

16TH DECEMBER, 2011

APPEAL -	*Ground of Appeal – Incompetent grounds of appeal – Issues formulated therefrom – effect of.*
CONSTITUTIONAL LAW-	*Conflict of law – Where an Act is inconsistent with constitutional provisions – effect of inconsistency.*
COURT-	*FCT Customary Court of Appeal – Jurisdiction of - how derived*
FAIR HEARING-	*Nature of – Duty of Court to ensure – extent of*
INTERPRETATION OF STATUTES -	*Need to consider a statute as a whole.*
INTERPRETATION OF STATUTES-	*The Blue Pencil Rule –application of - Part One of the Schedule to the Customary Court Act 2007 - Proforte Ltd v. President of the Customary Court of Appeal, FCT & Ors.*
JURISDICTION-	*Concept of -*
STATUTE-	*FCT Customary Court Act, 2007 – section 16 (b) (c) (d) and (e) – validity of*

ISSUES:

1. Whether the trial court was right to have held that the Defendant/Appellant was liable to pay the sum of ₦75, 000.00 to the Plaintiff/Respondent when the car had not been sold contrary to the written agreement of the parties.
2. Whether the grounds of appeal as filed by the appellant are competent to vest this court with jurisdiction to determine this appeal

FACTS:

The brief facts leading to this appeal was that at the court below, the respondent as plaintiff sued the appellant wherein he claimed the sum of ₦75,000.00 being debt owed resulting from the part payment made for the purchase of a vehicle from the appellant. At the conclusion of hearing, the court below entered its judgment in favor of the respondent. Dissatisfied, the appellant has now appealed to this court.

HELD (*Allowing the Appeal*):

1. **On the jurisdiction of the FCT Customary Court of Appeal**

   Being the creation of statute, the appellate jurisdiction of this court is confined within the parameter of the enabling laws which is the 1999 Constitution and Decree 30 of 1990 and plethora of judicial precedents. It is a settled law that before the invocation of any appellate jurisdiction, the question for determination must ***"...*** *relate to Customary Law in contra distinction to English or Common Law or any other system of law other than Customary Law . . . It follows therefore that any appeal to either of the said Appellate Courts the grounds of which or the question for determination of which is not based on customary law is incompetent ab initio. . ."****: Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39-40*** which was based on ***Golok v. Diyalpwah (1990) 3 NWLR (Pt. 139) 414; Hirmor v. Yongo (2003) 9 NWLR (Pt. 824) 77*** and ***Customary Court of Appeal, Edo State v. Aguele (2006) 12 NWLR (Pt. 995) 565.***

2. **On what vests jurisdiction on the Customary Court of Appeal**

   The law is that it is the issue raised in the ground of appeal that will vest this court with the adjudicatory power to determine an appeal before it: ***A.G. Anambra State v. N.I.W.A. (2003)2 NWLR (Pt. 861) 657; Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799) 554*** and ***Customary Court of Appeal Edo State v. Aguele (2006) 12 NWLR (Pt. 995) 565.***

3. **On the nature of fair hearing**

   Fair hearing is both a common law and constitutional law right enshrined in the provision of section 36 (1) of the 1999 Constitution: ***Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 333; Chigbu v. Thomas (Nig) Ltd (1999) 3 NWLR (Pt. 593) 137, NACB Ltd v. Obadiah (2004) 4 NWLR (Pt.863) 340;*** and ***Compendium of Laws 2nd Edition, vol. 1, Page 831***

4. **On the effect of incompetent ground of appeal**

   It is trite law that where a ground of appeal from which an issue for determination is formulated is incompetent, the issues arising therefrom is equally considered bad *ab initio*:

Kadzy Int'l Ltd v. Kano Tannery Co. Ltd (2004) 4 NWLR (Pt. 864) 567 – 568; Shuairu v. NAB Ltd (1998) 4 SCNJ, 109.

5. **On validity of issues formulated from struck out ground of appeal**

   The consequence of an issue formulated from a struck out ground of appeal is that the issues for determination formulated therefrom and the arguments canvassed in support thereof becomes irrelevant and would also be struck out. *See* ***Ferodo Ltd v. Ibeto Ind. Ltd (2004) 4 NWLR (Pt. 866) 344 AND 366; Agbamu v. Ofili (2004) 5 NWLR (Pt. 867) 565.***

6. **On the extent of the duty of the Court as an unbiased umpire.**

   It is not the business of the court to sift the chaff from the grain by performing a surgical operation on the appellants' brief to extract argument in respect of valid grounds from the invalid ones, as such exercise may involve the court descending into the arena and the dust rising therefrom may of necessity becloud its judgment. The duty of the court is that of an umpire whose function in the interest of justice is to tend the rope and not step into the brawl by excising argument on good grounds of appeal from those of bad ones. ***Ayalogo v. Agu (1998) 1 NWLR (Pt. 532) 129; Korede v. Adedokun (unreported) Suit No. CA/1/14/92; Bakare v. Bogunjoko (2007) 6 NWLR (Pt. 1029) 136 – 137*.**

7. **On the concept of jurisdiction**

   The concept of jurisdiction is of universal application hence it is applicable in the Customary Court in the FCT, therefore any ground of appeal against the decision of the Customary Court which raises the question of the competence of the court below is an issue or question of customary law within the meaning of sections 247 (1) and 224 (1) of the 1979 Constitution ***(****in this instance section 245 and 267 of the 1999 Constitution****)*** and is appealable as an issue of customary law up to the Supreme Court ***Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39-40***.

8. **On when a provision of an act is inconsistent with the provision of the Constitution**

   A provision of an Act will not be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter either expressly or by implication: ***A.-G Ondo State v. A.-G Ekiti State (2001) 17 NWLR (Pt. 743) 773-774.***

9. **On the need to consider a statute as a whole in interpreting a section.**

   For the purpose of determining the validity of a provision of an enactment, the section should not be read in isolation but the whole statute must be considered together since the section is part of a whole. In the instant case, The provisions of items 3 and 5 of Part 1 of the Schedule to the Customary Court ACT, 2007 ought not be read in isolation but together with

other provisions of the statute, from which the provision of sections 16 (b), (c), (d) and (e) and 17 will be discovered to have relevance with the said items 5 and 3. The provisions of section 16 in themselves are not absolute but only effective when the stipulations therein (particularly in (b) and (c)) are complied with. See ***Chima v. Ude (1996) 3 NWLR (Pt. 461) 379; Awuse v. Odili (2004) 8 NWLR (Pt. 876) 513***.

10. On validity of section 16 (b) (c) (d) and (e) of the Customary Court Act

I am therefore of the view without reservation, that the principle of inconsistency with the constitution can be read into the provision of item 5 as rightly done by the High Court, because the provisions of section 16 (b) (c) (d) and (e) under which item 5 can be conveniently accommodated would if given effect, have the consequence of infringing the constitutional provisions. I am informed into holding this view for reason of my understanding that the item vested original unlimited jurisdiction on the customary court in respect of causes or matters arising under any law including bye laws but excluding those arising under the customary law. It therefore follows that the Customary Court will have jurisdiction by the operation of item 5, on causes or matters which the 1999 Constitution may have also vested unlimited original exclusive jurisdiction on the Federal High Court. -***Per A.M.A. Saddeeq, JCCA***.

11. On the propriety of applying the Blue Pencil Rule on item Part One of the Schedule to the Customary Court Act 2007 by the FCT High Court in *Proforte Ltd v. President of the Customary Court of Appeal, FCT & Ors*

The application of the blue pencil rule to item 3 and its declaration to be also null and void on ground of being inconsistent with the constitutional provision, with due respect cannot be absolute but limited to the extent of the inconsistency: ***Mohammed v. C.O.P. (1987) 4 NWLR (Pt. 65)432,*** *wherein* ***Kanada v. the Governor of Kaduna State (1986) 4 NWLR (Pt. 35) 375*** was referred to; ***Nwaigwe v. Okere (supra) 21***. I therefore regard the declaration that item 3 is inconsistent to the constitution only to the extent that if construed as vesting original unlimited jurisdiction on the customary court in civil causes and matters in any other law not being customary law, as that will bring the jurisdiction to be in conflict with that vested on the Federal High Court by the1999 Constitution. In other words the declaration of the FCT High Court is not to be construed to mean that the customary court is deprived of any jurisdiction under item 3 where the issue of customary law is involved: ***N.D.I.C. vs. OKEM ENT. LTD (2004) 10 NWLR (Pt. 850) 186 – 188.***

Similarly the decision of the FCT High Court should be read, understood and applied in that light. Construing the decision as absolute in relation to item 3 will be prejudicial to a party involved in any of the mentioned causes or matters which relates to customary law because that party cannot approach the customary court to ventilate his grievance due to the erroneous understanding of the decision. Such a party can also not be able to seek redress from either the Federal High Court or the FCT High Court as none is vested with the jurisdiction to entertain such causes or matters since the 1999 Constitution which vested unlimited original exclusive jurisdiction in some matters on either of these courts or other superior courts of records, did not have express or implied provisions on causes and matters relating to customary law. I therefore do not think that is the intention of the law makers or the meaning to be ascribed to the decision of the FCT High Court. - ***Per A.M.A. Saddeeq, JCCA.***

Cases cited in this Judgment

A.-G Ondo State v. A.-G Ekiti State (2001) 17 NWLR (Pt. 743) 773-774

A.G. Anambra State v. N.I.W.A. (2003)2 NWLR (Pt. 861) 657

Agbamu v. Ofili (2004) 5 NWLR (Pt. 867) 565

Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799)

Awuse v. Odili (2004) 8 NWLR (Pt. 876) 513

Ayalogo v. Agu (1998) 1 NWLR (Pt. 532) 129

Bakare v. Bogunjoko (2007) 6 NWLR (Pt. 1029) 136 – 137

Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 333

Chigbu v. Thomas (Nig) Ltd (1999) 3 NWLR (Pt. 593) 137

Chima v. Ude (1996) 3 NWLR (Pt. 461) 379

Customary Court of Appeal, Edo State v. Aguele (2006) 12 NWLR (Pt. 995) 565

Ferodo Ltd v. Ibeto Ind. Ltd (2004) 4 NWLR (Pt. 866) 344

Golok v. Diyalpwah (1990) 3 NWLR (Pt. 139) 414

Hirmor v. Yongo (2003) 9 NWLR (Pt. 824) 77

Kadzy Int'l Ltd v. Kano Tannery Co. Ltd (2004) 4 NWLR (Pt. 864) 567 – 568; Shuairu v. NAB Ltd (1998) 4 SCNJ, 109

Kanada v. the Governor of Kaduna State (1986) 4 NWLR (Pt. 35)

Korede v. Adedokun (unreported) Suit No. CA/1/14/92

Mohammed v. C.O.P. (1987) 4 NWLR (Pt. 65)432

N.D.I.C. v. Okem Ent. Ltd (2004) 10 NWLR (Pt. 850) 186 – 188

NACB Ltd v. Obadiah (2004) 4 NWLR (Pt.863) 340

Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39-40

Statutes/Rules of Court/Books referred to in this judgment

1999 Constitution

Compendium of Laws 2nd Edition, vol. 1, Page 831

Customary Court Act, 2007

Decree 30 of 1990

APPEARANCE:

Thaddeus Mbalian Esq, for the Appellant.

Hon. Justice A.M.A. Saddeeq, JCCA (Delivering the lead judgment): This is an appeal against the decision of the Customary Court, Grade A, Lugbe, in the FCT (hereinafter referred to as "the court below") delivered on the 5th day of May, 2011 whereat, judgment was entered in favor of the respondent. Dissatisfied, the appellant on the 3rd day of June, 2011 appealed to this court on three (3) grounds of appeal. Without reproducing *their particulars, the grounds of appeal read as follows:*

> ***"A. The learned trial judges erred in law when they held that they had jurisdiction to entertain the suit.***
>
> ***B. The learned trial judges erred in law when they held that the defendant was bound to refund the sum of Seventy Five Thousand Naira (₦75, 000.00) to the plaintiff by the agreement they entered.***
>
> ***C. The refusal of the learned trial judges to transfer the matter after an allegation of bias against them amounted to denial of the right to fair hearing guaranteed by the constitution to the defendant/appellant".***

The brief facts leading to this appeal was that at the court below, the respondent as plaintiff sued the appellant as defendant wherein he claimed the sum of ₦75,000.00 being debt owed resulting from the part payment made for the purchase of a vehicle from the appellant. At the conclusion of hearing, the court below entered its judgment in favor of the respondent.

In compliance with the rules of practice and procedure of this court, the appellant represented by Thaddeus Mbalian Esq. settled his brief of argument. There was no exchange of the respondents'

reply brief because he was not represented. Learned counsel for the appellant posed two issues for determination in this appeal as follows:

> ***"(a) Whether the trial court was right to have held that the Defendant/Appellant was liable to pay the sum of ₦75, 000.00 to the Plaintiff/Respondent when the car had not been sold contrary to the written agreement of the parties. This relates to ground B of the Notice of Appeal.***
>
> ***(b) Whether in the face of the judgment of the FCT High Court presided over by Justice Ogakwu nullifying the provisions of items 3 and 5 of part 1 of the Customary Court Act, 2007, the trial court was still vested with jurisdiction to try the case at hand. This relates to grounds A and C of the Notice of Appeal".***

Due to my reservation on issue B, I adopt issue A as formulated by appellant as one of the issue for determination, in addition to the issue formulated by the court which is: whether the grounds of appeal as filed by the appellant are competent to vest this court with jurisdiction to determine this appeal. I will commence with the consideration of this issue.

Permit me my lords, to summarily dispose of the issue formulated by the court albeit the grounds of appeal to which they may relate. Being the creation of statute, the appellate jurisdiction of this court is confined within the parameter of the enabling laws which is the 1999 Constitution and Decree 30 of 1990 and plethora of judicial precedents. It is a settled law that before the invocation of any appellate jurisdiction, the question for determination must ***"...*** *relate to Customary Law in contra distinction to English or Common Law or any other system of law other than Customary Law . . . It follows therefore that any appeal to either of the said Appellate Courts the grounds of which or the question for determination of which is not based on customary law is incompetent ab initio. . ."****:* ***Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39-40*** which was based on ***Golok v. Diyalpwah (1990) 3 NWLR (Pt. 139) 414; Hirmor v. Yongo (2003) 9 NWLR (Pt. 824) 77*** and ***Customary Court of Appeal, Edo State v. Aguele (2006) 12 NWLR (Pt. 995) 565.*** Even at the risk of repetition, the law is that it is the issue raised in the ground of appeal that will vest this court with the adjudicatory power to determine an appeal before it: ***A.G. Anambra State v. N.I.W.A. (2003)2 NWLR (Pt. 861) 657; Auto Import Export v. Adebayo (2002) 18 NWLR (Pt. 799) 554*** and ***Customary Court of Appeal Edo State v. Aguele (supra) 565.***

Ground B from which the first issue of the appellant was filtered is a ground which is complaining about the finding or conclusion reached by the court below after hearing the evidence of both party. I cannot say this ground involves any issue of customary law. Similarly, a thorough reading of ground C and the submission in its support at paragraph 3.6 of the appellants' brief showed that it is a complaint against the alleged violation of the appellants' right to fair hearing by the court below on ground of his complaint of bias against it. Fair hearing is both a common law and constitutional law right enshrined in the provision of section 36 (1) of the 1999 Constitution: ***Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 333; Chigbu v. Thomas (Nig) Ltd (1999) 3 NWLR (Pt. 593) 137, NACB Ltd v. Obadiah (2004) 4 NWLR (Pt.863) 340;*** and ***Compendium of Laws 2nd Edition, vol. 1, Page 831***. This ground certainly cannot be said to be a ground which is competent to vest this court with jurisdiction. This being the case, the said grounds B and C are incompetent before this court and the appropriate order to make in the circumstance is to have the grounds struck out. Same are accordingly hereby struck out. It is trite law that where a ground of appeal from which an issue for determination is formulated is incompetent, the issues arising therefrom is equally considered bad ab initio: ***Kadzy Int'l Ltd v. Kano Tannery Co. Ltd (2004) 4 NWLR (Pt. 864) 567 – 568; Shuairu v. NAB Ltd (1998) 4 SCNJ, 109.*** The consequence of an issue formulated from a struck out ground of appeal is that the *"... issues for determination formulated therefrom and the arguments canvassed in support thereof becomes irrelevant and would also be struck out":* ***Ferodo Ltd v. Ibeto Ind. Ltd (2004) 4 NWLR (Pt. 866) 344 AND 366; Agbamu v. Ofili (2004) 5 NWLR (Pt. 867) 565.***

With the above position of the law in mind, I will strike out the first issue for determination and consider as irrelevant the arguments canvassed in support of the issue as contained in the appellants' brief. As for issue 2 which is said to also cover ground C, I have chosen not to strike it out for reasons which will not to be considered in this part of the judgment, however ordinarily it ought to be struck out having held that ground C from which it is also said to have been distilled is defective.

I should pause here to explain why I will not strike out issue 2 which is said to relate to both grounds A and C. With humility, reading in between the line of the issue, even though it is said to also cover the incompetent ground C, I do not view it in that perspective.

The issue is manifestly vivid that it can only be said to be distilled from ground A and cannot, with emphasis accommodate ground C. Assuming though not conceding that it also covers ground C

which is declared to be incompetent, it will mean that the issue would have been formulated from both competent and incompetent grounds of appeal and this would have the consequence of literally choking up the competent ground A. I am strengthened in taking this position because it will mean a *"... mixed grill served and I am of the firm view that it is not the business of the court to sift the chaff from the grain by performing a surgical operation on the appellants' brief to extract argument in respect of valid grounds from the invalid ones, as such exercise may involve the court descending into the arena and the dust rising therefrom may of necessity becloud its judgment. The duty of the court is that of an umpire whose function in the interest of justice is to tend the rope and not step into the brawl by excising argument on good grounds of appeal from those of bad ones".* ***Ayalogo v. Agu (1998) 1 NWLR (Pt. 532) 129; Korede v. Adedokun (unreported) Suit No. CA/1/14/92; Bakare v. Bogunjoko (2007) 6 NWLR (Pt. 1029) 136 – 137*****.** The effect of this mixed grill will be to strike out the issue and all the arguments canvassed on it in the brief: ***Korede v. Adedodun (supra)*** *cited in* ***Welle v. Bogunjoko (supra) 136 137.***

I am in no position to either improve on or depart from the trite law above. I can only be bound by it and having declared that ground C is incompetent, issue 2 which learned counsel said also covered the ground would have been caught up with the above pronouncement and its consequence since it is not the courts' responsibility to sift the chaff from the grain. Even if the ground is competent, having found that issue 2 did not cover it, it is my humble view that I would have reached the inevitable conclusion that no issue was formulated from ground C, apart from the argument canvassed in the brief.

From all the aforesaid, it is my finding that issue 2 as formulated does not cover the incompetent ground C, neither can the argument contained in paragraph 3.6 be said to relate or borne out of the said issue 2. If I should hold them to be so, then the inevitable repercussion will be the striking out of the issue on ground of incompetence and that will be disastrous to this appeal which my conscience will not allow me to think that the interest of justice and fairness has been discharged in this appeal. I leave this matter at this point.

Reading into the appellant's ground A, I am of the conviction that the jurisdiction of the court below is under the search light in view of the pronouncement of the FCT High Court in the unreported case of ***Proforte Ltd vs. President Customary Court of Appeal, FCT & Ors in Suit No. FCT/HC/CV/1078/2010*** as it relates to items 3 and 5 of Part 1 of the Schedule to the Customary Court Act, No. 8, 2007. The concept of jurisdiction is of universal application hence it is applicable

in the customary court in the FCT, therefore any ground of appeal against the decision of the customary court which raises the question of the competence of the court below *"... is an issue or question of customary law within the meaning of sections 247 (1) and 224 (1) of the 1979 Constitution and is appealable as an issue of customary law up to the Supreme Court*..." ***Nwaigwe v. Okere (supra) 477 (****in this instance section 245 and 267 of the 1999 Constitution.****)*** I hold that ground A is an issue or question of customary law within the contemplation of section 267 of the 1999 Constitution and it is appealable as such up to the Supreme Court. With the resolution of this issue formulated by the court, I will now consider the merit of this appeal on the surviving ground of appeal having struck out grounds B and C for been incompetent.

On this issue, learned counsel for the appellant submitted that for a court to be competent to entertain a matter, the conditions enumerated in ***Arewa Paper v. N.D.I.C. (2006) 7 SCNJ, 470 – 471***, must be satisfied. These are: (a) properly constituted court with regard to the number of its members, their qualification and none is disqualified for any reason, (b) the subject matter being within the courts' jurisdiction and (c) the case is before the court through the due process of law and upon the fulfillment of any condition precedent to the exercise of jurisdiction.

It was further contended by the appellant that the subject matter before the court below was a claim of debt against the appellant in the sum of ₦75, 000.00, which learned counsel argued, fell under the provision of items 3 and 5 of Part 1, of the Schedule to the Customary Court Act, 2007 which bothers on civil causes or matters relating to debt, demand or damages in any law other than customary law. Referring to the FCT High Courts' decision of the 17th day of March, 2011 in ***Proforte Ltd v. President of the Customary Court of Appeal, FCT & Ors*** (unreported) learned counsel stressed that items 3 and 5 of Part 1 of the Schedule to the Customary Court Act, 2007, were nullified for being inconsistent with the provision of section 267 of 1999 Constitution. He maintained that the decision of the court below which was delivered on the 9th day of May 2011, was handed down when it had no jurisdiction following the annulment of the provisions of items 3 and 5 by the FCT High Court on the 17th day of May, 2011 (sic). Relying on ***Nika Fishing Co. Ltd v. Lavina Corporation (2008) 7 SCNJ, 99,*** learned counsel submitted that jurisdiction is a very hard matter of law and so cannot be subject to particular feelings and sentiment of court. He therefore holds the opinion that since the decision of the court below was an exercise in futility having been made without jurisdiction; this court should allow this appeal, set aside the decision of the court below and dismiss the suit.

This issue as argued in the appellants' brief squarely deals with the competence of the court below having regards to the decision of the FCT High Court wherein the provisions of items 3 and 5 of Part One to the Schedule of the Customary Court Act, 2007, were struck down and declared a nullity for being inconsistent with the provision of the 1999 Constitution. For a better appreciation, I find it very apt to reproduce the two provisions of the Customary Court Act 2007 (i.e. items 3 and 5) and the relevant parts of the judgment of the FCT High Court. Starting with items 3 and 5 of Part One of the Schedule to the Customary Court Act 2007, it provides thus:

> *"3. Civil causes and matters including bye-laws where the debt, demand including dowry, bride price or damages do not exceed the amount specified in the respective columns thereof...*
>
> *5. Civil causes and matters under any law (other than customary law) including bye-laws where the amount of debt, demanded or damages does not exceed the amount indicated in the column hereof..."*

Commenting on these provisions, at page 47 of the FCT High Courts' judgment it reads thus:-

> "*It relates to the exclusive jurisdiction conferred on the Federal High Court in the eighteen major items set out in section 251 of the 1999 Constitution. Some of these eighteen major items are respect of civil causes and matters. The unlimited jurisdiction conferred on the Customary Court in civil causes and matters thus implies that the Customary Court can exercise jurisdiction in respect of those enumerated items where exclusive jurisdiction has been vested in the Federal High Court. This is clearly inconsistent with the constitutional provision which gives the Federal High Court jurisdiction to the exclusion of any other court..."*

The learned judge continued at page 49 that:

> "*At the risk of being prolix items 3 and 5 of Part 1of the Schedule to Act No.8 had made the same or similar provisions in respect of an area where the 1999 Constitution has made ample provision under Section 257 (1) of the Constitution. It even goes further to confer jurisdiction on the Customary Court in civil causes and matters where jurisdiction has been vested in the Federal High Court to the exclusive of any other court under section 251 of*

the Constitution. The effect of this is that the stipulations of items 3 and 5 of Part 1 of the Schedule to Act No. 8 are invalid for duplication and or inconsistency and therefore inoperative and or null and void: ***A.G. Abia State v. A. G. Federation (2002) 6 NWLR (Pt. 763) 264*** **at 369 E – G."**

Still on the inconsistency, the learned trial judge stated at Page 50 of his judgment that:

"*… I hold that items 3 and 5 of Part 1 of the Schedule to the Federal Capital Territory, Abuja, Customary Court Act No.8 of 2007 which make stipulations in areas that have already been amply covered by the 1999 Constitution are unconstitutional. The said items 3 and 5 of Part 1 of the Schedule to Act No. 8 are consequently struck down for being inconsistent with the constitutional provisions".*

On the effect to the above finding of the High Court, still at pages 50 – 51, it was pronounced that:

"The concomitance of the decision that items 3 and 5 of Part 1 of the Schedule to Act No. 8, pursuant to which the Customary Court, Mpape, Abuja exercised jurisdiction in respect of the action arising from the commercial contract … are inconsistent with the Constitution, necessarily implies that the Customary Court Mpape, Abuja did not have jurisdiction <u>since the relationship … did not involve any question of customary law…</u>"

For the avoidance of doubt the FCT High Court held at Pages 52 -53 thus:

1. *"Items 3 and 5 of the Federal Capital Territory Customary Court Act No. 8 of 2007 which confers <u>unlimited jurisdiction on the Customary Court in respect of civil causes and matters that are not related to customary law</u> is null and void for being inconsistent with the Constitution of the Federal Republic of Nigeria, 1999*

2. *It is declared that the Federal Capital Territory Customary Court <u>cannot adjudicate on any subject matter not involving the interpretation or questions of customary law.</u>*

3. *It is declared that the Federal Capital Territory Customary Court lacks the competence to enforce commercial contracts which do not involve question of customary law…"* (All underlined to stress the extent of the inconsistency of item 5 of Part 1 to the Schedule to the Customary Court Act 2007).

It is not the intention of this court to sit on appeal over the decision of the FCT High Court being a court of co-ordinate jurisdiction, but to bring out its meaning and effect for proper appreciation by the courts below and the legal practitioners appearing before that crop of courts. I open the consideration of this issue by holding that a provision of an Act will not be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter either expressly or by implication: ***A.-G Ondo State v. A.-G Ekiti State (2001) 17 NWLR (Pt. 743) 773-774.*** For the purpose of determining the validity of a provision of an enactment, the section should not be read in isolation but the whole statute must be considered together since the section is part of a whole : ***Chima v. Ude (1996) 3 NWLR (Pt. 461) 379; Awuse v. Odili (2004) 8 NWLR (Pt. 876) 513.*** The provisions of items 3 and 5 of Part 1 of the Schedule to the Customary Court ACT, 2007 ought not be read in isolation but together with other provisions of the statute, from which the provision of sections 16 (b), (c), (d) and (e) and 17 will be discovered to have relevance with the said items 5 and 3. The provisions of section 16 in themselves are not absolute but only effective when the stipulations therein (particularly in (b) and (c)) are complied with. As it appears now the customary court may not have jurisdiction on causes or matters arising from any law contemplated in the said provisions above because I am yet to know of the existence of any law, bye laws of the appropriate FCT Area Council, Rules of any Statutory Corporation operating within the FCT or order made pursuant to the Customary Court Act 2007, authorizing the enforcement of any written law by the customary court, and even if there is in existence any of such, it must be devoid of being inconsistent with the constitutional provisions referred to in the declaratory decision of the FCT High Court. I am therefore of the view without reservation, that the principle of inconsistency with the constitution can be read into the provision of item 5 as rightly done by the High Court, because the provisions of section 16 (b) (c) (d) and (e) under which item 5 can be conveniently accommodated would if given effect, have the consequence of infringing the constitutional provisions. I am informed into holding this view for reason of my understanding that the item vested original unlimited jurisdiction on the customary court in respect of causes or matters arising under any law including bye laws but excluding those arising under the customary law. It therefore

follows that the customary court will have jurisdiction by the operation of item 5, on causes or matters which the 1999 Constitution may have also vested unlimited original exclusive jurisdiction on the Federal High Court.

I cannot hold the same opinion in respect of item 3, wherein causes and matters arising out of customary law cannot be said to be excluded from the stipulations therein. The application of the blue pencil rule to item 3 and its declaration to be also null and void on ground of being inconsistent with the constitutional provision, with due respect cannot be absolute but limited to the extent of the inconsistency: ***Mohammed v. C.O.P. (1987) 4 NWLR (Pt. 65)432,*** *wherein* ***Kanada v. the Governor of Kaduna State (1986) 4 NWLR (Pt. 35) 375*** was referred to; ***Nwaigwe v. Okere (supra) 21***. I therefore regard the declaration that item 3 is inconsistent to the constitution only to the extent that if construed as vesting original unlimited jurisdiction on the customary court in civil causes and matters in any other law not being customary law, as that will bring the jurisdiction to be in conflict with that vested on the Federal High Court by the1999 Constitution. In other words the declaration of the FCT High Court is not to be construed to mean that the customary court is deprived of any jurisdiction under item 3 where the issue of customary law is involved: ***N.D.I.C. vs. Okem Ent. Ltd (2004) 10 NWLR (Pt. 850) 186 – 188.*** This understanding can be implied from the pronouncement of the FCT High Court especially in the reproduced extracts from the said judgment by the use of sentences like *"…civil causes and matters that are not related to customary law …", "…on any subject not involving the interpretation or question of customary law…"* and *"… the competence to enforce commercial contracts which do not involve questions of customary law*...". I am also of the strong view that the stipulations in item 3 should be read along with the provisions of section 17 (2) (a) (iii) and (b) which is the provision that clearly stipulated the law applicable to civil causes or matters before the customary court. Item 3, with due respect, should therefore be simply read in the light that the customary court shall have unlimited jurisdiction in any cause or matter between parties, be it debt, demand, damages, dowry, bride price or commercial contract (if any) to mention but a few which involve the interpretation or question of customary law: ***N.D.I.C. vs. Okem Ent. Ltd (supra) 189***: as this approach will bring out the proper intent of section 17 of the Customary Court Act, 2007. Similarly the decision of the FCT High Court should be read, understood and applied in that light. Construing the decision as absolute in relation to item 3 will be prejudicial to a party involved in any of the mentioned causes or matters which relates to customary law because that party cannot approach the customary court to ventilate his grievance due to the erroneous understanding of the decision. Such a party can also not be able to seek redress from either the

Federal High Court or the FCT High Court as none is vested with the jurisdiction to entertain such causes or matters since the 1999 Constitution which vested unlimited original exclusive jurisdiction in some matters on either of these courts or other superior courts of records, did not have express or implied provisions on causes and matters relating to customary law. I therefore do not think that is the intention of the law makers or the meaning to be ascribed to the decision of the FCT High Court.

Before sealing the consideration on this issue, there is the need to comment on the submission of the appellant that faulted the insistence of the court below to proceed with the hearing of the matter inspite of the pronouncement of the FCT High Court which was said to have been brought to its notice. The appellants' grievance with that approach is that the court below ought not to have continued with the proceedings in this matter on the ground of incompetence after the declaratory judgment of the FCT High Court was said to have been drawn to its attention. I would have ignored this argument because it is not borne out of the appeal record and that could by implication, mean that the decision of the FCT High Court was never brought to the notice of the court below. However, being an issue touching on the jurisdiction of the said court below which can be raised at anytime, even for the first time on appeal, I regard it as a salient but germane issue which cannot be swept under the carpet.

It is a general legal principle that it is often the claim of the plaintiff which determines the courts' jurisdiction: ***Erhuumwuse v. Ehanire (2003) 13 NWLR (Pt.837) 373.*** In courts such as the court below, more often than not, jurisdiction cannot be ascertained solely from the claim because the court is not a superior court of record where pleadings are ordered and filed and the technicalities of the law applied. It is the defendants' reaction to the evidence called by the plaintiff that will assist the customary court in determining whether or not it has jurisdiction to adjudicate on the dispute before it: ***A – G. Anambra State v.***
A – G. Federation (1993) 6 NWLR (Pt.302)692. Therefore not being a superior court of record but a court of summary jurisdiction, a customary court is *"...bound to consider not only the claim before it but also the defence of the defendant in order to determine what the real issue between the parties is and whether or not it has jurisdiction to entertain the suit. In other words, the Customary Court ought to consider the totality of the case of both the plaintiff and the defendant in order to form a balanced and objective opinion as to whether or not it has jurisdiction to entertain the suit ..."* ***Erhuumnuse Vs***

Ehanir e(supra) 378 – 379. I therefore find no substance in the argument of the appellant complaining about the insistence of the court below to hear the matter.

If the jurisdiction of the court below is presently being raised on the basis of the decision of the FCT High Court as it relates to items 3 and 5 of Part 1 of the Schedule to the Customary Court Act, 2007, I see nothing wrong in that. If at all the competence of the court below was challenged by the appellant, not being a superior court of record, the court below cannot determine whether or not it had jurisdiction to adjudicate on the matter before it based on the claim alone without as it rightly did, considering the totality of the case *vis-a-vis* the claim and the evidence of the parties before it in order to determine the real issue between the parties with the aim of forming a balanced and objective opinion on whether or not it had the competence to adjudicate on the matter. To this extent, the court below cannot be said to be in error. However, since the issue of its competence on the basis of the decision of the FCT High Court was not raised before it, the court below cannot be faulted when it went ahead to determine the matter on its merit.

Now that the competence of the court below is attacked in this court, reading and understanding the decision of the FCT High Court as before now done, and construing the stipulations in the provision of item 3 of Part 1 of the Schedule to the Customary Court Act, 2007 read with section 17 of the same enactment to imply that the FCT Customary Court will have unlimited jurisdiction on cause or matters involving or related to customary law, I hold the view that the action before the court below, having regards to the claim and the totality of the matter as reflected in the appeal record cannot be said to raise any question of customary law or arose out of customary law within the understanding of section 17 of the Customary Court Act, 2007 read with the stipulations in item 3 of Part 1 of the Schedule to the Act under focus. Though every court is required to jealously guard its jurisdiction, the proper approach after considering the totality of the matter before the court below is not to close my eyes to the evidence called and the position of the law: ***A – G. Kwara State v. Olawale (1993)1 NSCC VOL. 24 (Pt.1) 119***; but to terminate the suit on ground of incompetence not dismissing it as urged by the learned appellants' counsel, as such dismissal will have the prejudicial effect of stopping the respondent from reinstituting his action before a court of competent jurisdiction. On the whole this issue must be resolved in the affirmative in favor of the appellant.

The conclusion reached is that the issue raised by the appellant as it relates to the jurisdiction of the court below is well taken and this appeal succeeds on this ground. The decision of the Customary Court, Lugbe delivered on the 5th day of May 2011, is hereby set aside. The suit having been caught by the declaratory decision of the FCT High Court, delivered on the 17th day of March, 2011, is incompetent before the court below, since the transaction was not a commercial contract which involves the determination of any customary law issue between the parties. Being incompetent the proper order to make in this circumstance is to have it struck out. Accordingly, the suit filed before the court below is hereby struck out. This appeal is allowed.

Hon. Justice Moses A. Bello (JP) OFR, PCCA: I have had the opportunity of reading the judgment of my learned brother Hon. Justice A.M.A Saddeeq (JCCA). I totally agree with the reasons adduced in the said judgment especially to the effect that Customary Courts of the Federal Capital Territory, Abuja have unlimited jurisdiction to entertain matters that raises Customary Law or on any bye-law that confers jurisdiction on the said courts on dowry, bride price, damages or debts under native law and customs as envisaged in item 3 of Part 1 of the schedule of Federal Capital Territory Customary Court Act No. 8, 2007.

Since the transaction and subject matter of this suit at the trial court was based on commercial contract not entered into under Customary Law, this appeal succeed based on lack of jurisdiction and the decision of the Lower Court is hereby set aside, while the appeal is allowed.

Hon. Justice Stanley A. Lawal, JCCA: I have had the advantage to preview before now the judgment of my learned brother Honourable Justice A.M.A. Saddeeq just delivered. I am in agreement with the reasoning and the conclusion in the said judgment.

APPEAL ALLOWED

KACHUKWULU OGUGUA

V

1. PASTOR EMMANUEL SAMUEL

2. C.O.P. ABUJA COMMAND

Appeal No. **FCT/CCA/CVA/26/2010**

HON. JUSTICE S. ADEKUNLE LAWAL, JCCA (Presided and Delivered the Lead Judgment)

HON. JUSTICE USMAN N. AHMED, JCCA

HON. JUSTICE ISTIFANUS GANDU, JCCA

20TH JULY, 2011

APPEAL-	*Appeals to the Customary Court of Appeal – How determined*
COURT-	*FCT Customary Court of Appeal – Jurisdiction of – source of jurisdiction*
COURT-	*Jurisdiction of – Appellate jurisdiction – When can be assumed.*
JURISDICTION-	*Exercise of - where none exist- effect of – appropriate order to make*
JURISDICTION-	*Meaning of – Sources of – whether parties can confer on court –*
JURISDICTION-	*Nature of – when can be raised – proceedings by court without jurisdiction – competence of*

ISSUES:

1. Whether or not the court (Customary Court of Appeal, Abuja) has jurisdiction to entertain the appeal.
2. Whether the trial court erred in law when the Chairman and the members of the court held that the plaintiff (now appellant) is liable to pay the cost of N100,00.00 (One Hundred Thousand Naira) only to the defendant (now respondent)

FACTS

The Plaintiff/Appellant commenced a suit against the respondents at the Customary Court, Jikwoyi, Abuja by filing a plaint dated 19th January, 2010 praying the court for the restraining orders against the Defendants (Respondents herein). At the conclusion of hearing, the trial Customary Court delivered its judgment which was in favour of the Defendnats. The appellant being

dissatisfied with the judgment of the lower court delivered on the 8th day of July, 2010 filed before this court a Notice of Appeal dated the 5th day of August, 2010.

HELD (Striking out the Appeal):

1. **On when the issue of jurisdiction can be raised**.

   There is a plethora of decided cases to the effect that the question of jurisdiction being radically fundamental can be raised at any stage of the proceedings. See ***Rivers State Government of Nigeria & Anor. v Specialist Konsult (2005) 7 NWLR pt. 923, 145 at 172.***

2. **On the nature of the issue of jurisdiction**

   The issue of jurisdiction is fundamental to any effective adjudication which can be raised by the court *suo motu* where parties fail to raise it. See ***A.G. Lagos State v Dosunmu* (1989) 3 NWLR pt. 111,552; *Prof. Aderemi Olutola v. University of Ilorin (2004) 18 NWLR pt. 905, 416 at 446.***

3. **On the competence of a proceeding where the court has no jurisdiction**

   The issue of jurisdiction is fundamental to the administration of justice and adjudication, therefore any adjudication no matter how well tried and or conducted is incompetent if it is conducted without jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity, however well conducted and decided. See ***Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR pt. 702, 178 at 188; Prof. Aderemi v Unilorin (2004) 18 NWLR pt. 905, 416 at 446***

4. **On the meaning of jurisdiction**

   Jurisdiction as the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. See ***Mobil Producing Nigeria Unlimited v. Lagos state Environment Protection Agency& Ors (2002) 18 NWLR pt. 798, 1 at 32***

5. **On the source of jurisdiction of the FCT-Customary Court of Appeal**

   It is statute that creates the court and defines the powers and the extent of its application. It follows therefore that courts derive their jurisdiction therefrom. Similarly, this court as an appellate court, its appellate jurisdiction is also statutory, having being derived from the statute creating it, the Constitution and any other enabling law inclusive. This court is a creature of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from section 267 and 8 (1) of the1999 Constitution and Decree No. 30 of 1991 respectively.See the case of ***Nigeria Shippers' Council v. United***

World Limited Inc. (2001) 7 NWLR pt. 713, 576; ***Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196; Trustee, P.A.W. Inc. v. Trustee, A.A.C.C. (2002) 15 NWLR pt. 70-, 449.***

6. **On what determines appeal that goes to the Customary Court of Appeal**

   It is the issue or issues for determination in an appeal that determines the court to which an appeal lies, if the appeal raises questions involving customary law, it goes to the Customary Court of Appeal and if the appeal raises questions of general law, it goes to the High Court. To properly invoke the appellate jurisdiction of this court, the Notice of Appeal must contain a ground or grounds of appeal that raises question or questions of customary law. See ***M. Ahmadu Usman v. M. Sidi Umaru (1992)7 NWLR pt. 254, 377 at 397 — 398.***

7. **On when an appellate court can properly assume jurisdiction over an appeal**

   The court can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid Notices of Appeal not by incompetent notice of appeal. The notice of appeal is without doubt the foundation of an appeal. See ***Robert I. Ikweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 at 425-426***; ***Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949, 616 at 634; Tukur v. Governor of Gongola State (1988) l NWLR pt. 68, 39***.

8. **On whether parties consent can confer jurisdiction on court**.

   It is trite that parties cannot by consent real or tacit, confer jurisdiction on a court where none exists. See ***Sunday Gbagarigha v. Adikumo George & Anor (2005) 17 NWLR pt. 953, 163 at 190; Yekini Ogoh v. Enpee Industries Ltd (2004) 17 NWLR pt. 903, 449 at 462.***

9. **On propriety of exercising jurisdiction where none exists**

   Jurisdiction cannot be determined by rules of court it is either a matter of the Constitution or the enabling statute. There is no justice in exercising jurisdiction where none exists. It is injustice to the law, to the court and to the parties to do so. See ***Rivers State Government of Nigeria & Anor v. Specialist Konsult (2005) 7 NWLR pt. 923, 145 at 172***

10. **On the proper order to make where a court lacks jurisdiction**

    Where a court finds that it lacks jurisdiction to entertain the suit before it, the proper order to make is one striking out the suit. See ***NDIC v. CBN & Anor.*** **(*supra*); *Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR Pt.199,501 3. CBN v. Katto (1994) 4 NWLR Pt. 339, 446.***

Cases cited in this Judgment

A.G. Lagos State v Dosunmu (1989) 3 NWLR pt. 111,552

Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR pt. 702, 178

Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196

M. Ahmadu Usman v. M. Sidi Umaru (1992)7 NWLR pt. 254, 377

Mobil Producing Nigeria Unlimited v. Lagos state Environment Protection Agency& Ors (2002) 18 NWLR pt. 798, 1 at 32

Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713, 576

Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR Pt.199,501 CBN v. Katto (1994) 4 NWLR Pt. 339, 446.

Prof. Aderemi Olutola v. University of Ilorin (2004) 18 NWLR pt. 905, 416

Rivers State Government of Nigeria & Anor. v Specialist Konsult (2005) 7 NWLR pt. 923, 145

Robert I. Ikweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949, 616

Sunday Gbagarigha v. Adikumo George & Anor (2005) 17 NWLR pt. 953, 163 Yekini Ogoh v. Enpee Industries Ltd (2004) 17 NWLR pt. 903, 449

Trustee, P.A.W. Inc. v. Trustee, A.A.C.C. (2002) 15 NWLR pt. 70-, 449

Tukur v. Governor of Gongola State (1988) l NWLR pt. 68, 39

Statutes/Rules of Court/Books referred to in this Judgment

1999 Constitution FRN

Decree No. 30 of 1991

APPEARANCES:

1. Osakwe Morris Esq for the Appellant

2. A. F. Anakwe Esq for the 1st Respondent

Hon. Justice Stanley A. Lawal, JCCA (Delivering the leading judgment): The Plaintiff/Appellant commenced a suit against the respondents at the Customary Court, Jikwoyi, Abuja by filing a plaint dated 19th January, 2010 praying the court for the following and same is hereby reproduced as follows:

1. An order of this court restraining the 1st and 2nd defendants, their agents, staffs, servants and officers from going to the plaintiffs customers and clients to embarrass him and destroy the good relationship between him and his customers and clients.

2. An Order of this Court restraining the 1st and 2nd defendants from using the2nd defendant and his agent, staff and officers as debts recoverers and collectors.
3. And for such further order or orders that this court would give or make in the circumstance of this case.

Upon hearing the case on the 8th day of July, 2010, the trial court delivered its judgment

The appellant having dissatisfied with the judgment of the lower court delivered on the 8th day of July, 2010 filed before this court a notice of appeal dated the 5th day of August, 2010. The grounds of appeal and the reliefs sought are herein reproduced as follows:-

GROUND 1

That the trial court erred in law when the chairman and the members of the court held that the plaintiff did not prove beyond reasonable doubt that he paid the sum of N180,000.00 (One Hundred and Eighty Thousand Naira) only as part of payment to the 1st defendant

PARTICULARS OF GROUND 1

i. That the trial court did not reckon with the provisions of Section 137, Section 138 (1) and Section 141 (1) of the Evidence Act in deciding this case which has resulted in the miscarriage of justice being suffered by the appellant.
ii. That it is a settled law that the degree of proof necessary for the plaintiff to prove his claim is not proof beyond resonanble doubt

GROUND 2

That the trial court erred in law when the Chairman and the members of the Court without any judicial or statutory authority awarded a cost of N100,000.00 (One Hundred Thousand Naira) only against the appellant in favour of the respondent.

i. That the discretionary powers exercised by the trial court was neither done judicially nor judiciously.
ii. That in arriving at the cost awarded to the Respondent the trial court misunderstood, the cost of suit (which is the filing fees, cost of service and mileage and other processes) with the expenses incurred in employing the service of a legal practitioner.

iii. That the cost awarded against the Plaintiff was outrageous, unjust and has no legal basis or support.

C. <u>OTHER GROUNDS SHALL BE FILED AS SOON AS THE RECORD OF THE PROCEEDING OF THE TRIAL COURT IS MADE AVAILABLE TO THE APPELLANT</u>

3. RELIEFS SOUGHT FROM THE APPELLATE COURT

a. An order setting aside the cost of N100,000.00 (One Hundred Thousand Naira) only awarded in favour of the 1ST defendant against the plaintiff.

b. An order of the court holding that the appellant has proved his case on the preponderance of evidence before the court that he has paid the 1st defendant the sum of N180,000.00 (One Hundred and Eight Thousand Naira) only, being repayment to the 1st defendant.

c. An order of this court deducting the sum of N180, 000.00 (One Hundred and Eighty Thousand Naira) only from the total sum which the appellant has to pay to the respondent.

The appellant also on the 16th day of March, 2011 filed before this court appellant's brief of argument dated 15th day of April, 2011.

The appellant through his counsel as contained in his brief of argument formulated two (2) issues for determination and same is hereby reproduced as follows:-

1. Whether the trial court erred in law when its chairman and the members of the court held that the plaintiff did not prove beyond reasonable doubt that he paid the sum of N180, 000.00 (One hundred and Eighty Thousand Naira Only). The Plaintiff is to pay the 1st defendant the total sum N545, 550.00 (Five Hundred and Forty-Five Thousand, Five Hundred and Fifty Naira) only as part payment to the 1st defendant (now respondent).
2. Whether the trial court erred in law when the Chairman and the members of the court held that the plaintiff (now appellant) is liable to pay the cost of N100,00.00 (One Hundred Thousand Naira) only to the defendant (now respondent).

On the 2nd day of June, 2011, the appellant's counsel adopted his brief of argument dated 15th day of March, 2011 and urged the court to grant and or allow the appeal of the appellant. The 1st Respondent's counsel in his reply refers the court to Order 5 Rule 4 of the Customary Court of

Appeal Rules (1996) and urge the court to hold that the appellant's having failed to file a reply to the 1st respondent's brief has admitted the facts contained therein.

The 1st respondent's counsel argued that issue 1 formulated by the appellant was never canvassed during the trial at the lower court and that appellant cannot be allowed to raise new issue. He also argued that an appellate court not being court of first instance has no right to evaluated evidence. He finally urged the court to dismiss the appeal because it is a calculated attempt to deny the respondent the fruit of the judgment of the lower court.

The parties having failed to raise the issue of jurisdiction of the court, the court *suo motu* raised the issue of jurisdiction of the court and invited counsels to the appellant and 1st respondent to come and address the court on the issue of jurisdiction of the court, (Customary Court of Appeal, Abuja). The matter was adjourned to 23rd day of June, 2011.

There is a plethora of decided cases to the effect that the question of jurisdiction being radically fundamental can be raised at any stage of the proceedings. See the case of ***Rivers State Government of Nigeria & anor v Specialist Konsult (2005) 7 NWLR pt. 923, 145 at 172.***

The issue of jurisdiction is fundamental to any effective adjudication which can be raised by the court *suo motu* where parties fail to raise it. See (i) ***A.G. Lagos State v Dosunmu*** **(1989) 3 NWLR pt. 111,552.** In the case of ***Prof. Aderemi Olutola v. University of llorin (2004) 18 NWLR pt. 905, 416 at 446*****,*** the Supreme Court held that "when there are sufficient facts *ex facie* on the record establishing a want of competence or jurisdiction in the court it is the duty of the court to raise the issue *suo motu* if the parties fail to draw the court attention to it. See also ***Oloba v. Akereja (1988) 3 NWLR pt. 84, 508 (2) Madukolu v. Nkemdilim (1962) 2 SCNLR, 341.***

On the 23rd day of June, 201 1, the appellant's counsel filed a written address dated 22nd June, 201 1 on the issue of jurisdiction of the court in response to the invitation of the court.

The appellant's counsel in the said written address contends that the sole issue for determination is "whether the Customary Court Grade A and the Customary Court of Appeal has the jurisdiction to entertain this case". He stated that in determining the jurisdiction of these courts the most important thing to consider are:-

a. The claim of the parties

b. The territorial areas where the dispute or contract arose or where the parties are resident and

c. The quorum of the presiding Officers.

He submitted in his written address that the trial Customary Court, Grade A and this court has jurisdiction over the claims before them and urged the court to so hold. He referred the court to Order 2 Rule 2 of the FCT, Abuja Customary Court (Civil Procedure) Rules, 2007. Also section 14 of Part III of the Customary Court Act, 2007.

On the 23rd day of June, 201 l, the appellant's counsel adopts the argument and the submission in his written address and urged the court to entertain the appeal and enter judgment in favour of the appellant.

The 1st respondent's counsel on the 21st June, 2011 also in response to the invitation of the court, filed a written address dated 20th day of June, 2011 wherein he argued that in determining the jurisdiction of a court, the court process to be used is the pleadings of the plaintiff, which is the statement of claim. He refer to the case of ***Inakoju v Adeleke (2007) 2 MJSC, 62 Para —A-C*** and also refer the court to schedule I Section 3 of the civil causes limit of jurisdiction and power-Federal Capital territory Customary Court Act, 2007 and section 14 of part III of the FCT Customary court Act, 2007. He argued that the Act conferred unlimited monetary jurisdiction on the lower court and that the parties submitted to the jurisdiction of the lower court. He further submits in the written address that section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 conferred on this court the powers of a superior court of record. He finally submitted that this court has jurisdiction to entertain the appeal and asked the court to so hold. On the 23rd day of June, 2011, the 1st respondent's counsel adopts his written address and urged the court to uphold the judgment of the lower court and dismiss this appeal.

ISSUE FOR DETERMINATION

1. Whether or not the court (Customary Court of Appeal, Abuja) has jurisdiction to entertain the appeal.

The issue of jurisdiction is fundamental to the administration of justice and adjudication, therefore any adjudication no matter how well tried and or conducted is incompetent if it is conducted without jurisdiction. See the case of ***Alhaji Sule Anka & Ors v. Alhaji Abdullahi Lokoja & Ors (2001) 4 NWLR pt. 702,178 at 188.*** Any defect in competence is fatal, for the proceedings are

anullity, however well conducted and decided. See also the case of ***Prof. Aderemi v Unilorin (supra).*** The Supreme Court in the case of ***Mobil Producing Nigeria Unlimited v. Lagos State Environment Protection Agency& Ors (2002) 18 NWLR pt. 798, 1 at 32*** defined jurisdiction as the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. Courts are creation of statute. It is statute that creates the court and defines the powers and the extent of its application. See the case of ***Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713, 576***.

It follows therefore that courts derive their jurisdiction therefrom. See ***Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196, Trustee, P.A.W. Inc. v. Trustee, A.A.C.C. (2002) 15 NWLR pt. 70-, 449.***

Similarly, this court as an appellate court, its appellate jurisdiction is also statutory, having being derived from the statute creating it, the Constitution and any other enabling law inclusive. This court is a creature of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from section 267 and 8 (1) of the1999 Constitution and Decree No. 30 of 1991 respectively. S.267 of the 1999 Constitution is herein reproduced as follows:

"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"

And.

S. 8 (1) of Decree No. 30 of 1991 provides as follows:

"Subject as otherwise provided in this Decree, the court shall have jurisdiction to hear and determine appeals in civil matters involving questions of customary law".

The Supreme Court held in the case of ***Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR pt. 820, 577 at 635*** that jurisdiction of a court is a matter of law and it is vested in a court by the Constitution and the statutes establishing the court. See the decision of Hon. Justice Karibi-Whyte JSC in ***Peter Adeboye Odofin & Anor v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350 at 367.*** The Supreme court in the case of ***M. Ahmadu Usman v. M. Sidi Umaru (1992)7 NWLR pt. 254, 377 at 397 — 398*** held that on appeal it is the issue or issues for determination in an appeal that determines the court to which an appeal lies, if the appeal raises questions involving

customary law, it goes to the Customary Court of Appeal and if the appeal raises questions of general law, it goes to the High Court.

By virtue of the above stated statutes and cited authorities, it is the issue or issues for determination in an appeal that confers jurisdiction on an appellate court. For this court to assume jurisdiction, the court must look at and examine the issues raised in the appeal. Therefore, the issues raised by the appellant in the instant case in his notice of appeal and brief of arguments need to be properly examined to ascertain the competence of this appeal.

GROUND 1

That the trial court erred in law when the chairman and the members of the court held that the plaintiff did not prove beyond resonable doubt that he paid the sum of N180,000.00 (One Hundred and Eight Thousand Naira) only as part payment to the 1st defendant.

PARTICULARS OF GROUND 1

i. That the trial court did not reckon with the provisions of Section 137, Section 138 (1) and Section 141 (1) of the Evidence Act in deciding this case which has resulted in the miscarriage of justice being suffered by the appellant.

ii. That it is a settled law that the degree of proof necessary for the plaintiff to prove his claim is not proof beyond reseasonable doubt.

iii. That the cost awarded against the plaintiff was outrageous, unjust and has no legal basis or support.

ISSUE 1

"Whether the trial court erred in law when its chairman and the members of the court held that the plaintiff did not prove beyond reasonable doubt that he paid the sum of N180,000.00 (One Hundred and Eighty Thousand Naira Only). The plaintiff is to pay the 1st defendant the total sum N545, 550.00 (Five Hundred and Forty—Five Thousand, Five Hundred and Fifty Naira) only as part payment to the 1st defendant (now respondent)".

Ground 1 and issue 1 canvassed and argued by the appellant, is a complaint on the alleged non—compliance of the trial court with the provision of Section 138 (1) and section 141 (1) of the

Evidence Act in deciding the case. This complaint did not raise any issue involving customary law, therefore the court (Customary Court of Appeal, Abuja) did not have jurisdiction to hear and determine same.

The issue raised in Ground 1 and issue 1 is issue of general law. Therefore Ground 1 and issue I raised, canvassed and argued by the appellant is incompetent.

GROUND 2

That the trial court erred in law when the chairman and the members of the court without any judicial or statutory authority awarded a cost of N100,000.00 (One Hundred Thousand Naira) only against the appellant in favour of the respondent.

i That the discretionary powers exercised by the trial court was neither done judicially nor judiciously.

ii. That in arriving at the cost awarded to the respondent, the trial court misunderstood the cost of the suit (which is the filing fees, cost of service and mileage and other processes) with the expenses incurred in employing the service of a legal practitioner.

iii. That the cost awarded against the plaintiff was outrageous, unjust and has no legal basis or support.

ISSUE 2

"Whether the trial court erred in law when the Chairman and the members of the court held that the plaintiff (now appellant) is liable to pay the cost of N100,00.00 (One Hundred Thousand Naira) only to the defendant (now respondent)".

Ground 2 and issue 2, *ex facie* does not raise question involving customary law, this is a complaint against award of cost which is an issue of general law consequently, the court did not have the requisite jurisdiction and lacks the competence to entertain same.

To properly invoke theappellate jurisdiction of this court, the Notice of Appeal must contain a ground or grounds of appeal that raises question or questions of customary law. The 2 grounds of appeal and the 2 issues filed, canvassed and argued by the appellant does not raise question or questions of customary law and the 2 issues are incompetent and it is so held.

The court can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid Notices of Appeal not by incompetent notice of appeal. See the case of ***Robert I. Ikweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 at 425-426*.** In the case of ***Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949, 616 at 634*** the Supreme Court held that appeals are creation of statutes, as such failure to comply with the statutory requirement prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive the appellate court jurisdiction to adjudicate on the appeal.

The notice of appeal is without doubt the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) l NWLR pt. 68, 39*.** The notice of appeal filed by the appellant herein is incompetent as it did not contain a valid ground of appeal that raises issues or questions of customary law and it is so hold.

The submissions of the counsels to the parties in their written addresses that this court has jurisdiction to entertain the appeal cannot stand and or confers jurisdiction on this court. It is trite that parties cannot by consent real or tacit, confer jurisdiction on a court where none exists. See the case of ***Sunday Gbagarigha v. Adikumo George & Anor (2005) 17 NWLR pt. 953, 163 at 190; Yekini Ogoh v. Enpee Industries Ltd (2004) 17 NWLR pt. 903, 449 at 462.***

Similarly, as per the decision of the Supreme Court in the case of ***Rivers State Government of Nigeria & Anor v. Specialist Konsult (2005) 7 NWLR pt. 923, 145 at 172*** 'jurisdiction cannot be determined by rules of court it is either a matter of the Constitution or the enabling statute. There is no justice in exercising jurisdiction where none exists. It is injustice to the law, to the court and to the parties to do so.

The issue of jurisdiction is vital and fundamental; any order made without jurisdiction of court is a nullity. See the case of ***NDIC v. CBN & Anor (2002)7 NWLR pt. 766,272 at 294- 295; Sunday Gbagarigha v. Adikumo George & Anor (supra).***

Where a court finds that it lacks jurisdiction to entertain the suit before it, the proper order to make is one striking out the suit, see ***NDIC v. CBN & Anor.* (*supra*); *Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR Pt.199,501 3. CBN v. Katto (1994) 4 NWLR Pt. 339, 446.***

The notice of appeal without any iota of doubt is the foundation of an appeal. See the case of ***Turkur v. Governor of Gongola State (1998) 1 NWLR pt. 68, 39.*** Consequently, the entire appeal

rest squarely on the notice of appeal being the foundation of the appeal and derive its competency therefrom.

The appellant's Notice of Appeal and the 2 issues formulated and canvassed in this appeal are incompetent and liable to be struck out. The notice of appeal and the 2 issues formulated are hereby struck out.

In conclusion, this appeal in its entirety is declared incompetent and same is hereby struck out accordingly.

Hon. Justice Usman N. Ahmed, JCCA: I have had the opportunity of reading in advance the lead judgment of Hon. Justice S. Adekunle Lawal (Judge) Customary Court of Appeal, FCT, Abuja in this case. I entirely agree with the reasons adduced in the said lead judgment and agree with the said judgment.

Hon. Justice Istifanus Gandu, JCCA: The Appellant was the plaintiff at Grade A Customary Count Jikwoyi, Abuja and the Respondent was the defendant. The Appellant issued a summons against the Respondent claiming as follows:

"1. An order of this Honourable Court restraining the 1st and 2nd defendants, their agents, staffs, servant and officers from going to the plaintiffs Customers and clients to embarrass him and destroy the good relationship between him and his customers and clients.

2. An order of this Court restraining the 1st and 2nd defendant from using the 2nd defendant, his agent, staff and officers as debt recovers and collectors.

3. And for such further order or other orders that this Court would give or make in the circumstance of this case"

The 1st defendant/Respondent in his defense filed a counter claim and claimed the following relief:

1. *A declaration that the failure of the plaintiff to pay back to the 1st defendant his money is a breach and violation of the oral agreement to their business relationship and this Honourable Court of Justice will not support such irregularities and injustice.*
2. *The sum of N646,050.00 (Six Hundred and Forty Six Thousand, Fifty Naira) only being the agreed capital and interest sum due to the 1ST defendant and end unpaid by the plaintiff.*

3. *The sum of N200,000 (Two Hundred thousand Naira) only damages for inconveniences and frustration suffered by the defendant as a result of willful refusal of the plaintiff to heed to their agreement and oral understanding.*
4. *The sum of N200,000.00 (Two Hundred thousand Naira) only being the cost of engaging the services of ASEK CHAMBERS the receipt of which is hereby pleaded "*

After hearing both parties, the trial court gave Judgment in favour of the defendant/Respondent in the following terms.

"(1). The sum of N509, 000.00 (Five Hundred and Thousand Naira) only being the capital with which the defendant gave to the plaintiff for the execution of the transaction with H & S Company be deducted and refunded by the plaintiff to the 1st defendant from the total sum of N582000.00 (Five Hundred and Eighty Two Thousand Naira) only collected by the plaintiff from H & S Company

(2) That the balance of N73, 100.00 (Seventy Three Thousand, One Hundred Naira) only be divided into two and shared equally between the plaintiff and the 1" defendant to tune of N36, 550.00 (Thirty six Thousand Five Hundred and Fifty Naira) only being the agreed capital and interest sum due to the I" defendant and unpaid by the plaintiff.

On the counter claim filed by the 1st defendant against the plaintiff this Court hereby confirms the position of the 1"" defendant that there has indeed been a breach and violation of the oral agreement entered into by both parties.

(I) *Hereby award the sum of N100,000 (One Hundred Thousand Naira) only for the inconveniences and frustration suffered by the* 1st defendant *as a result of the willful refusal and bready violation of the oral agreement entered into by the parties.*

(2) The Court orders the plaintiff to pay the sum of N100,000.00 (One Hundred Thousand Naira) only being the cost of action in favour of the 1st defendant"

Dissatisfied with this judgment the Plaintiff/Appellant has appeal to this Court against the whole decision. For ease of reference the grounds of appeal are reproduce thus:

"Ground 1 :

That the trial court erred in law when the chairman and the members of the court held that the plaintiff did not prove beyond resonable doubt that he paid the sum of N180,000.00 (One Hundred and Eight Thousand Naira) only as part payment to the 1st defendant.

Particulars of Ground 1

i. That the trial court did not reckon with the provisions of Section 137, Section 138 (1) and Section 141 (1) of the Evidence Act in deciding this case which has resulted in the miscarriage of justice being suffered by the appellant.

ii. That it is a settled law that the degree of proof necessary for the plaintiff to prove his claim is not proof beyond reasonable doubt.

GROUND 2

That the trial court erred in law when the chairman and the members of the court without any judicial or statutory authority awarded a cost of N100,000.00 (One Hundred Thousand Naira) in favour of the respondent.

i That the discretionary powers exercised by the trial court was neither done judicially nor judiciously.

ii. That in arriving at the cost awarded to the respondent, the trial court misunderstood, the cost of suit (which is the filing fees, cost of service and mileage and other processes) with the expenses incurred in employing the service of a legal practitioner.

iii. That the cost awarded against the plaintiff was outrageous, unjust and has no legal basis or support.

Based on these ground of Appeal, the Appellant filed a brief of argument dated 16th March, 2011 on the same day. On the 5th day of April, 2011 the Respondent filed his reply brief. On the 2nd day of June, 201 1 when the Appeal came up for hearing both parties via their counsels adopted their briefs of argument filed and the matter was adjourned for judgment to 23rd June, 2011.

At the prejudgment conference, this Court raised the following issue *suo motu* thus:

"whether the Customary Court of Appeal Federal Capital Territory has jurisdiction to entertain this appeal."

To this issue, counsel on the 23rd June, 2011 addressed this Court by written addresses. The Appellants written address is dated the 22nd June, 2011 and filed on 23rd June 2011. The Respondent's brief on the issue of jurisdiction is dated the 20th June 2011 and filed on the 21st June, 2011.

The Appellant in his brief referred this Court to Order 2 Rule 2 Customary Court's (Civil Procedure) Rules 2007 and Section 14 item (iii) of the schedule there and Section 6 (5) & 6 and submitted that this Court has jurisdiction. The Respondent referred to both the claim before the court below and the counter claim filed. He argued that even if the plaintiffs claim at the trial Court was not within the jurisdictionof the Court, his claim being a debt simplicitor is perfectly within the jurisdiction of this Court the Court below and this Court. He cited the case of ***Inakoju v. Adeleke (2007) 2 MJSC 62*** to the effect that it is the pleading of the plaintiff that is use in determing jurisdiction. He referred us to S.14 and items on the schedule there to and particularly item 5. He further referred us to Section 6 (5) & (6) h and submits that this Court has jurisdiction to hear this matter.

In conclusion he referred us tothe authorities of ***Nwankwo v. Yaradua (2010) parts MJSC 34*** to the effect that a Court is competent to exercise jurisdiction in a matter if it is properly constituted as:

(i) Number and qualification

(ii) Subject matter is within jurisdiction

(iii) The case is duly instituted and conditions precedents are fulfilled.

He submitted that this case falls within the jurisdiction of this Court.

The issue herein before set out for determination suo motu by this Court is very clear. It is repeated as *"whether this Court has jurisdiction to hear this matter. The jurisdiction of this Court is provided for in Section 267 of the constitution of the Federal Republic of Nigeria 1999 as (amended). This section provides as follows:*

"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"

On the same terms section 8 Customary Court of Appeal Decree (Act) 1991, provides as follows.

"Subject to as otherwise provided in this Decree, the Court shall have jurisdiction to hear and determine appeals in civil matters involving questions of Customary Law from the decision of the upper Area Court and Area Courts"

It is pertinent to state that jurisdiction of a court is a creation of statute. See the cases of ***Uwaigwe v. Okere (2008) 13 NWLR (PART 1105) 452 at 471.*** In the case of ***Uwazuruike v. Attorney General of the Federation (2007) 8 NWLR (pt 1035) 5 at 13.*** In these cases the Supreme Court held that appellate jurisdiction is always statutorily conferred on a Court or tribunal either by the constitution or a statute of the National Assembly or Law of the House of Assembly of a state.

In deciding the jurisdiction of the Court, just like the statement of claim, it is the ground of Appeal and issues formulated there from by the Appellant that is considered.

In ***Usman v. Umaru (1992) 2 NSCC 605*** it was held inter alia

> *"the superior Court to which the Appeal goes would be determine by the nature of the question raised in the appeal. I fit raises issue of General Law, it goes to the high Court --- --- and if it raises question of Customary Law, the appeal goes to Customary Court of Appeal"*

A decision is in respect of Customary Law when the controversy involves a determination of what the relevant Customary Law is and the application of the question in controversy. Where the parties are in agreement as to what the applicable Customary Law is, and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable Customary Law is, no decision as to any Customary Law question arises. Where the decision of the Court turns on facts or question of procedure such question will not be question of Customary Law. See ***Pam v. Gwom (2002) 2 NWLR (PT. 644) 322.***

In the instant case, the Appellant has filed two grounds of appeal and formulated two issues for determination of this Court. For ease of reference, the questions are reproduced here under thus:

(1) "whether the trial Court erred is Law when it's Chairman and

Members of the Court held that the plaintiff did not prove beyond reasonable doubt that he paid the sum of N180,000.00 (One Hundred and Eighty Thousand Naira only). The plaintiff is

to pay the 1ST defendant a total sum of N545, 550.00 (Five Hundred and Forty Five Thousand Five Hundred and fifty five Naira only) part payment to the 1st defendant (now Respondent)

(2) whether the trial Court erred in Law when the chairman and the plaintiff (now Appellant) is liable to pay the cost of N100,000.00 (One Hundred Thousand Naira only) to the defendant (now Appellant)

Now can it be said that these issues framed from the two grounds of appeal are question of Customary Law? It has been argued by both counsels that this court has jurisdiction. I have herein before said that this court's jurisdiction is not the same with that of the trial court. There jurisdiction of the trial Court is drawn from the Customary Court Law Act of the FCT 2007, particularly Section 14 (2) read together with the schedule thereto. The jurisdiction of this Court is as out lined in Section 267 of the 1999 constitution and Section 8 of the Customary Court of Appeal Decree (Act). I agree with my learned brother in the lead judgment that to be able to invoke the appellate jurisdiction of this Court the grounds of appeal and the issues formulated by the Appellant must involve question of Customary Law. I have not been able to see in them any question of Customary Law. For these reasons and in view of Section 267 and S. 8 above cited, I shall and I hereby decline jurisdiction to hear this appeal.

I too will strike out the notice of appeal, issues formulated there from and the argument canvassed in their support. The entire appeal is hereby struck out.

APPEAL STRUCK OUT

MAL. AWAL MALUMFASHI

V.

MAL. GARBA GUSAU

Appeal No.**: FCT/CCA/CVA/10/2011**

HON. JUSTICE S. ADEKUNLE LAWAL, JCCA, (Presided)

HON. JUSTICE USMAN N. AHMED, JCCA (Delivered the lead judgment)

HON. JUSTICE ISTIFANUS GANDU, JCCA

26TH OCTOBER, 2011

ACTION-	*Commencement of action – appropriate venue – whether issue of jurisdiction*
COURT-	*Rules of Court – Essence of*
PRACTICE AND PROCEDURE-	*Absence of defendant in Court - whether court can proceed – effect of*
PRACTICE AND PROCEDURE-	*Brief filing – Respondent's Brief – Failure to file – effect of*
PRACTICE AND PROCEDURE-	*Parties to proceedings – where party willfully stay away from proceedings – attitude of court – whether amounts to breach of fair hearing*

ISSUE

Whether a party who fails to avail himself the opportunity presented by a trial process can complain of lack of fair hearing.

FACTS

The brief facts of the case are that the Plaintiff/Respondent instituted a suit at the Customary Court, Bwari, Abuja against the Defendant/Appellant on grounds that the Appellant made false accusation against him to the Police. At the commencement of hearing, the Appellant sought leave of the trial court to transfer the case to the FCT Customary Court sitting at Kubwa. In its ruling, the trial court refused the application for transfer. It is against that ruling that the Appellant herein being dissatisfied, has appealed to this court.

HELD (Allowing the Appeal):

1. **On the essence of rules of court.**

It is trite that laws or rules are made to regulate the practice and procedure of courts in order to ease the prosecution of cases and not to cause hardship and unbearable expenses for parties. Such is the practice which made the 2007 Act of the Customary Court of the FCT to contain a Section (S. 28 of the Customary Court Act, 2007) that gives parties a leeway to avoid hardship and conveniently carry out their cases in court.

2. **On whether the court can proceed to hear a matter in the absence of the defendant**

   The rules of the court permit the court to proceed to hear and determine the appeal and deliver judgment accordingly whether the Respondent appears or not, as there was proper services on him. See Order 7 Rule 9(5) of Federal Capital Territory Customary Court of Appeal Rules 1996.

3. **On attitude of court where a party willfully refuses to participate in proceedings**.

   The court cannot be held to ransom by any litigant who refuses by no means to be an active party in a trial process. It is the duty of the court to adjudicate on matters timeously and to avoid injustice in the most humanly way possible bearing in mind the interest of both the Appellant and the Respondent. That party who refuses to take part in the trial process does so at his own peril, for if at the end of the day the result of the case is not in his favour, he has himself to blame and no one else. See the case of ***Muhammed S.M.D. v. Tersoo Kpelai (2001) 6 NWLR Part 710 page 700 at 711-12.***

4. **On whether a party who refuse to partake in a trial process can complain of fair hearing**.

   Where a party is seen to have been served not only with the processes filed but also with the hearing notice and he chooses to stay away from the court whilst the hearing in the case proceeds, he cannot be heard to complain after judgment has been delivered, that he was denied fair hearing

5. **On effect of non filing of respondent's brief**

   Where a Respondent did not file a brief of argument in an appeal, the facts contained in the Appellant's brief is deemed as not denied. See the case of ***Sen. Haruna Abubakar & Ors. v. INEC & Ors.(2004) 1 NWLR Part 854, 207***

6. **On where to commence an action**

   It is well established that the venue for commencement of action in a civil trial is the judicial division where the Defendant resides or carries on business or where the cause of action rose. See ***Noah Akintunde v. Dr. E.O. Ojo (2002) 4 NWLR Part 757 at Page 284.***

7. **On whether issue of venue to commence an action is a matter of jurisdiction**

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. The venue of trial of civil case will be where the Defendant resides or carries on business. See ***Kranus Thompson Org. Ltd v. UNICAL (2004) a NWLR Part 879,631 and Ajibola v. PSTSC (2007) ALL FWLR Part 350, 1341.***

Cases cited in this Judgment

Ajibola v. PSTSC (2007) ALL FWLR Part 350, 1341
Kranus Thompson Org. Ltd v. UNICAL (2004) a NWLR Part 879,631 and
Muhammed S.M.D. v. Tersoo Kpelai (2001) 6 NWLR Part 710 page 700
Noah Akintunde v. Dr. E.O. Ojo (2002) 4 NWLR Part 757 at Page 284
Sen. Haruna Abubakar & Ors. v. INEC & Ors.(2004) 1 NWLR Part 854, 207

Statutes/Rules of Court/Books referred to in this Judgment

FCT Customary Court Act, 2007
FCT Customary Court of Appeal Rules 1996

APPEARANCES:

Mohammed Shehu, Esq. for the Appellant

Hon. Justice Usman N. Ahmed, JCCA (*Delivering the lead judgment*): This is an interlocutory appeal against the ruling of the Customary Court, Bwari, Abuja delivered on the 14th April, 2011 in Appeal No.: FCT/CCA/CVA/10/2011.

The brief facts of the case are that the Plaintiff/Respondent instituted a suit No.: CC/CV/14/2011 at the court of first instance, Customary Court, Bwari, Abuja against the Defendant/Appellant.

The claim was as follows:

1. That the Plaintiff is a businessman and lives at Pipeline, Kubwa.

2. That the Defendant is a Civil Servant who lives at Pipeline behind Court of Appeal Quarters, Kubwa, Abuja.

3. That sometimes in July, 2010, the Defendant laid false information to the police that he is a member of "Boko Haram".

4. That as a result of the false information the police arrested and detained the Plaintiff for more than two days.
5. That the Defendant now castigated the Plaintiff in public saying that his types should not be seen in Abuja.
6. That after police investigation the police found that the information given to them by the Defendant is false and hence they discharged the Plaintiff.
7. That the Plaintiff psychologically and socially suffered irreparable damage as a result of the activities of the Defendant.
8. WHEREOF the Plaintiff's claim against the Defendant is as follows:

1. The sum of ₦5,000,000.00 only for specific and general damages being psychological and social damage suffered by the Plaintiff.
2. The sum of ₦100,000.00 only for cost of filing and presenting this matter.

Being dissatisfied with the ruling of the court delivered on the 14th April, 2011, the Appellant filed an appeal to this court by filling the following grounds:

Ground of Appeal

The Honourable Court erred in law in dismissing the oral application of the Appellant for transfer of the matter to the Kubwa Division of the Customary Court where the cause of action arose and on ground of convenience.

Particulars

The Honourable court erred in law when it cited Orders 13 of the FCT Customary Court Civil Procedure Rules, 2007 in refusing the Appellant's application for transfer, when the said order was not applicable in the circumstances.

Grounds of Appeal

The Honourable court erred in denying the application of the Appellant's Counsel for stand down so as to get information and inform the court with citations of authorities cited in support of application for transfer, thus denying him fair hearing.

Particulars

The Appellant's Counsel cited authorities without citation and objected to by Respondent's Counsel for stand down to get the citation was denied by the court

RELIEFS SOUGHT FROM THE COURT

1. An order of the Customary Court of Appeal allowing the appeal, setting aside the Ruling of the Customary Court of 14th April, 2011 uphold the Appellant's application for transfer of the matter to the division of the Customary Court, Kubwa.

The Appellant also on 19/05/2011 filed before this court Appellant's brief of Argument and Appellant through his Counsel formulated just one issue for determination and same is hereby reproduced as follows:

It is trite that laws or rules are made to regulate the practice and procedure of courts in order to ease the prosecution of cases and not to cause hardship and unbearable expenses for parties. Such is the practice which made the 2007 Act of the Customary Court of the FCT to contain a Section (S. 28 of the Customary Court Act, 2007) that gives parties a leeway to avoid hardship and conveniently carry out their cases in court.

The Respondent did not file any Brief of Argument to the process and his Counsel failed to make any representation. On the 2/6/11, the Appellant's Counsel filed his papers and same adjourned to the 13th July, 2011 for hearing. On 13th July, 2011 the Counsel adopted his brief of argument which dated 19/5/11 and urged the court to enter judgment since there was no any response from the Respondent' Counsel.

The court in the interest of justice adjourned the matter yet to another date of 29/9/2011 still for hearing in order to give the Respondent the opportunity to oppose the appeal. But surprisingly, on 29/9/2011 when the case was fixed yet for hearing, the Respondent nor his Counsel were not in court and as such no legal representation.

As stated above the Respondent despite the opportunity offered him to oppose the appeal still failed to file any brief of argument in respect of the appeal, he also refused to attend the court and no legal representation despite the hearing notice and the processes served on him.

Nevertheless, the rules of the court permit the court to proceed to hear and determine the appeal and deliver judgment accordingly whether the Respondent appears or not, as there was proper services on him. See Order 7 Rule 9(5) of Federal Capital Territory Customary Court of Appeal Rules 1996.

The court cannot be held to ransom by any litigant who refuses by no means to be active party in a trial process. It is the duty of the court to adjudicate on matters timorously and to avoid injustice in

the most humanly way possible bearing in mind the interest of both the Appellant and the Respondent. That party who refuses to take part in the trial process does so at his own peril, for if at the end of the day the result of the case is not in his favour, he has himself to blame and no one else. See the case of ***Muhammed S.M.D. v. Tersoo Kpelai (2001) 6 NWLR Part 710 page 700 at 711-12*****,** so also see the case of ***Stephen Amadi & Other v. Chairman & Members of Obio Customary Court & Others (2005) 12 NWLR Part 939,386 at 404***, that in civil matters no law compels any party to be physically present in court to prove his case or to defend it.

Where however, a party is seen to have been served not only with the processes filed but also with the hearing notice and he chooses to stay away from the court whilst the hearing in the case proceeds, he cannot be heard to complain after judgment has been delivered, that he was denied fair hearing.

The effect of the Respondent's failure to attend the court and also file any brief of argument in respect of this appeal despite the service of the processes on him is that court shall proceed with the appeal and determine the matter on the strength of the Appellant's case.

However, where a Respondent did not file a brief of argument in an appeal, the facts contained in the Appellant's brief is deemed as not denied. See the case of ***Sen. Haruna Abubakar & Ors. v. INEC & Ors.(2004) 1 NWLR Part 854, 207*** where Hon. Justice OMAGE JCA at 228 held that it is safe to conclude that facts contained in the Appellant's brief are not denied if the Respondent fail for any reason to file a valid brief.

The Notice of Appeal dated 27th April, 2011 filed by the Appellant have the following grounds of appeal thus:

> *"The Honourable Court erred in law in dismissing the oral application of the Appellant for transfer of the matter to the Kubwa Division of the Customary Court where the cause of action arose and on ground of convenience".*

I have heard the submission of the Appellant's Counsel and agreed with him that the cause of action is civil in nature and took place at Kubwa and not Bwari and both parties resides also at Kubwa.

It is well established that the venue for commencement of action in a civil trial is the judicial division where the Defendant resides or carries on business or where the cause of action rose. See the case of ***Noah Akintunde v. Dr. E.O. Ojo (2002) 4 NWLR Part 757 at Page 284.***

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. The venue of trial of civil case will be where the Defendant resides or carries on business. See ***Kranus Thompson Org. Ltd v. UNICAL (2004) a NWLR Part 879,631 and Ajibola v. PSTSC (2007) ALL FWLR Part 350, 1341.***

This court is empowered to exercise the supervisory power on lower courts in this type of situation in its Rules in Order 6 Rule (1) of the Court (1996) and for convenient of the parties such powers is hereby exercised accordingly.

In summary, the Ruling of the Customary Court, Bwari delivered on the 14th April, 2011 in suit No.: FCT/CC/CV/14/2011 is hereby set aside and the matter is accordingly transferred to the Customary Court, Dutse Division of the Federal Capital Territory.

Hon. Justice Stanley A. Lawal, JCCA: Having been privileged to read before now the judgment of my learned brother, Hon. Justice Usman N. Ahmed, JCCA just delivered. I am in agreement with the reasoning in the said judgment, the interlocutory appeal is also allowed by me in all the terms set out therein.

Hon. Justice Istifanus Gandu, JCCA: I have had the opportunity of reading the draft of the judgment just delivered by my Learned Brother Hon. Justice Usman N. Ahmed. The facts have been sufficiently set out. The reasoning and the conclusions reached have adequately resolved this appeal. There is nothing useful on my part to add. I abide by all the Orders made there. I too will allow the Appeal.

APPEAL ALLOWED

FANYA SARKIN NOMA

V

LARABA GIMBA

Appeal No**. FCT/CCA/CVA/3/2010**

HON. JUSTICE A.M.A. SADDEEQ, JCCA (Presided and delivered the Lead Judgment)

HON. JUSTICE M.G. GWAGWA, JCCA

HON. JUSTICE ISTTFANUS GANDU, JCCA

27TH JULY, 2011

ACTION-	*Action for declaration of title – Claimant in – What claimant must prove*
ACTION-	*Action for declaration of title – Proper parties to*
APPEALS-	*Objection to – hearing of – where no notice of Preliminary objection is filed – effect of*
COURT-	*FCT Customary Court of Appeal – Jurisdiction to hear preliminary objection – exercise of*
EVIDENCE-	*Evaluation of by trial court – attitude of Appellate court to*
INTERPRETATION OF STATUTES-	*Shall- when used in a statute – effect of*
JUDGMENT AND ORDERS-	*Competence of – Parties to – must be properly before the court*
PRACTICE AND PROCEDURE-	*Notice of Preliminary Objection – Requirement for- whether parties can waive*
PRACTICE AND PROCEDURE-	*Objection to Appeal – Where incorporated with in Respondent's brief - Duty of Respondent*
TRESPASS-	*Claimant of trespass – what claimant must establish*

ISSUE

Whether the evidence of the parties were adequately evaluated by the trial court before reaching the conclusion it did by entering judgment in the respondents' favour.

FACTS:

Before the Grade A Customary Court sitting at Bwari, in the FCT, the respondent as plaintiff instituted this suit against the appellant as defendant, for declaration of title and trespass onto the piece of land she claimed to have inherited from her late father, named Gimba. At the trial court, the respondent sought for the court's order of injunction to restrain the appellant from building on the disputed land and a declaratory order vesting title in the land on her.

After a full circle-hearing during which both parties testified for themselves and called witnesses, the trial court entered judgment in favour of the respondent on the 28th day of January, 2010, after its consideration of the facts before it. Aggrieved by that decision, the appellant initiated this appeal.

HELD (Allowing the Appeal in Part):

1. **On when the FCT Customary Court of Appeal may hear a preliminary objection**
   For an objection to be worthy of consideration on its merits, it must be competent and for it to be so, the respondent is required to comply with the mandatory provision of Order 7 rule 17 (1) of the FCT Customary Court of Appeal rules, 1996. See ***Emir of Kano v. Agundi (2006) 2 NWLR (Pt 965) 587***.
2. **On whether an objection to an appeal can be heard where no notice of preliminary objection is filed**.
   It is mandatory for any respondent intending to object to the hearing of an appeal to file a formal notice of the preliminary objection. See ***FIPBC (Nig) Ltd v. EAS Ltd & Ors (2006) 6 NWLR (Pt 975) 13.***
3. **On the effect of the word "shall" when used in a statute**.
   The word "shall" is used to express what is legally mandatory. Its use in a statute or rules of court makes it mandatory that the rule or provision must be observed. See ***Onochie & Ors v. Odogwu & Ors (2006) 6 NWLR (Pt 975) 89***.
4. **On whether parties can waive the requirement for a Notice of Preliminary Objection**.
   Being a statutory provision non compliance with it cannot be waived by either party.
5. **On the duty of a respondent where his objection is incorporated in the**

respondent's brief.

Whenever a respondent does not file a separate Notice of Preliminary Objection, but merely incorporates the preliminary objection in the respondents' brief of argument, it is imperative on the respondent to move the court to take the preliminary objection first. Where a respondent does not apply for or seek leave of court before hearing of an appeal to move his preliminary objection to the appellants grounds of appeal, the preliminary objection will be deemed abandoned. See ***Min. of Works & Housing v. Shittu (2004) 16 NWLR (Pt 1060) 370; Nsirim v. Nsirim (1990) 3 NWLR (Pt 138)285, Onochie v. Odogwu 2006) 6 NWLR (Pt 975) 79.***

6. **On need for parties to be properly before the court for its orders to be competent**

The trial court must have the competence to make declaratory order and for it to have the required competence, the proper parties *inter alia*, must be before it otherwise the consequence is fatal to the action. See ***Eupere v. Aforije (1972) 1 ALL NLR (Pt 1) 220; Adelakun v. Oruku (2002) 11 NWLR (Pt 992) 646 – 647.***

7. **On proper parties to action for the declaration of title to land**

The position of the law is that in an action for the declaration of title to a disputed land, the proper parties must be before the court for the plaintiff to sustain the action. The law is that when in a claim of land it is admitted that the disputed land belongs to another person not made a party to the suit, such claim must fail except such a person is made a party. Consequently, it is the duty of the plaintiff to find and make his claim against the party who claims title to the land and not a confessed trespasser. See ***Darko v. Agyakwa, 9 WACA, 166; Lawanson v. Afani Const. Co. Ltd (2002) 2 NWLR (Pt 752) 618***.

8. **On what a party seeking a declaration of title in his favour must establish**

The court does not grant declaration on admission of parties. It has to be satisfied that the plaintiff owns the title claimed if the action is one of declaration of title. For the respondent to be entitled to the declaratory relief she must satisfy the court that under all circumstances of this case, she is entitled to the declaratory relief when all the facts are taken into consideration physically and judiciously: See ***Motonwase v. Sorongbe (1988) 5 NWLR (Pt 92) 99; Okedare v. Adebora (1994) 6 NWLR (Pt 349) 157; Bello v. Eweka (1981) ISC, 107 Makanjuola vs. Ajilore (2001) 12 NWLR (Pt 727) 427.*** This is not the case in the instant case because since the appellants' father was not before the trial court to defend the respondents' claim for title to the disputed land, she cannot be

said to have satisfied the trial court that she was entitled to the declaratory relief under that circumstances.

9. **On what a claimant for trespass must establish**

   For a party to maintain a claim of trespass, he must establish that the slightest possession of the disputed land is in him irrespective of whether or not he owned the land or privy to its owner. This claim is not dependent on a declaration of title because possession *per se* is a good title against everyone except the true owner. See ***Okolo v. Uzoko (1978)4 SC, 77; Amakor v. Obiefuna (1974) 3 SC, 67; Ricketts vs. Hassan (2002) 2 NWLR (Pt 750) 107 and 110; Amakor v. Obiefuna (1974) 3 SC, 67***; ***see AKANO vs. OKUNADE (1978) 3 SC, 129.***

10. **On attitude of appellate court to evaluation of evidence by trial court**

    It has been a settled law that the evaluation of evidence is a province upon which the trial court has supremacy. Unless the decision is *inter alia* shown to be perverse, led to a miscarriage of justice, not based on credible evidence or neglect of the principle of law, the appellate court will not interfere with such findings. ***Dakolo & Ors v. Rewane Dakolo & Ors (2011) LPELR, S. C 169/2004.***

Cases cited in this Judgment

Adelakun v. Oruku (2002) 11 NWLR (Pt 992) 646 – 647.

AKANO v. OKUNADE (1978) 3 SC, 129.

Amakor v. Obiefuna (1974) 3 SC, 67

Amakor v. Obiefuna (1974) 3 SC, 67

Bello v. Eweka (1981) ISC, 107

Dakolo & Ors v. Rewane Dakolo & Ors (2011) LPELR, S. C 169/2004.

Darko v. Agyakwa, 9 WACA, 166

Emir of Kano v. Agundi (2006) 2 NWLR (Pt 965) 587.

Eupere v. Aforije (1972) 1 ALL NLR (Pt 1) 220

FIPBC (Nig) Ltd v. EAS Ltd & Ors (2006) 6 NWLR (Pt 975) 13.

Lawanson v. Afani Const. Co. Ltd (2002) 2 NWLR (Pt 752) 618.

Makanjuola v. Ajilore (2001) 12 NWLR (Pt 727) 427.

Min. of Works & Housing v. Shittu (2004) 16 NWLR (Pt 1060) 370

Motonwase v. Sorongbe (1988) 5 NWLR (Pt 92) 99

Nsirim v. Nsirim (1990) 3 NWLR (Pt 138)285

Okedare v. Adebora (1994) 6 NWLR (Pt 349) 157

Okolo v. Uzoko (1978)4 SC, 77

Onochie & Ors v. Odogwu & Ors (2006) 6 NWLR (Pt 975) 89

Onochie v. Odogwu 2006) 6 NWLR (Pt 975) 79.

Ricketts v. Hassan (2002) 2 NWLR (Pt 750) 107 and 110

Statutes/Rules of Court/Books referred to in this Judgment

Evidence Act Cap 112 of 1990

FCT Customary Court of Appeal Rules, 1996.

APPEARANCES:

Patrick A. Ameh Esq. for the Appellant.

Hassan G. Grema ESQ. for the Respondent**.**

Hon. Justice A.M.A. Saddeeq, JCCA: Before the Grade A Customary Court sitting at Bwari, in the FCT, the respondent as plaintiff instituted this suit against the appellant as defendant, for declaration of title and trespass onto the piece of land she claimed to have inherited from her late father, named Gimba. At the trial court, the respondent sought for the court's order of injunction to restrain the appellant from building on the disputed land and a declaratory order vesting title in the land on her.

After a full circle-hearing during which both parties testified for themselves and called witnesses, the trial court entered judgment in favour of the respondent on the 28th day of January, 2010, after its consideration of the facts before it. Aggrieved by that decision, the appellant initiated this appeal on two (2) grounds later amended by substitution with two other grounds which reads thus:-

> *"1. The learned trial Judges erred in law in delivering their judgment in favour of the respondent despite the fact that she placed little or insufficient evidence before the court in the course of the trial.*
>
> *2. The learned trial Judges erred in law when they failed to evaluate the evidence put forward by the appellant and her witnesses before arriving at the conclusion contained in the judgment".*

Both parties settled and exchanged their briefs of argument in compliance with the rules of this court. The appellant in her brief distilled two (2) issues for resolution from the above amended two grounds of appeal, which issues are here below reproduced:

"1. Whether the plaintiff was able to prove that she was entitled to the land in dispute?

2. Whether the trial Judge discharged their duty to evaluate the evidence put forward by the appellant".

The respondent, in her brief also formulated two (2) issues for determination in addition to giving a Notice of Preliminary Objection to the hearing of the appeal. The two issues of the respondent are:-

"1. *Whether the plaintiff/respondent in this case has not proved the case beyond the balance of probability or preponderance of evidence to be entitled to the judgment of the lower court.*

2. Whether the justices of the lower court has discharged their duties to evaluate the evidence put forward by the appellant to arrive at a just conclusion of the matter".

I will deal first with the notice of preliminary objection given by the respondent in the brief. In paragraph 3.0 at page 3 of the respondents' settled brief, under the heading "ISSUES FOR DETERMINATION" the respondent raised the preliminary objection on two grounds which reads thus:

1. *"That the appellant has no locus to institute this appeal.*

2. *That the grounds of appeal as formulated by the appellant is incompetent".*

Having raised the above preliminary objection, I shall commence this judgment with it. The preliminary objection raised some fundamental issues of law which could affect the competence of this court to hear and determine this appeal. However, for the objection itself to be worthy of consideration on its merits, it must be competent and for it to be so, the respondent is required to comply with the mandatory provision of Order 7 rule 17 (1) of this court' rules, 1996, which provides thus:-

" 17 (1) A respondent intending to rely upon a preliminary objection to the hearing of an appeal shall file such notice

giving the appellant seven (7) clear days after service thereof before the hearing setting out the grounds of objection".

The above quoted provision is in pari materia with the provision of Order 3 rule 15 (1) of the Court of Appeal Rules, 2002. Following the construction of this rule 15 (1) in ***Emir of Kano v. Agundi (2006) 2 NWLR (Pt 965) 587***, it is mandatory for any respondent intending to object to the hearing of an appeal to file a formal notice of the preliminary objection as provided for in Order 3 rule 15(1) of the Court of Appeal Rules, see ***FIPBC (Nig) Ltd v. EAS Ltd & Ors (2006) 6 NWLR (Pt 975) 13.*** This is so because of the use of the word "shall" which is used to express what is legally mandatory. It has been held that *"...Its use in a statute or rules of court makes it mandatory that the rule or provision must be observed..."* ***see Onochie & Ors v. Odogwu & Ors (2006) 6 NWLR (Pt 975) 89***. Therefore it is mandatory for the respondent in this matter to comply with the provision of Order 7 rule 17 (1) of this courts rules. Even though a preliminary objection can be raised in the respondents brief***,*** see ***Min. of Works & Housing v. Shittu (2004) 16 NWLR (Pt 1060) 370.*** The act of giving such notice of preliminary objection in the respondents brief is clearly an approach outside the contemplation of the mandatory rule, see ***Okumodi v. Sowonmi (2004) 2 NWLR (Pt 856) 17,*** and non compliance with the said rule could be disastrous to the objection. See ***Emir of Kano v. Agundi (supra) 587.*** Being a statutory provision non compliance with it cannot be waived by either party.

Even where I opt to exercise the courts' discretion under the provision of rule 17 (3) of Order 7 of this courts' Rules , to treat the respondents' notice as contained in the brief as having complied with the rule, 17 (1), there is yet another snag to the preliminary objection. The snag is that it is now trite law that *"...whenever a respondent does not file a separate notice of preliminary objection, but merely incorporates the preliminary objection in the respondents' brief of argument, it is imperative on the respondent to move the court to take the preliminary objection first..." see Min. Works & Housing vs. Shittu (supra)370 and "...where a respondent does not apply for or seek leave of court before hearing of an appeal to move his preliminary objection to the appellants grounds of appeal, this preliminary objection will be deemed abandoned..." see* ***Nsirim v. Nsirim (1990) 3 NWLR (Pt 138)285, Onochie v. Odogwu (supra)79, and Min. Works & Housing v. Shittu (supra) 370.*** In the instant appeal, though the respondent did not file a separate formal Notice of Preliminary Objection in compliance with rule 17 (1) of Order 7, the notice was however incorporated in the brief, unfortunately the respondent never applied for or sought the leave of this court to move the court to take the preliminary objection before adoption of the argument in support of the objection in the

brief. In consonance with the above authorities which are binding on this court, I will have no option than to deem that the preliminary objection had been abandoned, and so I hold.

Having sealed the coffin of the preliminary objection with the last nail, I reach the inevitable conclusion that the objection is abandoned and same is hereby discountenanced.

With the disposal of the preliminary objection, the stage appeared set for the consideration of this appeal on its merit. As before now noted at the beginning of this judgment, two issues were filtered from the two (2) grounds of appeal, for determination by the appellant and these issues appeared to have been adopted by the respondent who recast them with slight flavor. A closer reading of the issues made me more inclined to considering them under one broader issue which should read thus:- *Whether the evidence of the parties were adequately evaluated by the trial court before reaching the conclusion it did by entering judgment in the respondents' favour.*

In dealing with this issue, it will be a better approach to consider the submissions in the manner laid out in the appellants' brief of argument, but as the first leg for the consideration of the sole issues formulated by the court. Learned counsel to the appellant contended that the respondent did not discharge the burden of proof upon her to entitle her to the title of the disputed land. He argued that by the authority in ***Idundun v. Okumagba (1976)710 S.C, P227 (sic),*** the respondent to succeed in her claim, must adduce evidence in any of the five listed sources of acquiring title to land, namely: (i) Traditional evidence; (ii) Acts of ownership; (iii) Production of document of title; (iv) Proof of possession connected or adjacent land (contiguity rule); and (v) Act of long possession and enjoyment of land.

He maintained that having relied on traditional evidence, the respondent was required to prove who her ancestors were and how they acquired the disputed land, instead; she adduced sufficient evidence showing that the land belonged to her (appellants') father. Learned counsel submitted further that apart from the evidence from the respondent and PW3, showing that the title to the land was acquired through her inheritance from her father, Gimba, neither the respondent nor any of her witness led evidence on how the late Gimba acquired the land she was said to have built on. It was also contended that none of the witnesses know the owners of the adjacent land. The cases of ***Okpala Ezeokonkwo & 2 Ors v. Nwafor Okeke & 2 Ors (2002) 11 NWLR (Pt 777) 20, and Kenneth Ndukuba & Anor v. Nwarieji & Anor (2007) 1 NWLR (Pt 1061) 447,*** were referred to to support the submission that the respondent had not discharged the burden upon her.

Considering the evidence of the appellant and her witnesses, learned counsel submitted that both the appellant and DW2 gave evidence that her father acquired a large portion of land and built three rooms on part thereof for late Gimba and the portion in dispute was not part of it. DW4 was said to have given evidence that they refused to include the land when sharing the properties of late Gimba because the owner of the land is still alive and this piece of evidence was corroborated by DW5. The appellant also argued that it is in evidence that when DW6 approached the respondents' father for a piece of land to build on, he was referred to the appellants' father.

On long possession which the lower court was said to have rested its decision, the appellant argued that it was not borne out of the evidence before it. Relying on ***Eze Okonkwo & 2 Ors v. Nwafor Okeke (supra),*** it was contended that the lower court was not guided by the principle laid therein, though the appellant and her witnesses had established acts of ownership by the appellants' father over the large portion of land of which the portion in dispute formed part of.

In response to these arguments, referring to pages 3 – 5 of the appeal record, it was the reply of the respondent that evidence of how she came to own the land by inheritance was given and the evidence was corroborated by PW2. The evidence, according to the respondent was unchallenged by the appellant, pages 3 – 9 of the appeal record were referred to the court. Citing ***Salami & Anor v. Lawal (2008) Vol. 161, LRCN, 1 – 33,*** the respondent further contended that where the opponent is unable to show a better title than the person in possession, title must be given to the latter.

Drawing the courts attention to pages 10 – 22 of the appeal record, the respondent maintained that though the appellant and her witnesses traced the ownership of the land in dispute to the appellants father who is said to be living, none of them led evidence to establish whether the appellants father had given the same land to the appellant or that the appellant instituted an action against her father to disprove that the respondent inherited the land from her father, late Gimba. The respondent urged the court to invoke the provision of section 149 (1) of the Evidence Act against the appellant.

On the applicability of the authorities relied upon by the appellant, the respondent argued that since the Customary Courts in the FCT had no jurisdiction to entertain matters relating to title to land, those authorities do not avail the appellant as they are in applicable. The respondent, referring to ***Richetts v. Hassan (2002) 2 NWLR (Pt 750) 94 – 112,*** submitted further that the defence of *justertii* cannot be employed by the appellant to defeat the possessory right of the

respondent. Concluding argument on this point, the respondent urged the court to dismiss this appeal for lacking in substance.

The other limb of this issue relates to the argument on evaluation of the evidence of the parties. In the appellants brief, it was submitted that the trial court had failed in its duty of evaluating the evidence before it having not taken the advantage of seeing and hearing the parties and their witnesses. It was appellants' contention that while the finding of facts of the trial court did not emanate from the evidence before it, it had also failed to consider the appellants' evidence that this disputed land formed part of the larger potion which belonged to the appellants' father, and this had led the court to a wrong and erroneous conclusion on the credible appellants' evidence. Similarly, it was argued that in the absence of the evidence of long possession on the part of the respondent, the trial court proceeded to considering and resolving same in the respondents favour. The appellant referred the court to paragraph 3 of page 45 of the appeal record and maintained that there was no evidence before the trial court to support the conclusion that this land in dispute had been given to the respondents father as a gift by the appellants father and if that was the situation, the complete title in the land would have been passed at that point. Placing reliance on ***Mogaji v. Odofin (1978) 4 S.C. 91***, the appellant maintained that the appellate court will be correct to consider and re-evaluate the evidence to arrive at its own conclusion. It was therefore appellant's contention that the trial court was in error to have included the portion in dispute with that on which the respondent fathers' house was built on in the absence of such evidence. Further in her submission, the appellant stated that ascription to the respondent an evidence that was neither borne from her in evidence in-chief nor from her evidence during cross examination, amounted to supplying evidence to aid a parity's case, which by inference has the effect of the court being biased.

The appellant also submitted that the judgment of the trial court falls short of the required standard as enunciated in ***Chiabee Bayal v. Lokigir Ahemba (1999) 10 NWLR (Pt 623) 393 – 393 parags H – A; and Olum Ogba & Ors v. Isreal Onwuzo & Ors (2005) 14 NWLR (Pt 945) 345***, for reason of not according to the appellants' case adequate and full consideration.

The appellant then urged this court to set aside the judgment of the trial court having occasioned a miscarriage of justice, and referring to ***Agbabiaka v. Saido & 11 ORS (1998) 10 NWLR (Pt 571) 545***, the appellant submitted that this is a proper circumstance which can result into the appellate courts' interference with the finding of facts of the trial court.

The respondent however argued that the trial court evaluated the evidence of both parties before reaching its conclusion. Pages 41 – 42 of the appeal record were referred to the court, especially the consideration of the finding of physical facts at the locus in quo. The respondent argued further that the appellant had unequivocally accepted the solemn truth by her saying that "I *agreed that my father (Sarkin Noma) gave all of them that disputed land out of love, but I want the court to give an order that all of them should vacate the disputed land now*".

Finally, the respondent maintained that this point is unfounded having not touched the ratio decedendi of the lower courts' decision, thus urged the court to dismiss this appeal.

In the consideration of the submissions of the parties in this appeal, I have chosen to make the respondents' claim before the trial court as the starting reference point due to the order made by it which reads thus:-

"That the ownership of the land in dispute is vested in the plaintiff (Laraba Gimba) daughter of late Gimba due to the act of long possession of the land in dispute by her father (late Gimba) and the ownership of the adjacent house which was premised on S 46 of 1 the Evidence Act Cap 112 of 1990 which provides that the act of long possession and enjoyment of land may be evidence of ownership".

The trial court must have the competence to make the above declaratory order and for it to have the required competence, the proper parties inter alia, must be before it otherwise the consequence is fatal to the action: *see* ***Eupere v. Aforije (1972) 1 ALL NLR (Pt 1) 220,*** referred to in ***Adelakun v. Oruku (2002) 11 NWLR (Pt 992) 646 – 647.*** From the claim and relief sought from the trial court, it is undoubtedly clear that the claim before it was for a declaration of title to a disputed land and trespass. I reproduced the claim here below for better understanding of this part of the judgment: One of the causes of action is, *"the said Fanya Sarkin Noma went into my land and started building on my land without my consent:"* and also one of the reliefs ought is *"An Order of this honourable court to force the defendant (Fanya Sarkin Noma) to give back my land to me"*.

The position of the law is that in an action for the declaration of title to a disputed land, the proper parties must be before the court for the plaintiff to sustain the action. Perusing pages 12 and 14 of the appeal record, the appellant as defendant before the trial court led evidence showing that the ownership of the land disputed is in her father that is the title in the land vests in her father. This declaration of the appellant in her testimony portrayed her as a confessed trespasser having not counter claimed the title to the disputed land. Her father to whom she said the land belonged was

not made a party before the trial court to defend the respondents' claim for declaration of title to the disputed land. By the appellants' declaration that the ownership of the land vests in her father, she certainly was not the proper person to defend the respondents' action as it relates to the claim for declaration of title. The law is that when in a claim of land it is admitted that the disputed land belongs to another person not made a party to the suit, such claim must fail except such a person is made a party. Consequently, it is the duty of the plaintiff to find and make his claim against the party who claims title to the land and not a confessed trespasser…" ***see Darko v. Agyakwa, 9 WACA, 166,*** referred to in ***Lawanson v. Afani Const. Co. Ltd (2002) 2 NWLR (Pt 752) 618***.

The above pronouncement which is binding on this court is applicable to this matter. When the trial court heard evidence from the appellant as DW1 in an action against her in which the respondent is claiming ownership of the land in dispute, the appellants' statement in both her evidence in chief at page 12 and cross examination at page 14 should have sent the proper signal to both the court and the respondent, that the claim for declaration of title to the disputed land cannot be sustainable against the appellant who had not claimed ownership of the land, and therefore was not the proper party as defendant to defend the respondents' claim.

I make bold to state that the court does not grant declaration on admission of parties. It has to be satisfied that the plaintiff owns the title claimed if the action is one of declaration of title. See ***Motonwase v. Sorongbe (1988) 5 NWLR (Pt 92) 99; Okedare v. Adebora (1994) 6 NWLR (Pt 349) 157; Bello v. Eweka (1981) ISC, 107 referred to in Olis v. Asojo (2002)1 NWLR (Pt 747) 31 – 32.*** The appellant having not counter claimed the title to the disputed land is not required to prove title which she never claimed she had; *se****e Oshoboja v. Dada (1999) 12 NWLR (Pt 629) 102*** referred to in ***Olisa v. Osojo (supra) 30.*** For the respondent to be entitled to the declaratory relief she must satisfy the court that under all circumstances of this case, she is entitled to the declaratory relief when all the facts are taken into consideration physically and judiciously: see ***Makanjuola v. Ajilore (2001) 12 NWLR (Pt 727) 427.*** This is not the case here because since the appellants' father was not before the trial court to defend the respondents' claim for title to the disputed land, she cannot be said to have satisfied the trial court that she was entitled to the declaratory relief under that circumstances.

The trial court was therefore in error to have declared ownership or title in the land in dispute to the respondent in the absence of the appellants' father who is said to own the said land as the

proper person to defend the suit. The respondents' claim for declaration of title to the land against the wrong defendant ought to have failed: ***see Lawanson v. Afani Const. Co. Ltd (supra) 618.***

At this juncture, I will evade the consideration of the issue of whether or not the Customary Court of the FCT has the jurisdiction to entertain suit relating to a claim for declaration of title to land as raised by the respondent in her brief, because the argument did not stem out of any issue distilled from any ground of appeal before this court. The submission of the parties on the appellants' first issue for determination, now considered as the first leg to the sole issue formulated by the court can only be considered if the proper party as defendant was properly before the trial court.

It remains to deal with the second leg of this issue which relates to improper evaluation of the evidence by the trial court. Before that, notwithstanding my earlier finding that the respondents' claim for declaration of title was not sustainable against the appellant, part of the claim before the trial court is trespass and for the respondent to maintain it against the appellant, she must establish that the slightest possession of the disputed land is in her irrespective of whether or not she owned the land or privy to its owner***: see Okolo v. Uzoko (1978)4 SC, 77, Amakor v. Obiefuna (1974) 3 SC, 67,*** referred to in ***Ricketts vs. Hassan (2002) 2 NWLR (Pt 750) 107 and 110.*** This claim is not dependent on a declaration of title: ***see Amakor v. Obiefuna (1974) 3 SC, 67***; because possession *per se* is a good title against everyone except the true owner, ***see Akano v. Okunade (1978) 3 SC, 129.***

With the restatement of the above position of the law on trespass, since the appellant is complaining of inadequate consideration of the evidence by the trial court, an appraisal of the evidence before the trial court and may be at the locus in quo becomes relevant to ascertain if the respondent can maintain her action for trespass against the appellant. Considering the totality of the evidence of the respondent and her witnesses from pages 6 to 11 of the appeal record, I find that there is ample evidence that the land in dispute was part of the share from the property of the late respondents' father. Same corroboration cannot be said about the evidence of the appellant before the trial court. None of the witness for the appellant gave evidence to establish or show that the appellant was in possession of the land in dispute as rightly submitted by the respondent. I agree with the appellants' submission that to the extent that some of her witnesses, herself inclusive gave evidence that ownership of some lands including the disputed land, is in the appellants' father. These pieces of evidence cannot with due respect, be considered as having established that the possession of the land in question is in the appellant neither did it prove her as

having a better title than the respondent. If anything, the evidence of DW4 which I believe and will say more about, showed that the respondent was in possession of the land, having been given to her as part of her inheritance from her late father , irrespective of whether it was rightly or wrongly given to her.

The evidence of this witness who was not treated as a hostile witness was against the interest of the appellant, the party for whom the evidence was given. These evidence and that of other witnesses for the respondent proved that possession of the land in dispute was vested in the respondent. Without considering the evidence at the *locus in quo*, with due respect, I find the submission of the appellant that the trial court having failed to adequately consider the evidence before it, had occassioneed a miscarriage of justice, as a hard nut to crack. At best, all except DW4 led evidence showing that the land was owned by the appellants' father as opposed to the appellants' ownership or possession. Neither is there evidence on record that the land was given to the respondents' father who was a "son" to the appellants' father, as a lease, especially when it was the appellant's father that first built 3 rooms on the land for the respondent's father.

Coming to DW4 whose evidence I believed as reflecting the truth of what transpired, this witness as an uncle to the respondent and a brother to the appellant participated in the sharing of the late Gimbas' properties to his surviving heirs, the disputed land inclusive and had played a prominent role between the parties prior to the institution of the action at the trial court, led evidence which contradicted the testimony of the other appellants' witnesses, which established that the possession of the land in dispute rests in the respondent. This witness emphatically said in his very exhaustive evidence from pages 18 – 21, particularly at page 19 that "…*finally the land was shared and it was given to Laraba…."* Also on the same page, this witness said "…*I did tell her that the land was given to Laraba…"* DW6 also gave evidence that the respondents' father lived on the disputed land.

At this point in time what is required to maintain an action for trespass is possession and balancing the evidence of both parties on an imaginary scale to ascertain the party in whom possession of the disputed land resides, I am of the firm conviction that the scale tilted more in favour of the respondent who was proved by preponderance of evidence to be in possession rightly or wrongly prior to the invasion of her possessory right by the appellant, who though is the daughter of the person said to own the land, but was not shown to have a better title than the respondent. The defence of justertii, therefore put up by appellant is not available to her against the respondent who

is shown by evidence to be in possession, ***see Richetts v. Hassan (supra) 112.*** With the appraisal of the testimony of the parties, I cannot agree with the appellant that the trial court did not evaluate the evidence of the parties. In view of the above finding which resulted into the conclusion reached by the trial court as it relates to trespass, this court will certainly arrive at the same conclusion too. It is noteworthy to place on record that some contentions of both parties are irrelevant for consideration because they are not borne out of any ground of appeal. To this end, the arguments of the appellant relating to an alleged provision of evidence by the trial court in aid to the respondents' case and the respondents' argument that the FCT Customary Court lacked jurisdiction to entertain actions for declaration of title to land, not related to any ground of appeal before this court goes to no issue. In the same token the appellants' submission that the judgment of the trial court falls short of the required standard is not an issue that can be accommodated within any of the two amended grounds of appeal. I will therefore disregard the arguments as if they do not exist in both briefs.

In summation, it has been a settled law that the evaluation of evidence is a province upon which the trial court has supremacy. Unless the decision is *inter alia* shown to be perverse, led to a miscarriage of justice, not based on credible evidence or neglect of the principle of law, the appellate court will not interfere with such findings; ***see Dakolo & Ors v. Rewane Dakolo & Ors (2011) LPELR, S. C 169/2004.***

The findings of fact at the trial court cannot be disturbed in the instant appeal. However, part of the decision of the trial court cannot be allowed to stand due to its neglect of the principle of law that in an action for declaration for title to land, the proper parties must be before the court for the action to be sustained. This neglect had certainly resulted to a miscarriage of justice as far as the respondents' claim for declaration of title to the disputed land is concerned.

In view of all that has been said in this judgment, the first leg of this appeal as argued by the parties as issue one is hereby resolved in favour of the appellant. Accordingly the claim for declaration of title to the disputed land at the trial court against an improper party as defendant is hereby struck out for want of competence of the action. Invariably, therefore, the decision of the trial court wherein title to the disputed land was vested on the respondent is hereby set aside. However, if so desired, the respondent can institute an action for declaration of title to the disputed land against the proper person in a court of competent jurisdiction.

As for the second leg of this appeal which is the parties' second issue for determination, it is hereby resolved in favour of the respondent. The trial courts' order on the appellant to vacate the land in dispute having rightly found to be in the respondents' possession is hereby affirmed.

On the whole, this appeal is hereby allowed in part.

Hon. Justice M.G. Gwagwa, JCCA: I have had the opportunity of reading before now, the leading judgment just delivered by my learned brother, Hon. Justice A.M.A. Saddeeq, JCCA. I agree with his lordsship's reasoning and conclusions reached. I hereby adopt same as mine. This appeal is hereby also allowed by me in part.

Hon. Justice Istifanus Gandu, JCCA: I have had the opportunity of reading in advance, the judgment just delivered by my learned brother, Hon. Justice A.M.A. Saddeeq. I have nothing more to add.

APPEAL ALLOWED IN PART

CHRISTOPHER IFEANYI OPUTA

V

IFENYINWA GEORGINA UMUNAKWE

Appeal No**. FCT/CCA/CVA/20/2011**

HON. JUSTICE A. M. A. SADDEEQ, JCCA (Presided and delivered the Lead Judgment)

HON. JUSTICE M. G. GWAGWA, JCCA

HON. JUSTICE USMAN AHMED, JCCA

HON. JUSTICE ISTIFANUS GANDU, JCCA

16TH MAY, 2012

COURT-	*Customary Court – proceedings of*
COURT-	*Customary Court – Jurisdiction of – How determined*
JURISDICTION-	*Jurisdiction of court – nature of – challenge to – whether court can hear evidence to determine*

ISSUE:

Whether the Customary Court was right in ruling that it had jurisdiction to hear and determine the RESPONDENT'S SUIT**.**

FACTS:

At the court below, the Customary Court, Garki, in the FCT, the Respondent as the Plaintiff initiated an action against the Appellant as the Defendant seeking amongst other things, a declaration on the paternity of one Maria Ndaliakwu Uchechi Umunakwe under the native law and custom of Osina village and Igbo land. The Appellant alongside is defense, also challenged the jurisdiction of the court. The trial court ruled that it had jurisdiction. The Appellant being dissatisfied with the ruling, has filed this appeal against the said ruling.

HELD (Allowing the Appeal)*:*

1. **On the nature of jurisdiction of a court**

   It has always been a trite law that jurisdiction of a court is a very fundamental and priceless commodity in every judicial process. It is the fulcrum, centre pin or the main pillar upon which the validity of any decision of any court stands and around which other issues rotate**.** Due to the importance of the issue of jurisdiction every court must satisfy itself that it has the requisite competence before embarking on hearing any matter brought before it. See

Shell Petroleum Development Co. (Nig) Ltd v. Isaiah (2001) 11 NWLR (Pt.723) 168; Att. Gen of Lagos State v. Hon. Justice L.J. Dosumu (1989) 3 NWLR (Pt. 111) 566 -567.

2. **On whether the court can hear evidence in order to determine its jurisdiction to hear a case.**

Per Saddeeq, JCCA:

Both parties seemed to have made a point by submitting that it is the plaintiffs' claim that determines the jurisdiction of the court to entertain the action. This is a general principle of law which is particularly applicable in respect of matters initiated before the superior courts of record. This general principle like every other one has an exception because in some situations the court may need to take evidence even where pleadings are delivered in order to be satisfied that the real issue in controversy is within the confines of its statutory limit. See ***Erhunmwunse v. Ehanire (2003) 13 NWLR (Pt 837) 377; Barclays Bank of Nigeria v. CBN (1976) 6 SC, 175; (1976) VOL. 10, NSCC, 298-299; Adeyemi & Ors v. Opeyori (1976) 9-10 SC, 31; (1976) VOL. 10, NSCC, 464.*** Similarly in courts like the court below where a party's claim cannot be ascertained until he gives evidence. It will be the reaction of the defendant to the testimony of the plaintiff which helps the court to determine whether it has jurisdiction to adjudicate on the dispute or not because pleadings are not filed in the Customary Courts not being a Court of Superior record. See **A*G Anambra State v. AG Federation (1993) 6 NWLR (PT. 302) 692***.

Per Usman, JCCA:

It is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of the court to entertain a suit where pleadings are filed. Therefore the question of jurisdiction is determined by the nature of the plaintiff's case. But in Customary Courts or Area Courts, because they are not superior courts of record, no pleadings are filed in either of them. The only material before such courts is the plaintiff's claim which is the initiating process in all civil suits filed in these courts. The trial is therefore conducted summarily and therefore the defendant only has opportunity of doing the case by oral evidence that means his witness will testify before the court in his defense.

3. **On the nature of trials conducted at the Customary Court**

Trials in the court below are conducted in a summary manner and the only opportunity a defendant has to project his case is by oral evidence when he and his witnesses testify before the court. See ***A – G. Anambra State v. A – G., Federation (1993) 6 NWLR (PT. 302) 692; Adeyemi v. Opeyori (1976) 9-10 SC, 31; (1976) VOL. 10, NSCC, 464.***

Per Usman, JCCA:

It is not the practice of our customary court or our lower courts for pleadings to be filed by parties before them. It is not therefore always easy to determine at the beginning of a case the actual issue involved which the court is to adjudicate upon.

4. **On determination of jurisdiction by the Customary Court**

It is trite law that to ascertain the jurisdiction of customary court, the customary court is bound to consider not only the claim before it but also the defense of the defendant in order to determine what the real issue between the parties is and whether or not it has jurisdiction to entertain the suit. In other words, the customary court ought to consider the totality of the case of both the plaintiff and the defendant in order to form a balanced and objective opinion as to whether or not it has jurisdiction to entertain a suit. See ***Erhunmwunse v. Ehanire (2003) 13 NWLR (Pt 837) 378 – 379.***

Cases cited in this judgment

Adeyemi & Ors v. Opeyori (1976) 9-10 SC, 31; (1976) VOL. 10, NSCC, 464.

A*G Anambra State v. AG Federation (1993) 6 NWLR (PT. 302) 692*.

A. G. of Lagos State v. Hon. Justice L.J. Dosumu (1989) 3 NWLR (Pt. 111) 566

Barclays Bank of Nigeria v. CBN (1976) 6 SC, 175; (1976) VOL. 10, NSCC, 298

Erhunmwunse v. Ehanire (2003) 13 NWLR (Pt 837) 377

Shell Petroleum Development Co. (Nig) Ltd v. Isaiah (2001) 11 NWLR (Pt.723) 168

APPEARANCES:

Aroh Chidi Esq; for the Appellant.

Obinna D. Ogbuagu Esq; for the Respondent.

Hon. Justice A.M.A. Saddeeq, JCCA (Delivering the leading Judgment): Before the court below, the Customary Court, Garki, in the FCT, the Respondent as the plaintiff initiated an action against the Appellant as the defendant seeking the reliefs which came before what is said to be her 16 paragraphs statement of claim. These said reliefs read as follows:-

> "1. A declaration that Maria Ndaliakwu Uchechi Umunakwe is a daughter to the family of Chief Umunakwe of Osina village in Ideato Local Government of Imo State, under the native law and custom of Osina village and Igbo land;

2. A declaration that Ms. Ifenyinwa Georgina Umunakwe is the mother and only guardian in law of Maria Ndaliakwu Uchechi Umunakwe under Igbo native law and custom;

3. A declaration that the Defendant cannot claim paternity of the said Maria Ndaliakwu Uchechi Umunakwe not having married Ms. Ifenyinwa Umunakwe under the law, whether customary or statutory;

4. An order of perpetual injunction restraining the defendant from harassing, threatening or making any claim to paternity of the said Maria Ndaliakwu Uchechi Umunakwe."

In defence of the respondents' claim, the appellant also filed a 22 paragraphs of what he considered to be his statement of defence on the 21st day of June, 2011 and Notice of Preliminary Objection to challenge the lower courts' jurisdiction to hear and determine the action. On the 23rd day of June 2011, the preliminary objection was moved by the appellant and after hearing submissions from both parties, the matter was adjourned to the 27th day of July, 2011, for Ruling.

In its Ruling of the 27th day of July, 2011 the court below at Page 31 of the Appeal Record, after the review and appraisal of the party's submissions and the applicable provisions of the relevant statutes referred to in their submissions, in its considered ruling held that it had the jurisdiction to adjudicate on the matter before it, thereafter it dismissed the appellants' preliminary objection. This appeal is the offshoot of the discontentment of the appellant with the said Ruling of the court below, which Notice and Ground of Appeal was dated and filed on the 2nd day of August, 2011. The sole Ground of Appeal with its particulars of errors read thus:-

"**GROUND ONE**

1. The court erred in law and misdirected itself in law, when it held that it had jurisdiction to hear and determine the suit.

PARTICULARS OF ERROR IN LAW:

1. The subject matter of the suit is the determination of the paternity of a child of 5years old;
2. The issue involved is governed by Child's Right Act;

3. The provisions of the Child Rights Act give exclusive jurisdiction to the family court to determine issues concerning the paternity, welfare and custody of a child;
4. There was no marriage or union under any customary law between the parties;
5. The provisions of the Federal Capital Territory (Customary Court Act) are not in any way superior to the Child Rights Act
6. The appellant does not submit to jurisdiction of the Customary Court."

In compliance with the Rules of this court, the parties filed and exchanged their briefs of arguments wherein the parties formulated a similar sole issue for determination in this appeal. The sole issue is: "*Whether the Customary Court was right in ruling that it had jurisdiction to hear and determine the RESPONDENT'S SUIT".*

Aroh Chidi Esq., of learned counsel to the appellant, argued that from the pleadings before the court below, some facts are indisputable and these are ***(i)*** In paragraph **7** of the statement of claim which is on page 3 of the appeal record and paragraphs 5,6,7,8, and 15 of the statement of defence on pages 7,8, and 9 of the appeal record and Exhibits A and B on pages 11 and 12, the paternity of Maria is not in dispute, ***(ii)*** it is not also in dispute that there has never been any marriage be it customary, religious or legal between the parties, and ***(iii***) only a social relationship existed between the parties.

In further argument, the appellant contended that the challenge to the lower courts' jurisdiction was based on the provisions of the Child's Rights Act which is said to have vested exclusive jurisdiction on the Family Court to hear and determine issues relating to child custody, where the biological parents are not married. To support this submission, the appellant relied on the provisions of sections 68 PART VIII and 162 PART XII of the Child Right Act. It was the appellants' contention that the combined effect of these two provisions is that though other courts, the lower court inclusive, could consider issues of possession and child custody in a situation of legitimate marriage, the Act which is primarily intended to protect the child, its welfare and development in situation where such a child was born out of wedlock, vested the Family Court with exclusive jurisdiction.

It was submitted by the appellant that the lower courts' reliance on the provision of section 14 (2) of the FCT Customary Court Act to declare that it has jurisdiction on the matter filed before it was a grave error. To this end, it was the appellant's contention that there was no union or marriage under any customary law between the parties who hailed from two different cultural backgrounds,

one being from Imo State and the other from Delta State who met in Abuja under a cosmopolitan arrangement which does not subject them to the lower court's jurisdiction or to the jurisdiction of the FCT Customary Court.

The appellant continued his submission by contending that had the court below properly interpreted the provisions of the FCT Customary Court Act, the issue for determination would have been what its decision will be where there is a conflict between two statutes on the same subject, one dealing with specific issue and the other on a general issue. According to learned counsel to the appellant, the provision of section 14 (2) and item 2 of the Schedule to the FCT Customary Court Act, 2007, generally dealt with the issue of custody and guardianship of a child irrespective of the parents' situation, but the provisions of sections 68 and 162 of the Child's Rights Act are special and specific legislation in respect of child's custody where the parents are not married under any law. It was submitted that in the event of there being any conflict between the provisions of these enactments, where one is general and the other is specific, the court should follow the law on specific issue: ***Jack v. Unam (2004)5 NWLR (Pt. 865) 208 at 215; NDIC v. Sheriff (2004) 1 NWLR (Pt. 855) 570; Unongo v. Akume (2004) VOL. II WRN 1 – 176 PAGE 42; Ezeadukwa v. Maduku (1997)8 NWLR (Pt 578) 635 and F.M.B.N v. Olloh (2002)9 NWLR (Pt. 773) 457,*** were cited in support of this argument.

In conclusion, Aroh Chidi Esq., of learned counsel, urged the court to allow this appeal, set aside the Ruling of the court below and transfer the suit to the appropriate Family Court for determination.

In the respondents' brief settled and argued by Obinna D. Ogbuagu Esq. of learned counsel, it was submitted that this appeal deals mainly with the issue of the lower courts' jurisdiction, a concept which he defined by placing reliance on Black's Law Dictionary 8th Edition and ***Egharevba v. Eribo & Ors (2010) LPELR – SC 132/2009.*** In furtherance of the submission on this issue the respondent relied on ***Madukolu v. Nkemdilim (1962) 1 All NLR 587*** to state that for the court to assume jurisdiction some requirements must be met and these are:- ***(a)*** a properly constituted court with respect to the number and qualification of the judges; ***(b)*** the subject matter is within the courts' jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and (c) the case was initiated by due process of the law. Contending further, it was submitted by the respondent that it is the claim of the plaintiff that determines the jurisdiction of a court and not the defence put up by the defendant, citing ***Akinfolarin v. Akinnola (1994) 3 NWLR (Pt. 335) 659***, to buttress this argument.

According to learned counsel to the respondent, the appellant's appeal is predicated on the provision of the Child Right Act and the mistaken assumption that the matter was "…basically about custody of Maria Ndaliakwu Uchechi Umunnakwe"***.*** Relying on ***Ifeajuna v. Ifeajuna (2000) 9 NWLR (Pt. 671) 107***, where it was held that "…*Jurisdiction is a hard matter of law, which can only be determined in the light of the enabling statute and claim before the court… As a matter of law, a court must blindly follow and apply its jurisdictional limits or limitations as contained or provided in the statute…,"* it was argued that the jurisdiction of the court below is determined by its enabling statute which is the FCT Customary Court Act, 2007, wherein its section 14 provides thus:-

> *" (1) A Customary Court shall have and exercise jurisdiction over all person within the territorial limits of the Federal Capital Territory, Abuja who submit to the jurisdiction of the court*
>
> *(2) A Customary Court shall have and exercise jurisdiction over causes and matters set out in the schedule to this Act*".

The provision of the schedule was also reproduced as follows:-

> 1. *Matrimonial causes and matters between persons married under customary law or arising from or connected with a union contracted under customary law other than those arising from or connected with a Christian marriage or marriage under Islamic law …*
>
> 2. *Suits relating to the custody of children or Guardianship of children under customary law."*

The respondent maintained that considering the claims before the court below and its jurisdiction as conferred upon it by its enabling statute, the court below was right to have found that it is properly seised to hear and determine the matter before it because items ***1*** and ***3*** of what is termed to be the claims are on issues arising from a union contracted under customary law by the parties who carried a relationship under customary law resulting to their promise to marry under customary law.

On the submission relating to the Child Right Act, learned counsel to the respondent argued that a thorough reading of the provision of section 68 of the Act will reveal that it refers to when an order

for parental responsibility may be made upon an application of either party. He maintained further that the claims before the court below are not in respect of parental responsibility. Similarly, it is the respondent's contention that section 162 of the Act which purports to vest exclusive jurisdiction on the Family Court in respect of certain specified issues, does not include the issues raised in the claims before the court below.

Responding to the appellants' submission that the relationship between the parties was a social one in a cosmopolitan city, the respondent argued that, in paragraphs 2 - 4 of the appellants statement of defence, the appellant admitted his proposal of marriage under customary law which constitute customary introductory rites and plans for a traditional wedding, therefore the court below was right to have held that it had the jurisdiction on the suit. The respondent submitted further that issues of paternity and marital rites under customary law are not issues for the Family Court which is not a court superior to the Customary Court to bind it or oust its jurisdiction. Learned counsel to the respondent holds the view that the exclusive jurisdiction vested on the Family Court does not rob the court below of its jurisdiction as conferred upon it by its enabling statute, stressing that the exclusivity of the Family Courts' jurisdiction as conferred by the Child Right Act applies only in respect of some specific items in the said Act.

In further response, the appellant in his reply brief, referring the court to paragraphs 3**,** 7 and 9 of the respondent's as plaintiff statement of claim, particularly paragraph 7**,** contended that the paragraph is a conclusive fact that the biological paternity of Maria is not in doubt.

Learned counsel to the appellant further submitted that paragraphs 2, 8, and items 1 – 4 are unambiguous on what the plaintiff seeks to achieve because if the respondent is not aware of the appellant's paternal right, she would not need any court's pronouncement to determine the paternal responsibility and custody of Maria. It was contended that the parties not being married and the child having been born out of wedlock, the court below lacked the jurisdiction to determine the custody of the child, he referred the court to the pronouncement in ***Okwueze v. Okwueze (1989) 3 NWLR (Pt. 109) 321 at 327*** whereof it was held that *"... where there is no valid marriage, the question of determining the custody of children cannot come under the jurisdiction of the customary court, since the applicable law will be the Infants Law Cap 49, Law of Ondo State, which oust the jurisdiction of the Customary Court;"* to buttress his contention on this point. He also drew the court's attention to ***Omodion v. Fashoro (1960) NWLR, 27 at 334***

Referring to section 14 (1) of the Customary Court Act, 2007, the appellants' reply was that parties must submit to jurisdiction of the court over them and contesting the lower courts' jurisdiction is

an indication of the appellants' unwillingness to submit to the jurisdiction of the court below and that alone robs the court of any jurisdiction.

Finally, it is the argument of the appellant in his reply brief that what the respondent sought from the court below is clearly what the provision of section 68 of the Child Right Act dealt with particularly claims 1, 2 and 3, therefore section 162 of the Act is applicable as it vests exclusive jurisdiction on the Family Court.

From my appraisal of the submissions of the parties, I agree and adopt the appellants' sole issue for determination in this appeal. A cursory perusal of the contentions shows that it bothers on the jurisdiction of the court below to adjudicate upon the matter before it. For the purpose of considering this sole issue it has always been a trite law that jurisdiction of a court is a *"…very fundamental and priceless commodity in every judicial process. It is the fulcrum, centre pin or the main pillar upon which the validity of any decision of any count stands and around which other issues rotate…"*: ***Shell Petroleum Development Co. (Nig) Ltd v. Isaiah (2001) 11 NWLR (Pt.723) 168; Att. Gen of Lagos State v. Hon. Justice L.J. Dosumu (1989) 3 NWLR (Pt. 111) 566 -567.*** Due to the importance of the issue of jurisdiction every court must satisfy itself that it has the requisite competence before embarking on hearing any matter brought before it. The contentions of both parties are based on the provisions of the Child Right Act. Cap C5, 2003, FCT Customary Court Act, 2007 and the supposed claims of the respondent at the court below. I will not confine this judgment to the arguments of the parties alone but also to what the court below being a court of summary jurisdiction, is required to do when its jurisdiction is challenged.

When this objection was argued before it, it was not pursuant to any motion supported by any affidavit evidence. The objection was argued orally based on the provisions of the Child Rights Act, Cap C50, 2003 on the part of the appellant who raised the objection and the provision of the Customary Court Act, 2007 and the alleged claim, on the part of the respondent as the plaintiff/petitioner at the court below. Both parties seemed to have made a point by submitting that it is the plaintiffs' claim that determines the jurisdiction of the court to entertain the action. This is a general principle of law which is particularly applicable in respect of matters initiated before the superior courts of record: ***Erhunmwunse v. Ehanire (2003) 13 NWLR (Pt 837) 377***. This general principle like every other one has an exception because in some situations the court may need to take evidence even where pleadings are delivered in order to be satisfied that the real issue in controversy is within the confines of its statutory limit., ***Barclays Bank of Nigeria v. CBN (1976) 6 SC, 175; (1976) VOL. 10, NSCC, 298-299; Adeyemi & Ors v. Opeyori (1976) 9-10 SC, 31;***

(1976) VOL. 10, NSCC, 464. Similarly in courts like the court below where *"... a party's claim cannot be ascertained until he gives evidence. It will be the reaction of the defendant to the testimony of the plaintiff which helps the court to determine whether it has jurisdiction to adjudicate on the dispute or not ..."* **AG *Anambra State v. AG Federation (1993) 6 NWLR (PT. 302) 692;*** because pleadings are not filed in the Customary Courts not being a Court of Superior record.

In the instant matter, documents which appeared like pleading were filed; regrettably they fall short of the standard of pleadings, to put it mildly. Reading both pleadings, they appeared to me more like depositions in an affidavit. While the said statement of claim did not show what the claims against the appellant are. Items 1- 4 from pages 1-2 of the appeal record are more of reliefs than claims. On the part of the appellant, the document called the statement of defence is in addition to the above flaw not a traversed denial of the said respondent's claims. For the reason of the said flaws, I am not satisfied that with the insufficient materials before it, the court below was properly placed to consider the objection to its jurisdiction without first taking evidence of both parties because of my finding on the said pleadings, notwithstanding what was filed by them.

Trials in the court below are conducted *"in a summary manner and the only opportunity a defendant has to project his case is by oral evidence when he and his witnesses testify before the court ..."*; ***A – G. Anambra State v. A – G., Federation (supra) 692; Adeyemi v. Opeyori (supra).*** It is trite law that to ascertain the jurisdiction of customary court, *"... The customary court is... bound to consider not only the claim before it but also the defence of the defendant in order to determine what the real issue between the parties is and whether or not it has jurisdiction to entertain the suit. In other words, the customary court ought to consider the totality of the case of both the plaintiff and the defendant in order to form a balanced and objective opinion as to whether or not it has jurisdiction to entertain a suit ..."* ***Erhunmwunse v. Ehanire (supra) 378 – 379.*** This pronouncement has a binding effect on this court and the court below. To forestall being caught in the same erroneous web like the court below, this court needs to have the comprehensive materials upon which it can base its consideration on whether or not the court below was right to have reached the conclusion that it has the jurisdiction to entertain the matter before it. Having found that there is no proper pleadings before the court below, a careful reading and consideration of the appeal record reveals that apart from the statutes and the alleged claims, there was no other material before the court below upon which it rested its decision. The court below did not consider the totality of the case of the parties having not taken evidence for it to determine what the real issues in controversy between the parties are. This omission is fatal because I cannot reach the conclusion that the decision of the court below that it has jurisdiction to adjudicate on the matter was based on a balanced and

objective opinion which can only be arrived at if the totality of the case was considered in the light of the above authority. This court also needed the totality of the case of the parties before it can form any balanced and objective opinion as to whether the court below has the competence to hear the matter before it. The submissions of the parties can only be properly considered together with the totality of the case, since the disclosure in the appeal record falls short of the requirement in the above judicial authority. I will resolve this sole issue for determination in the negative in favor of the appellant. With this resolution, it will amount to an academic exercise if I am to consider the provisions of the relevant statutes having disposed of this appeal on other ground.

All said and done, this appeal is allowed. The Ruling of the court below is hereby set aside. The court below being a court of summary jurisdiction is hereby ordered to rehear the objection to its jurisdiction, taking into account the pronouncement in ***Erhunmwunse v. Ehanire (supra***), in order for it to determine what the real issues between the parties are and to form a balanced and objective opinion thereafter on whether or not it has jurisdiction to hear the matter.

Hon. Justice M.G. Gwagwa, JCCA: I have had the advantage of reading the judgment of my brother, A.M.A Saddeeq, JCCA. I agree entirely with it and for the reasons adequately given. I wish to add nothing. The appeal succeeds and the Ruling of the lower court set aside.
Hon. Justice Usman N. Ahmed, JCCA: I have had the opportunity of previewing the judgment read by my learned brother, A.M.A Saddeeq, JCCA, I entirely agree with him.

It is not the practice of our customary court or our lower courts for pleadings to be filed by parties before them. It is not therefore always easy to determine at the beginning of a case the actual issue involved which the court is to adjudicate upon. This is the case in the instant case.

It is a fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of the court to entertain a suit where pleadings are filed. Therefore the question of jurisdiction is determined by the nature of the plaintiff's case. But in Customary Courts or Area Courts, because they are not superior courts of record, no pleadings are filed in either of them. The only material before such courts is the plaintiff's claim which is the initiating process in all civil suits filed in these courts. The trial is therefore conducted summarily and therefore the defendant only has opportunity to doing the case by oral evidence that means his witness will testify before the court in his defense.

As it is in this case, the Customary Court Gaki did not exhaust all means of considering full evidence of the case between the parties in controversy before saying that it had the jurisdiction in the dispute. To me this very fatal to the case and I therefore cannot reach the conclusion that the court below has the requisite jurisdiction to adjudicate on the matter for the reasons stated above, the ruling of the Customary Court Garki delivered on the 26th July, 2011 is hereby set aside and the matter be sent back for retrial and full evidence taken.

Hon. Justice Istifanus Gandu, JCCA: I had the opportunity of reading in advance the judgment just delivered by my lord, Justice A.M.A Saddeeq, JCCA. The facts leading to this appeal have been adequately set out. I agree with his reasoning and the decision reached in this appeal. Taking into consideration the pronouncement in ***Erhunmwunse v. Ehanire (supra),*** that a Customary Court ought to consider the totality of the case of both parties before dealing with whether it has jurisdiction or not.

This is the safest thing to do because doing so will not overreach any of the parties or the court. It will give the court a clearer view of what it is called upon to consider. This is also not in conflict with the settled law that issue of jurisdiction can be raised at any stage of the proceeding in a case. See ***Anisu v. Osayomi (2008) 15 NWLR (Pt. 1110) 246.*** For all the reasons given in the lead judgment, I also allow the appeal in all the term set out therein.

APPEAL ALLOWED

SUNDAY EMMANUEL ALLEH

V

SAIDU ADAMU

SALEH TUKURA

APPEAL NO.: **FCT/CCA/CVA/20/2010**

HON. JUSTICE S. ADEKUNLE LAWAL, JCCA (Presided and delivered the Lead Judgment)

HON. JUSTICE USMAN N. AHMED, JCCA

HON. JUSTICE ISTIFANUS GANDU, JCCA

21ST FEBRUARY, 2012

APPEAL-	*Appeal before Customary Court of Appeal – Question on facts and procedure – competence of*
APPEAL-	*Notice of Appeal – relevance of – invalid notice of appeal – effect of*
COURT -	*Customary Court of Appeal – Appeals before Customary Court of Appeal – Competence of – condition precedent for competence*
COURT-	*Jurisdiction of – Source of jurisdiction - where challenged – Duty of court*
FAIR HEARING-	*Doctrine of – Scope of fair hearing – Duty of court to ensure fair hearing*
JURISDICTION -	*Jurisdiction of court – Nature of – Absence of jurisdiction – effect on competence of proceedings*
WORDS AND PHRASES -	*Miscarriage of Justice – Meaning of – Where party alleges – burden to establish miscarriage of justice*

ISSUES:

1. Whether or not this court (Customary Court of Appeal, Abuja) has jurisdiction to hear and determine the appeal.
2. Whether the failure of the lower court to allow a second visit to the *locus in quo* amounts to denial of fair hearing and a miscarriage of justice.

FACT:

This is an interlocutory appeal against the ruling of the Kwali Customary Court in the Federal Capital Territory, wherein the Court dismissed an application by the Appellant for a visit to the *locus in quo*.

HELD (Striking out the Appeal):

1. **On duty of the court where it jurisdiction is challenged**

   When the jurisdiction of a court is challenged, it behooves on the court to consider and determine the issue of jurisdiction first before proceeding to consider the case on merit.

2. **On the source of a court's jurisdiction**

   Court is creation of statute. It is the statute that creates the court and defines the power and the extent of its application. See ***Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713. 576; Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR pt. 820, 577 at 635***; ***Peter Adeboye Odofin & Anor. v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350 at 367.***

   Similarly, this court as an appellate court, its appellate jurisdiction is also statutory, having being derived from the statute creating it. This court is a creation of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from sections 267 and 8(1) of the 1999 Constitution and Decree 30 0f 1991 respectively. See ***Per S.A. Lawal, JCCA***

3. **On how the court to which an appeal lies is determined**

   On appeal it is the issues or issues for determination in an appeal that determines the court to which an appeal lies if the appeal raise questions involving customary law, it goes to the Customary Court of Appeal and if the appeal raises questions of general law, it goes to the High Court. See ***M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 NWLR pt. 254, 377 at 397 – 398.***

4. **On condition precedent for an appeal to be competent before the Customary Court of Appeal**

   It is trite that to properly invoke the appellate jurisdiction of this court, the Notice of Appeal must contain a ground or grounds of appeal that raises question or questions of customary law. The grounds of appeal from which the Customary Court of Appeal could derive its jurisdiction must therefore relate to customary law alone. For an appeal to be competent before Customary Court of Appeal, the grounds of appeal must relate to and raise questions of customary law. See the case of ***C.C.A. Edo State V. Aguele (2006) 12 NWLR pt. 995, 545.***

5. **On whether appeal relating to facts and/or procedures are questions of customary law**

   Where the decision of Customary Court of Appeal turns purely on facts, or on question of procedure such decision is not with respect a question of customary law, notwithstanding that the applicable law is customary law. See ***Iorpuun Hirnor & Anor v. Dzungu Yongo & Ors (2003) 9 NWLR pt. 824, 77 at 98 Para C.***

6. **On competence of a proceeding without jurisdiction**

   Where a Customary Court of Appeal proceeds to hear and determine grounds of appeal other than that on customary law, it acts without jurisdiction to do so and such decision no matter how well conducted will be a nullity.

7. **On the need for Notice of Appeal to be valid**

   The court can only consider appeals in matters in which such appellate jurisdictionhas been properly invoked through valid Notices of Appeal not by incompetent Notice of Appeal. See ***Robert I. lkweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 at 425 — 426*; *Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949. 616 at 63***

8. **On the relevance of a Notice of Appeal**

   The Notice of Appeal is without doubt the foundation of an appeal. See ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39.***

9. **On the impropriety of court exercising jurisdiction where it lacks jurisdiction**

   There is no justice in exercising jurisdiction where none exists; it is injustice to the law, to the court and to the parties to do so.

10. **On the fundamental nature of the issue of jurisdiction**

    The issue of jurisdiction is vital and fundamental; any order made without jurisdiction of court is a nullity. See ***NDIC v. CBN & Anor. (2002) 7 NWLR pt. 766, 272 at 294 — 295.***

11. **On the need for courts to adhere to fair hearing**

    Fair hearing is a constitutional right of all parties to a dispute and as such must be guaranteed at all time. The court or a trial judge must ensure the strict adherence to the doctrine of fair hearing because justice must not only be done but must seen to be done to all parties involved in a dispute.

12. **On the scope of the principle of fair hearing.**

    The doctrine of fair hearing is not a one way traffic but it is to all the parties. In a civil case, the principle of fair hearing translate into these:

    i. A plaintiff (or any party) is entitled to counsel of his choice.

ii. A plaintiff or any party must be afforded opportunity to call all necessary witnesses in support of his case.

iii. A plaintiff or any party by himself or counsel must have the opportunity to cross-examine or otherwise challenge the evidence of witness called by his adversary.

iv. At the close of the case and in accordance with the relevant court rules, a plaintiff or any party must have the same right as given to his adversary to offer by his counsel the final address on the law in support of his case. See ***Augusta A. Ndukauba v. Chief Silas M. Kolomo & Anor (2005) 4 NWLR pt. 925, 411 at 429 – 430 paras H, A & B***.

13. On the extent of the duty of the court under the principle of fair hearing

The duty of the court in respect of fair-hearing is to give the other party opportunity to be heard. Where such an opportunity has been given and it was not utilized by the party, he would not be heard to complain of denial of right to fair-hearing. See ***Anthony Okeke v. Petmag Nig. Ltd (2005) 4 NWLR Pt. 915, 245 at 265 Para H.***

14. On the meaning of the phrase "miscarriage of justice"

The term "miscarriage of justice" in its essence, is the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. Miscarriage of justice means a reasonable probability of more favourable outcome for the party affected. See ***Emmanuel Olamide Larmie v. Data Processing Maintenance & Service (D .P.M.S) Ltd (2005) 18 NWLR pt. 958, 438 at 463***.

15. **On the burden to establish an allegation of miscarriage of justice** Where a party alleges that there has been a miscarriage of justice, the nature of the miscarriage and the manner in which it has been occasioned must be shown. See ***Emmanuel Ogunmagbuaja Ohiara v. Gabriel Ohiara (2002)16 NWLR pt. 794, 607 at 625.***

Cases cited in this Judgment

Anthony Okeke v. Petmag Nig. Ltd (2005) 4 NWLR Pt. 915, 245 at 265 Para H

Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR pt. 820, 577

Augusta A. Ndukauba v. Chief Silas M. Kolomo & Anor (2005) 4 NWLR pt. 925, 411

C.C.A. Edo State V. Aguele (2006) 12 NWLR pt. 995, 545

Emmanuel Ogunmagbuaja Ohiara v. Gabriel Ohiara (2002)16 NWLR pt. 794, 607 at 625

Emmanuel Olamide Larmie v. Data Processing Maintenance & Service (D .P.M.S) Ltd (2005) 18 NWLR pt. 958, 438 at 463.

lorpuun Hirnor & Anor v. Dzungu Yongo & Ors (2003) 9 NWLR pt. 824, 77

M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 NWLR pt. 254, 377 at 397

NDIC v. CBN & Anor. (2002) 7 NWLR pt. 766, 272 at 294 — 295.

Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713. 576

Peter Adeboye Odofin & Anor. v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350

Robert I. lkweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949, 61

Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39.

Statutes/Rules of Court/Books referred to in this Judgment

1999 Constitution FRN

Decree No. 30 of 1991

APPEARANCES:

1. A. A. MUHAMMAD ESQ for the Appellant
2. CHINWE ASORONYE ESQ for the Respondents

Hon. Justice Stanley A. Lawal, JCCA (Delivering the leading judgment): This is an interlocutory appeal against the ruling of the Kwali Customary Court in the Federal Capital Territory, delivered on the 12th day of July, 2010.

In the Kwali Customary Court, Abuja, the Plaintiff/Appellant on the 21st day of June, 2010 applied to the lower court to visit the locus in quo for the second time. The lower court upon hearing the application and arguments of both parties as canvassed by their counsels dismissed the application.

The appellant being dissatisfied with the said ruling of the lower court delivered on the 12th day of July, 2010 filed before this court a notice of appeal dated 20th day of July, 2010 and filed on the 27th day of July, 2010.

The two grounds of appeal filed are herein reproduced as follows:

GROUNDS OF APPEAL

a. That the decision of the Honourable court in refusing the plaintiff's application for a visit to *locus in quo* was a wrong exercise of judicial discretion.

PARTICULARS

i. It is the law that the court should exercise its discretion both judicially and judiciously.

ii. A court can visit a Locus at any stage of the proceedings before final addresses or judgment is delivered.

b. The refusal of the Honourable trial court to visit the Locus inquo upon the application of the plaintiff has occasioned a mischarge of justice.

PARTICULARS

i. It is only upon a visit to the Locus that the Honourable trial court will be in a proper position to come to a just and fair decision over the matter.

ii. The failure to visit the locus has weakened the case of the plaintiff who will now beunable to present detailed facts and description of the subject property to the Honourable court.

c. Additional grounds of appeal will be filed upon the receipt by the plaintiff of the records of proceedings of the trial court.

RELIEFS SOUGHT FROM THE CUSTOMARY COURT OF APPEAL

i. To allow the appeal and set aside the decision of the lower court in the Ruling delivered on the 12th day of July, 2010.

The appellant filed a brief of argument dated 20th September, 2011. The appellant in the brief of argument formulated three (3) issues for determination and same is hereby reproduced as follows:

1. Whether the plaintiff can apply for a visit to locus in quo before the final written address and judgment.

2. Whether there will be fair hearing to the appellant/plaintiff when his application for visit to locus in quo was refused.

3. Whether the refusal of granting the appellant/plaintiff application to locus in quo has occasioned a miscarriage of justice.

On the 8th day of December, 2011, the appellant's counsel relied on both the appellant's brief of argument dated September, 2011 and the reply brief dated 25th November, 2011 and adopted the submissions in the appellant's brief of argument and the reply brief and urged the court to allow the appeal as it will be in the interest of justice to do so and that the Defendants/Respondents will not be prejudiced in any way if the appeal is allowed and the application is granted.

The appellant argued that it is a trite law that an interlocutory application can be moved before the judgment in any matter and as such the application for second visit to locus in quo by the appellant ought to be granted by the lower court. He refer the court to the case of ***Ukaegbu v Nwalolo NWLR (2009) 3 pt. 1127, 194 at 205 especially 238; Olasanmi v. Oshasona (1992) NWLR pt. 245, 22 or 6SCN, 282 at 291.***

The appellant also argued that there will be no fair hearing if the application of the appellant /plaintiff is refused and the refusal of the appellant's application to visit *locus* is a miscarriage of justice. The appellant's counsel urged the court to set aside the ruling of the trial court dated 12th July, 2010 and order the trial court to grant the application of the appellant/plaintiff.

In reply to the respondents' brief of argument that this court lacks jurisdiction to entertain the appeal, the appellant's counsel submitted that this court has the jurisdiction to entertain the appeal and urge this court to so hold.

The respondents' counsel adopts the respondent's brief of argument dated 20th October, 2011. He argued that the ground of appeal filed by the appellant does not fall within the jurisdiction of this court. He refers the court to Section 267 of the 1999 Constitution of the Federal Republic of Nigeria.

He submits that this court lacks jurisdiction to entertain this appeal and urged the court to so hold and dismiss this appeal with substantial cost of'N50,000 in favor of the respondents.

ISSUES FOR DETERMINATION

1. Whether or not this court (Customary Court of Appeal, Abuja) has jurisdiction to hear and determine the appeal.

2. Whether failure of lower court to allow second visit to the locus in quo amounts to denial of fair hearing and a miscarriage of justice.

ISSUE 1

Whether or not this court (Customary Court of Appeal, Abuja) has requisite jurisdiction to hear and determine the appeal.

It is very important and mandatory to consider whether or not this court has jurisdiction to entertain and hear this appeal. The respondent argued that the two grounds of appeal are not within the jurisdiction of this Honourable Court especially as it borders on a question of general law and not customary law.

When the jurisdiction of a court is challenged, it behooves on the court to consider and determine the issue of jurisdiction first before proceeding to consider the case on merit.

Court is creation of statute. It is the statute that creates the court and defines the power and the extent of its application. See the case of ***Nigeria Shippers' Council v. United World Limited Inc. (2001) 7 NWLR pt. 713. 576.***

It follows therefore that courts derive their jurisdiction therefrom. See ***Isuama v. Governor Ebonyi State (2006) 6 NWLR pt. 975, 196, Trustee, P.A.W Inc . v. Trustee, A.A.C.C (2002) 15 NWLR pt 70, 449.***

Similarly, this court as an appellate court, its appellate jurisdiction is also statutory, having being derived from the statute creating it. This court is a creation of the 1999 Constitution of the Federal Republic of Nigeria and Decree No. 30 of 1991 and its jurisdiction is derived from sections 267 and 8(1) of the 1999 Constitution and Decree 30 0f 1991 respectively.

S.267 of the 1999 Constitution is herein reproduced as follows:

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

and

5.8 (1) of Decree No. 30 of 1991 provides as follows:

"Subject as otherwise provided in this Decree, the court shall have jurisdiction to hear and determine appeals in civil matters involving questions of customary law".

The Supreme Court held in the case of ***Arjay Ltd & Ors v. Airline Management Support Ltd (2003) 7 NWLR pt. 820, 577 at 635*** that jurisdiction of a court is a matter of law and it is vested in a court by the Constitution and the statutes establishing the court. See the decision of Hon. Justice Karibi – Whyte JSC in ***Peter Adeboye Odofin & Anor. v. Chief Agu & Anor (1992) 3 NWLR pt. 229, 350 at 367.*** The Supreme Court in the case of ***M. Ahmadu Usman v. M. Sidi Umaru (1992) 7 NWLR pt. 254, 377 at 397 - 398*** held that on appeal it is the issues or issues for determination in an appeal that determines the court to which an appeal lies if the appeal raise questions involving customary law, it goes to the Customary Court of Appeal and if the appeal raise questions of general law, it goes to the High Court.

By virtue of the above stated statutes and cited authorities, it is the issue or issues for determination in appeal that confers jurisdiction on an appellate court. For this court to assume jurisdiction, the court must look at and examine the issues raised in the appeal. Therefore, the issues raised by the appellant in the instant case in his notice of appeal and brief of arguments need to be properly examined to ascertain the competence of this appeal, as it affects the jurisdiction of this court.

GROUNDS OF APPEAL

a. That the decision of the Honourable Court in refusing the plaintiff's application for a visit to *locus in quo* was a wrong exercise of judicial discretion.

PARTICULARS

i. It is the law that the court should exercise its discretion both judicially and judiciously.
ii. A court can visit a locus at any stage of the proceedings before final addresses or judgment is delivered.

b. The refusal of the Honourable trial court to visit the Locus inquo upon the application of the plaintiff has occasioned a miscarriage of justice.

PARTICULARS

i. it is only upon a visit to the Locus that the Honourable trial court will be in a proper position to come to a just and fair decision over the matter.
ii. The failure to visit the locus has weakened the case of the plaintiff who will now be unable to present detailed facts and description of the subject property to the Honourable court.

c. Additional grounds of appeal will be filed upon the receipt by the plaintiff of the records of proceedings of the trial court.

ISSUES

1. Whether the plaintiff can apply for a visit *to locus in quo* before the final written address and judgment.
2. Whether there will be fair hearing to the appellant/plaintiff when his application for visit to locus in quo was refused.
3. Whether the refusal of granting the appellant/plaintiff application to *locus in quo* has occasioned a miscarriage of justice.

The 2 grounds of appeal and the 3 issues formulated, canvassed and argued by the appellant are complaints that borders on question of general law. That the refusal of the lower court to grant his application to visit the locus in quo for the second time amounts to denial of fair hearing and a miscarriage of justice. This complaint or issues did not raise any issue and or question involving customary law.

It is trite that to properly invoke the appellate jurisdiction of this court, the notice of appeal must contain a ground or grounds of appeal that raises question or questions of customary law. The grounds of appeal from which the Customary Court of Appeal could derive its jurisdiction must therefore relate to customary law alone. For an appeal to be competent before Customary Court of Appeal, the grounds of appeal must relate to and raise questions of customary law. See the case of ***C.C.A. Edo State V. Aguele (2006) 12 NWLR pt. 995, 545.***

The Supreme Court in ***Iorpuun Hirnor & Anor v. Dzungu Yongo & Ors (2003) 9 NWLR pt. 824,77 at 98 Para C*** held that where the decision of Customary Court of Appeal turns purely on facts, or on question of procedure such decision is not with respect a question of customary law, notwithstanding that the applicable law is customary law.

Where a Customary Court of Appeal proceeds to hear and determine grounds of appeal other than that on customary law, it acts without jurisdiction to do so and such decision no matter how well conducted will be a nullity.

The court can only consider appeals in matters in which such appellate jurisdiction has been properly invoked through valid Notices of Appeal not by incompetent Notice of Appeal. See the case of ***Robert I. Ikweki & Ors v. Mr. James Ebele & Anor (2005) 11 NWLR pt. 936, 397 at 425 — 426.***

In the case of ***Mkpen Tiza & Anor v. Iorakpen Begha (2005) 15 NWLR pt. 949. 616 at 634*** the Supreme Court held that the appeals are creation of statutes, as such failure to comply with the statutory requirement prescribed by the relevant laws under which such appeal may be competen and properly before the court will deprive the appellate court jurisdiction to adjudicate on the appeal.

The Notice of Appeal is without doubt the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39.*** The Notice of Appeal filed by the appellant herein is incompetent as it did not contain a valid Ground of Appeal that raises issues or questions of customary law and I so hold.

There is no justice in exercising jurisdiction where none exists; it is injustice to the law, to the court and to the parties to do so.

The issue of jurisdiction is vital and fundamental; any order made without jurisdiction of court is a nullity. See the case *of* ***NDIC v. CBN & Anor (2002) 7 NWLR pt. 766, 272 at 294 — 295.***

Where a court finds that it lacks jurisdiction to entertain the suit before it, the proper order to make is one striking out the suit, see ***NDIC v. CBN & Anor supra; Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6NWLR pt. 199,501; CAN v. Katto (1994) 4 NWLR pt. 339, 446***

The Notice of Appeal without any iota of doubt is the foundation of an appeal. See the case of ***Tukur v. Governor of Gongola State (1988) 1 NWLR pt. 68, 39.*** Consequently, the entire appeal rest squarely on the Notice of Appeal being the foundation of the appeal and derive its competency therefrom.

The appellant's notice of appeal and the 3 issues formulated and canvassed in this appeal are incompetent and liable to be struck out. The notice of appeal and the 3 issues formulated are hereby struck out.

Issue 2

After concluding that the appeal is incompetent, considering issue 2, is purely to give a clear and detailed exposition of the parties legal position.

Issue 2 is;

Whether failure of lower court to allow second visit to the locus in quo amounts to denial of fair hearing and a miscarriage of justice

Fair hearing is a constitutional right of all parties to a dispute and as such must be guaranteed at all time. The court or a trial judge must ensure the strict adherence to the doctrine of fair hearing because justice must not only be done but must seen to be done to all parties involved in a dispute.

The doctrine of fair hearing is not a one way traffic but it is to all the parties in the case of ***Augusta A. Ndukauba v. Chief Silas M. Kolomo & Anor (2005) 4 NWLR pt. 925, 411 at 429 – 430 paras H, A & B*** held that in a civil case, the principle of fair hearing translate into these:

1. A plaintiff or any party is entitled to counsel of his choice.

2. A plaintiff or any party must be afforded opportunity to call all necessary witnesses in support of his case.

3. A plaintiff or any party by himself or counsel must have the opportunity to cross-examine or otherwise challenge the evidence of witness called by his adversary.

4. At the close of the case and in accordance with the relevant court rules, a plaintiff or any party must have the same right as given to his adversary to offer by his counsel the final address on the law in support of his case.

Also in the case of ***Anthony Okeke v. Petmag Nig. Ltd (2005) 4 NWLR Pt. 915, 245 at 265 Para H*** the court held that the duty of the court in respect of fair-hearing is to give the other party opportunity to be heard. Where such an opportunity has been given and it was not utilized by the party, he would not be heard to complain of denial of right to fair-hearing.

In the instant case, upon hearing the application of the respondents for the court to visit the locus in quo, which said application was opposed by the appellant, the court granted the application and the court on the 18th May, 2010, visited the locus in quo and conducted trial there. The appellant's counsel at pages 57-58 of the record of proceeding cross-examinned one of the respondent's witness and told the court that he would continue the cross-examination in the open court.

The lower court gave the appellant sufficient opportunity to present and conducts his case at the first visit to the locus in quo on the 18th May, 2010. The appellant cannot turn around and blame

the lower court for his failure to optimally utilize the opportunity given to him by the first visit to the *locus in quo.*

Consequently, the argument of the appellant as to denial of fair hearing and miscarriage of justice occasioned by the refusal of the lower court to grant his application for visit to the locus in quo for the second time is unfounded.

In ***Emmanuel Olamide Larmie v. Data Processing Maintenance & Service (D.P.M.S) Ltd (2005) 18 NWLR pt. 958, 438 at 463***. The Supreme Court held as per Hon. Justice Onnoghen JSC that the term "miscarriage of justice" in its essence, is the decision or outcome of legal proceedings that is prejudicial or inconsistent with substantial rights of a party. Miscarriage of justice means a reasonable probability of more favourable outcome for the party affected. ***Emmanuel Ogunmagbuaja Ohiara v. Gabriel Ohiara (2002)16 NWLR pt. 794, 607 at 625*** the court held that where a party alleges that there has been a miscarriage of justice, the nature of the miscarriage and the manner in which it has been occasioned must be shown. The appellant did not show how the ruling of the lower court refusing the second visit to the locus in quo would adversely affect his case.

A miscarriage of justice is such a departure from the rules which permeate a judicial procedure as to make that which happened not in the proper sense of the word a judicial procedure at all.

In the instant case, there was no miscarriage of justice by the lower court as to make this court interfere with its discretionary power.

In conclusion, I hereby strike out the appeal with cost to the respondents assessed at N3,000.00 only.

Hon. Justice Usman N. Ahmed, JCCA: I have had the privilege of reading the lead judgment of my learned brother Hon. Justice S. Adekunle Lawal (JCCA) just delivered. I agree with his reasoning and conclusion that the appeal lacks competence before this court and that there was no miscarriage of justice by the lower court as alleged by the counsel to the appellant. Accordingly, I also strike out the appeal and abide by the orders contained in the judgment.

Hon. Justice Istifanus Gandu, JCCA: I have read in advance this judgment just delivered by my learned brother Hon. Justice S.A. Lawal. I agree entirely with his reasoning and conclusions reached. I too will strike out the appeal. Same is hereby struck out.

APPEAL STRUCK OUT

EKWUEME THOMAS
OKOYE OZOR
V

AHMADU ABUBAKAR

*APPEAL NO.**: FCT/CC/ABJ/CV/11/2010***

HON. JUSTICE MOSES A. BELLO (OFR), PCCA (Presided and delivered the Lead Judgment)
HON. JUSTICE A.M.A SADDEEQ, JCCA
HON. JUSTICE M.G. GWAGWA, JCCA

23RD OCTOBER, 2013

CONSTITUTIONAL LAW-	*Provision of an Act – Where will not be inconsistent with the provision of the constitution*
COURT-	*FCT Customary Court – Jurisdiction of – scope of jurisdiction*
INTERPRETATION OF STATUTES-	*3rd Schedule to FCT Customary Court Act, 2007 - Application of Blue Pencil Rule –*
JURISDICTION-	*Nature of*

ISSUES:

1. Whether in the circumstance of the Respondent/Plaintiff case, the Grade 'A' Customary Court has the jurisdiction to preside and determine the suit.
2. Whether considering the testimonies of witnesses in this suit and the Exhibits tendered and admitted the Grade 'A' Customary Court and not properly evaluate the evidence before arriving at the judgment.

FACTS:

The plaintiff /respondent at the trial Customary Court Grade A, Abaji in the Federal Capital Territory, Abuja has sued the defendants (now appellants for the sum of N120,000.00(One Hundred and Twenty Thousand Naira only) being special and general damages arising from the action of the appellants in causing death and injury to the respondent's Calves. The trial court upon conclusion of hearing, entered judgment in favour of the Plaintiff/Respondent. Dissatisfied, the Appellants herein have filed this appeal.

HELD (Allowing the Appeal):

1. **On the universal nature of jurisdiction**

   The concept of jurisdiction is of universal application hence it is applicable in the Customary Court in the FCT, therefore any ground of appeal against the decision of the Customary Court which raises the question of the competence of the court below "……*is an issue* or question of customary law within the meaning of sections 247 (1) and 224 (1) of the 1979 Constitution (in this instance section 245 and 267 of the 1999 Constitution.) and is appealable as an issue of customary law up to the Supreme Court*…."* ***Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39 -40***

2. **On when provisions of an Act will not be inconsistent with the provision of the Constitution.**

   The provision of an Act will not be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter either expressly or by implication: ***A-G Ondo State v. A-G Ekiti State (2001) 17 NWLR (Pt743)*** **773-774.**

3. **On the need to adopt a holistic approach to interpretation**

   For the purpose of determining the validity of a provision of an enactment, that provision should not be read in isolation but the whole statute mush be considered together since the section is part of a whole: ***Chima v. Ude (1996) 3 NWLR (PT. 461) 379; Awuse v. Odili (2004) 8 NWLR (PT. 876) 513*.**

4. **On the propriety of applying the Blue Pencil Rule to the provision of item 3 of the Schedule to Customary Court Act No. 8 of 2007**

   The application of the blue pencil rule to item 3 and its declaration to be also null and void on ground of being inconsistent with the Constitutional provision, with due respect cannot be absolute but limited to the extent of the inconsistency*:* ***Mohammed v. C.O.P. (1987) Attorney General of Kaduna State (1986) 4 NWLR (Pt. 35) 375.***

   I therefore regard the declaration that item 3 is inconsistent to the Constitution only to the extent that if constructed as vesting original unlimited jurisdiction on the Customary Court in civil causes and matters in any other law not being customary law, as that will bring the jurisdiction to be in conflict with that vested on the Federal High Court by the 1999 Constitution. In other words the declaration of the FCT High court is not to be constructed to mean that the Customary Court is deprived of any jurisdiction under item 3 where the issue of customary law is involved. Item 3, with due respect, should therefore be simply read in the light that the Customary court shall have unlimited jurisdiction in any cause or matter between parties, be it debt, demand, damages, dowry, bride price or commercial

contract (if any) to mention but a few which involve the interpretation or question of Customary law. See ***N.D.I.C. v. Okem Ent. Ltd (2004) 10 NWLR Pt. 850 – 188. Per Bello, PCCA.***

5. **On the scope of the jurisdiction of the FCT Customary Court**

   ***Per Bello, PCCA*:**

   I am of the view that Customary Court in the FCT has unlimited jurisdiction to hear and determine matters that raises questions of customary Law or on any bye-law that confers jurisdiction on the said courts on dowry, bride price, damages or debts under native law and customs as envisaged in item 3 of Part 1 of the schedule of Federal Capital Territory Customary Court Act No. 8, 2007.

6. **On the duty of courts in guarding its jurisdiction**

   Undoubtedly every court is required to guard jealously its jurisdiction. Its duty amongst others is to expound the law and not to expand it by construing the provision of the law in such a manner that it will arrogate to itself the jurisdiction which the law never vested upon it. Similarly to jealously guard its jurisdiction does not imply flagrant disregard to the principle of *stare decisis* by the courts below.

Cases cited in this Judgment

A-G Ondo State v. A-G Ekiti State (2001) 17 NWLR (Pt743) 773-774.

Awuse v. Odili (2004) 8 NWLR (PT. 876) 513.

Chima v. Ude (1996) 3 NWLR (PT. 461) 379

Mohammed v. C.O.P. (1987) A.G. of Kaduna State (1986) 4 NWLR (Pt. 35) 375.

N.D.I.C. v. Okem Ent. Ltd (2004) 10 NWLR Pt. 850 – 188.

Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39 -40

Statutes/Rules of Court/Books referred to in this Judgment

1979 Constitution FRN

1999 Constitution FRN

FCT Customary Court Act No. 8 of 2007

APPEARANCES

Etsu E. K Esq for Appellants

Mrs. Y.T Alaran for Respondent

Hon. Justice Moses A. Bello (JP), OFR (Delivering the leading judgment): This is an appeal filed against the decision of Customary Court Grade A, Abaji in the Federal Capital Territory, Abuja on 9th day of July, 2010 on a suit earlier filed on 14th Day of April 2010 at the said Court hereinafter called the trial Court.

The plaintiff at the said trial Court that is now the respondent has sued the defendants (now appellants for the sum of N120,000.00(One Hundred and Twenty Thousand Naira only) as being special and general damages arising from the action of the appellants in causing death and injury to the respondent's Calves.

The said Respondent then Plaintiff has caused to be issued a Writ of Summons claiming jointly and severally against the appellants /defendants the following:-

(1) Special damages of N60,000.00 only being the value of the calf,
(2) Special damages of N30,000.00 only being the amount so far expended on medication and feeding of the injured cow;
(3) General damages of N30,000.00 to cover future feeding and treatment of the injured cow after expending which, if she is not recovered, plaintiff will have to sell her at a great loss;
(4) And for such further or other orders which the Honourable Court may deem fit to make in the circumstance of this case.

Upon conclusion of evidence, the trial Court gave judgment on the 14th day of June, 2010 (for the injured calf at N15,000.00 and the dead calf at the sum of N60,000.00), culminating into the sum of N75,000.00 (Seventy-five Thousand Naira only) and the defendants/appellants were to bear it jointly and severally.

The trial Court also dismissed the general claim of the plaintiff/respondent for the sum of N30,000.00 (Thirty Thousand Naira).

Dissatisfied with the decision at the trial Court, the Appellants appealed to this Honourable Court on 9th July, 2010.

THE GROUNDS OF APPEAL AS FILLED BY THE APPELLANTS ARE AS FOLLOWS:

1. The judgment of the Court is unreasonable, unwarranted and cannot be supported having regards to the weight of evidence.
2. The learned judges of the Grade 'A' Customary Court sitting in Abaji erred in law when it held that it had jurisdiction to entertain the suit which has nothing to do with the recognition and enforcement of customary law.

i. The plaintiff's claim is for an alleged conversion under the general law of tort.

ii. The jurisdiction of the Customary Court of the Federal Capital Territory has been streamlined by the combined effect of the Federal Capital Territory Customary Court Act 2007 and the decision of the FCT High Court in Pro-forte Limited Vs the President, Customary out of Appeal, and Nine (9) others to be limited to issues that touch on native law and custom.

3. The Grade 'A' Customary Court, Abaji misdirected itself in fact when it held that the plaintiff has proved conversion in tort to entitle him to the sums claimed under the summons.

i. There was no evidence linking injury and death of the cows of the plaintiff to either of the defendants.

ii. The Photographs and negatives of the three pictures of the slain calf does not establish in actual fact the venue and owner of the alleged farm where the incidence occurred. Even it was established that the calf died on the defendant's farm, the cause of death was never established.

iii. There was no visit by the Court to the locus in quo to ascertain the location of the alleged sport where the calf was slain.

In compliance with the dictates of the rules of this Court, the parties exchanged their respective briefs of argument via their counsel.

The appellants raised two issues for determination and I hereby reproduce them:

Issue 1. "*Whether or not the trial Grade 'A' Customary court has the requisite jurisdiction to adjudicate over the plaintiff's suit considering the subject matter of the suit vis-à-vis the statutory provisions conferring or specifying the jurisdiction of the trial Court"*

Issue 2. "*Whether or not the trial Court rightly evaluated the evidence of the plaintiff's witnesses before arriving at its decision as there is no direct link (eye-witness evidence) between the dead and injured calves with the appellants."*

While the appellant formulated these issues for determination as stated above, the respondent also seems to have adopted the same issues for determination as enumerated by the appellants. And I hereby reproduce the here below:

1. **"***Whether in the circumstance of the Respondent/Plaintiff case, the Grade 'A' Customary Court has the jurisdiction to preside and determine the suit."*
2. **"***Whether considering the testimonies of witnesses in this suit and the Exhibits tendered and admitted the Grade 'A' Customary Court and not properly evaluate the evidence before arriving at the judgment".*

In support of their appeal the appellants' and the respondent submitted their briefs of arguments.

At this juncture, I would like to place on record that it was the respondent's Counsel that adopted his brief while the appellants and their Counsel were always absent and after several adjournments, they still never appeared to adopt their brief of argument.

Though the appellants' Counsel was never present to adopt his brief but by virtue of Order 5 Rule 8 paragraph e of the Customary Court of Appeal Rules 2012 as amended, we hold that the appellant had argued his case.

I hereby reproduce the said Rule

Order 5 Rule 8 (e)- **"***When and appeal is called and the parties have been duly served with the notice of hearing, and if any party or any legal practitioner appearing for him does not appear to present oral argument even though Briefs have been filed by all the parties concerned in the appeal, the appeal will be treated as having been duly argued"*

In the appellants brief of argument, the counsel contends that the trial Court lacks the requisite jurisdiction to adjudicate over the matter since the matter before the Court has no connection whatsoever with Native Law and custom of the parties nor the Customary law of the area where the incident took place.

He submits further that it is the claim and in particular, the reliefs sought that determines the jurisdiction of the Court and supported his argument witht eh case of …..***Obong Charles D. Abia & Ors v. Cross River State Property & Investment Ltd. (2007)28 WRN, 150 Ratio 6 at 157; Professor Shuaib Oba Abdul-Raheem (No.1) & 3 Ors v. Dr. Taiwo Oloruntoba-Ojo & 3 Ors***

(2007) 2 WRN 28 Ratio 3 at 34 where Muntaka- Coomassie JCA held "in determining whether a court has jurisdiction in a matter or not, the court will examine or consider the nature of summons and statement of claim. In the instant case the learned judge of the Lower Court was wrong in looking beyond the writ of summons and statement of claim in order to convince himself that he can assume jurisdiction in this matter"

Counsel also made reference to the case of ***Tukur v. Government of Gongola State (1989) 4 NWLR (pt 117) 517 at 561***, where the apex court per Oputa, JSC held as follows: *"the Jurisdiction of a court can be limited* ***or*** *unlimited either by the amount or value of the property in litigation or as to the type of subject matter it can handle. Courts are creatures of statute and it is the statute that created a particular court that also confers on it jurisdiction. This may be extended, not by the Courts, but the Legislature for it is part of the interpretative functions of the Courts to expound the jurisdiction of the court but not to expand it"*

Again is the case of ***Aribisala v. Ogunyemi (2005) 11 WRN 28, OGUNTADE, JSC,*** held thus: "Jurisdiction is the blood that gives life to the survival of an action in a Court of law. Without jurisdiction, the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would be an abortive exercise.

The appellants' Counsel submitted on the second issue that circumstantial evidence cannot be based on speculation or suspicion however strong and thereby rely on the case of ***Felicia Akinbisade v. State (2007) 2 WRN 1.***

The Counsel to the appellants also submitted that Section 267 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) does not confer any jurisdiction on the Customary Court of Appeal of FCT apart from that of issues on Customary Law and thereby supported such contention by the decision in ***CCA Edo State v. Chief (Engr.) E. A. Aguele & 2 ors.*** **(**2007) 36 WRN 43 Ratio 2 at pg 149 as per *Bulkachuwa JCA***.**

The respondent's counsel in response submitted that Section 14 Sub Section 2 and item 5 of the schedule to the Customary Court Act No. 8 of 2007 gives the trial court jurisdiction to try the matter before it.

I hereby reproduce the said section and the schedule.

Section "14 (2) *A Customary Court shall have and exercise Jurisdiction over causes and matters set out in the Schedule to this Act".*

Items 3 & 5 of the Schedule-

"3. Civil causes and matters including by-laws where the debt, demand including dowry, bride price or damages do not exceed the amounts specified in the respective columns hereof." (Under the said column Grade A Customary Court has unlimited jurisdiction).

"5. Civil causes and matters under any law (other than customary law including bye-laws where the amount of debt, demand or damages does not exceed the amount indicated in the column hereof". (Under the said column Grade A Customary Court has unlimited jurisdiction).

He argued further that the trial court has not only unlimited jurisdiction as to damages, debts and demand but also has jurisdiction ab-initio to entertain claim resulting from killing of a nomadic Fulani's Calf.

On the second issue, the respondent's counsel submits that the trial court made a proper evaluation of the evidence produced before it and that in the absence of a primary or best evidence not been available, a secondary or circumstantial evidence can be adduced to prove any point.

From the submissions of the Counsel through their briefs of argument and the claim (or writ of claim at the trial Court, it shows clearly that the plaintiff/respondent was claiming for damages based on his killed calves (Chattel).

Before I consider the entire submissions of the parties, I have to express my view on the contention of the jurisdiction of the Customary Court of Appeal FCT Abuja.

The jurisdiction of Customary Court of Appeal, FCT, Abuja is wider than the jurisdiction of the other Customary Courts of Appeal in the States of the Federation because there are several jurisdiction conferred on the Customary Court of Appeal, FCT, Abuja by virtue of the following laws:

1. Section 8 Sub Sections 1- 4 of the Federal Capital Territory, Abuja Customary Court of Appeal Decree No 30 of 1991.
   "*8 (1) subject as otherwise provided in this Decree, the Court shall have jurisdiction to hear and determine appeals in civil matters involving questions of customary law from the decisions of Upper Area Courts and Area Courts.*

8 (2) For all the purposes of and incidental of the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment, order or decision made therein, the Court shall have all the powers authority and jurisdiction of every Area Court of which the judgment, order or decision is the subject of an appeal and the Court shall, without prejudice to the generality of the foregoing, have the jurisdiction powers and authority which are conferred upon Area Courts exercising appellate jurisdiction by the provisions of section 59 of the Area Courts Edict.

8 (3) Except as provided in subsection (2) of this section, the Court shall have no original jurisdiction in any cause or matter.

8 (4)- The Court shall have jurisdiction to review cases reported to it in accordance with section 50 of the Area Courts Edict 1967."

2. *Customary Court Act No. 8 of 2007 especially Sections 14, 16, 17 and 48 (1 & 2)*

***"14 (1)**- A Customary Court shall have and exercise jurisdiction over all persons within the territorial limits of the Federal Capital Territory, Abuja, who submit to the jurisdiction of the Court.*

***"14 (2)**- A Customary Court shall have and exercise jurisdiction over causes and matters set out in the Schedule to this Act."*

"16- Subject to the provisions of section 6 (4)(a) and 5(j) of the Constitution of the Federal Republic of the Nigeria 1999 and the provisions of this Act, a Customary Court shall administer-

(a) *The appropriate customary law specified in section 18 of this Act in so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force;*

(b) *The provisions of any written law which the court may be authorized to enforce by an order made pursuant to the provisions of this Act;*

(c) *The provisions of any enactment in respect of which jurisdiction is conferred on the court by that enactment;*

(d) The provisions of all bye-laws and rules made by the appropriate Area council, or having effect as if so made under the provisions of any enactment in force in the federal Capital Territory;

(e) The provisions of any rule made or deemed made by a statutory corporation having authority in the Federal Capital Territory."

*"**17** (1) in causes and matters arising from inheritance, the appropriate customary law shall be the customary law that governed the deceased.*

(2) Subject to the provisions of Sub-section (1) of this section-

(a) In civil causes or matters where:

(i) Both parties are not natives of the area of jurisdiction of the court; or

(ii) The transaction, the subject of the cause or matter was not entered into in the area of jurisdiction of the court or

(iii) One of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be resumed to have agreed that their obligations shall be regulated wholly or partly by the customary law applicable to that party, the appropriate customary law shall be the customary law binding between the parties which appeared to have regulated the subject matter in dispute;

(b) In all other civil cases and matters the appropriate customary law to be administered shall be the customary law prevailing in the area of jurisdiction of the court."

3. Customary Court of Appeal of the FCT, Abuja (Jurisdiction on Chieftaincy Matters) Act 2011 provides as follows: Section "1 (a & b)- subject to Section 267 of the constitution, the Customary Court of Appeal of the Federal Capital Territory Abuja, shall:

(a) Exercise appellate and supervisory jurisdiction in proceeding where the subject matter or the claim is on, or relates to customary law; and

(b) Have exclusive original jurisdiction in the Federal Capital Territory, Abuja to hear and determine dispute on or relating to Chieftaincy matters".

4. Section 267 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) that states- *"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 supervision jurisdiction in civil proceedings involving questions of Customary law."*

The said Constitutional provision gives power to the National Assembly to increase or confer more jurisdictions on the said Court (CCA) through an Act of Parliament. See section 267 supra.

The said Chieftaincy Act under Section 1(b) as well as Section 48 (1) & (2) of the Customary Court of FCT Act No. 8 of 2007 which provides as follows:

"48(1)- Any party who is aggrieved by the decision or order of a Customary Court, may within thirty days from the date of such decision or order appeal to the Customary Court of Appeal.

(2)- The right of appeal to the Customary Court of Appeal shall be subject to the conditions and in accordance with the provisions of any law or rules of Court, if any, for the time being in force regulating the practice and procedure of that court with respect to appeals."

Also confers more jurisdiction on the Customary Court of Appeal, of the FCT, Abuja and in this case, the trial Court, the question to be asked is whether or not the claim before it was a claim or damage under native law and Custom of the parties or prevalent in the said Community (area).

It is also a trite law to know from the proceedings or record of the trial court whether or not such Native Law or Custom was established by evidence before that trial Court?

After careful perusal of the record of proceedings, the trial Court held that the Court has Jurisdiction based on section 14 (2) and item 5 or the schedule to the said Customary Court Act No. 8 of 2007 and went further to state at pages 27 & 29 of the trial Court's judgment that, and I quote; *"Plaintiff's cause of action appears to be on trespass to chattel or trover or more specifically, the tort of conversion" and "plaintiff's cause of action is in tort and in respect of the injured cow."*

From the foregoing, it is obvious from the appeal record that the trial Court applied the English Common Law of Tort as relating to injury to chattel in determining the suit. So, it is my view that it must be shown on the face of the record of proceedings at the lower/trial Court that there is an established native law and custom if such tortuous act and remedy for redress.

Such evidence was never produced at the trial Court's record and it is erroneous for the lower/trial Court to assume such law as being established to have conferred jurisdiction on it as envisage in Section 14 of the Customary Court Act 2007.

The appropriate section of the Act that seems to apply is Section 16 & 17 (2) (iii) of the Act (Customary Court Act 2007).

In the earlier decision of this Court in the unreported case of ***Ariremako Femi v. Michael Korie FCT/CCA/CVA/14/2011*** we had earlier held that Customary Court of the Federal Capital Territory, Abuja by virtue of the Customary Court Act No 8 of 2007, only have jurisdiction on matters that raises Customary law or on any bye-law that confers jurisdiction on them whether on native law or not.

I am of the conviction that the jurisdiction of the Court below is under the search light in view of the pronouncement of the FCT High Court in the unreported case of **Proforte Ltd. v. President Customary Court of Appeal, FCT & Ors in Suit No. FCT/HC/CV.1078/2010** as it relates to items 3 and 5 of Part 1 of the schedule to the Customary court Act, No. 8, 2007. The concept of jurisdiction is of universal application hence it is applicable in the Customary Court in the FCT, therefore any ground of appeal against the decision of the Customary Court which arises the question of the competence of the court below *"……is an issue or question of customary law within the meaning of sections 247 (1) and 224 (1) of the 1979 Constitution and is appealable as an issue of customary law up to the Supreme Court…."* ***Odoemena Nwaigwe v. Nze Edwin Okere (2008) LPELR-SC, 39 -40*** (in this instance section 245 and 267 of the 1999 Constitution.)

It is not the intention of this court to sit on appeal over the decision of the FCT High Court being a Court of co-ordinate Jurisdiction, but to bring out its meaning and effect for proper appreciation by the courts below and the legal practitioners appearing before that crop of Courts. I open the consideration of this issue by holding that a provision of an Act will not be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter either expressly or by implication: ***A-G Ondo State v. A-G Ekiti State (2001) 17 NWLR (Pt743)*** **773-774. F**or the purpose of determining the validity of a provision of an enactment, that provision should not be read in isolation but the whole statute mush be considered together since the section is part of a whole: ***Chima v. Ude (1996) 3 NWLR (PT. 461) 379; Awuse v. Odili (2004) 8 NWLR (PT. 876) 513*.**

The provision of section 16 in themselves, are not absolute but only effective when the stipulations therein (particularly in (b) and (c) and complied with. As it appears now the Customary Court may not have jurisdiction on causes or matters arising from any law contemplated in the said provisions above because I am yet to know of the existence of any laws of the appropriate FCT Area Council, Rules of any statutory corporation operating within the FCT or Order made pursuant to the Customary Court Act 2007, authorizing the enforcement of any written law by the Customary Court, and even if there is in existence any of such, it must be devoid of being inconsistent with the constitutional provisions referred to in the declaratory decision of the FCT High Court.

I cannot hold the same opinion in respect of item 3, wherein causes and matters arising out of customary law cannot be said to be excluded from the stipulations therein. The application of the blue pencil rule to item 3 and its declaration to be also null and void on ground of being inconsistent with the Constitutional provision, with due respect cannot be absolute but limited to the extent of the inconsistency*: **Mohammed v. C.O.P. (1987) Attorney General of Kaduna State (1986) 4 NWLR (Pt. 35) 375*** was referred to; ***Nwaigwe v. Okere (Supra)21.***

I therefore regard the declaration that item 3 is inconsistent to the Constitution only to the extent that if constructed as vesting original unlimited jurisdiction on the Customary Court in civil causes and matters in any other law not being customary law, as that will being the jurisdiction to be in conflict with that vested on the Federal High Court by the 1999 Constitution. In other words the declaration of the FCT High court is not to be constructed to mean that the Customary Court is deprived of any jurisdiction under item 3 where the issue of customary law is involved: ***N.D.I.C. v. Okem Ent. Ltd (2004) 10 NWLR Pt. 850 – 188.***

This understanding can be implied from the pronouncement of the FCT High Court especially in the reproduced extracts from the said judgment by the use of sentences lie "…*civil causes and matters that are not related to customary law..", "…on any subject not involving the interpretation or question of customary law.."* and "…*the competence to enforce commercial contracts which do not involve questions of customary law…".* I am also of the strong view that the stipulations in item 3 should be read along with the provisions of section 17 (2) (a) (iii) and (b) which is the provision that clearly stipulated the law applicable to civil causes or matters before the Customary Court. Item 3, with due respect, should therefore be simply read in the light that the Customary court shall have unlimited jurisdiction in any cause or matter between parties, be it debt, demand, damages, dowry, bride price or commercial contract (if any) to mention but a few which involve the interpretation or

question of Customary law: ***N.D.I.C. v. Okem Ent. Ltd (supra) 189:*** as this approach will bring out the proper intent of section 17 of the Customary Court Act, 2007. Similarly, the decision of the FCT High Court should be read, understood and applied in that light. Construing the decision as absolute in relation to items 3 will be prejudicial to a party involved in any of the mentioned causes or matters which relates to customary law.

I am of the view that Customary Court in the FCT has unlimited jurisdiction to hear and determine matters that raises questions of customary Law or on any bye-law that confers jurisdiction on the said courts on dowry, bride price, damages or debts under native law and customs as envisaged in item 3 of Part 1 of the schedule of Federal Capital Territory Customary Court Act No. 8, 2007.

From the forgoing, I hereby hold that the trial Court misdirected itself by erroneously assuming Jurisdiction on a general law of tort or damage to chattel that evidence is not laid to show that such tort or damage is as regard to any Native law and Custom or Customary law of the area or on any bye-law of the Area Council.

No Court has the power to widen or enlarge her jurisdiction except that conferred on it by law.

Consequent on the above stated view of this court as clearly laid down in the case of ***Ariremako Femi Vs. Michael Korie*** (***supra***) I hereby take note of the issue raised by the appellants as it relates to jurisdiction of the trial court and hold that appeal succeeds in that ground since the issue of jurisdiction is germane and cardinal in any matter, and having held that the trial Court lacks jurisdiction it will be an exercise in futility to go ahead to consider that second issue as to proper valuation of the evidence produced before the trial Court.

The decision of the grade A Customary Court, Abaji, FCT, Abuja and delivered on 14th day of June 2010 is hereby set aside and this appeal is allowed.

Hon. Justice A.M.A. Saddeeq, JCCA: I have read in draft the judgment of my learned brother Moses A. Bello, PCCA and I completely identify with him that the appeal should be allowed. I hereby also allow same in the like terms as contained in the judgment.

For the purpose of emphasis, undoubtedly every court is required to guard jealously its jurisdiction. Its duty amongst others is to expound the law and not to expand it by construing the provision of the law in such a manner that it will arrogate to itself the jurisdiction which the law never vested upon it. Similarly to jealously guard its jurisdiction does not imply flagrant disregard to the

principle of stare decisis by the courts below, which can be found in the pronouncement of this court in the earlier unreported case of ***Ariremako Femi v. Michael Korie in Appeal No. FCT/CCA/CVA/14/2011*** wherein the provision of section 14 (2), section 17 (2) (a) and (b) and item 3 of the Schedule to the Customary Court Act, 2007, was considered.

Even at the expense of repetition, any cause or matter under item 3 of the first Schedule to the Customary Court Act, 2007 to which the provisions of sections 16 (a) and 17(2)(a) and (b) was not applied by the court below, takes that cause or matter out of the competence of that court as it would have been caught by the unreported decision of High Court of the FCT in ***Proforte Ltd. v. The President, Customary Court of Appeal Abuja and 9 others, in Suit No. FCT/HC/CV/1073/2010,*** because such cause or matter would have fallen under item 5 to which the blue pencil rule still stand applied, a position this court accepted in ***Femi v. Kories case***. For the suit at the court below to be competent before that court, the cause or matter must be one to which customary law as contemplated in sections 16(a) and 17(2)(a) and (b), is applicable.

Thus for this and the more exhaustive reasons contained in the lead judgment, I also resolve the 1st issue for determination in favour of the appellant. This suit before the court below was incompetent and same is hereby struck out. To avoid embarking on an academic exercise, the second issue for determination is hereby discountenanced with in view of the resolution reached on the first issue which has the effect of terminating the appeal.

Hon. Justice M.G. Gwagwa, JCCA: I have read in draft the judgment just delivered by my learned brother, Hon. Justice M. A. Bello, (JP) OFR, the Hon. President, Customary Court of Appeal, I agree with his reasoning and conclusion. The appeal succeeds.

APPEAL ALLOWED

MRS. ABIGAEAL F. OGUNMAKINJU

V

MR. OLUMIDE OGUNMAKINJU

Appeal No.**: FCT/CCA/CVA/1/2012**

HON. JUSTICE A.M.A. SADDEEQ, JCCA (Presided and delivered the Lead Judgment)
HON. JUSTICE M.G. GWAGWA, JCCA
HON. JUSTICE USMAN N. AHMED, JCCA
HON. JUSTICE ISTIFANUS GANDU, JCCA

18TH JUNE, 2013

COURT-	*FCT Customary Court of Appeal – Jurisdiction of – Scope of jurisdiction*
INTERPRETATION OF STATUTES-	*Powers to interpret Statutes –Exercise of by Customary Court of Appeal*
JURISDICTION-	*Jurisdiction of court – source of - issue of jurisdiction*

ISSUE:

Whether this appeal is competent having regard to the provision of section 267 of the 1999 Constitution (as amended) read with section 48(1) of the Federal Capital Territory Customary Court Act, 2007 and section 1(a) of the Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011.

FACTS:

The respondent filed an application on the 16th day of November, 2011 for the issuance of a civil summons against the appellant at the Grade 1 Customary Court, sitting at Bwari, in the FCT for the dissolution of their marriage and access to the off springs of the marriage, in addition to other injunctive reliefs such as the appellant should not continue to parade herself as the wife of the respondent, to stop answering the respondents' name, and detinue. While the matter was pending, the respondent was alleged to have driven out the appellant and the children from their matrimonial home. Consequent upon this development, the appellant filed a Motion on Notice of a Preliminary Objection seeking amongst others for an order dismissing the case or in the alternative, an order maintaining the status quo pending the determination of the suit. This appeal is against the ruling on the preliminary objection application

HELD (Striking out the Appeal):

1. **On the source of a court's jurisdiction**

   Every court is a creation of statute from where it derives its jurisdiction.

2. **On the fundamental issue of jurisdiction**

   Jurisdiction is a hard matter of law which can only be determined in the light of the enabling statute. It is the live-wire or blood which gives life to any adjudication. See ***Ifeajuna v. Ifeajuna (2000) 9 NWLR (Pt. 671)107; Nwaigwe v. Okere (2008) 13 NWLR (Pt. 1105), 477.***

3. **On the jurisdiction of the FCT Customary Court of Appeal to hear appeals from the Customary Court of the FCT**.

   The competence of this court in relation to the appeal arising from the decisions of the court below is circumscribed by the provision of its enabling statute, the 1999 Constitution (as amended) and any other relevant enactment made pursuant thereto.

4. **On the powers of the Customary Court of Appeal to interpret statutes**

   Per Saddeeq, JCCA:

   I will not hesitate to note that the court is not unmindful that it has no power to interpret the statute. With humility I consider the above pronouncement as the general rule, which like any other rule has an exception. Though this court may not have the competence to interpret the statute, it however has the inherent power to decide on whether or not it has the jurisdiction to entertain any appeal before it. Thus where the provisions of any statute must inevitably be construed to found on the jurisdiction of this court, I am of the conviction that this inevitable situation should operate as an exception to the above pronouncement. See ***Mashuwareng v. Abdu (2003) 11 NWLR (Pt. 831), 416; Nwaigwe v. Okere (supra) 476; A – G. Federation and 5 Ors vs. Usman Abubakar and 26 Ors (2008), 6 – 7 SC (Pt. 1), 210; Misc. Offences Tribunal v. Okoroafor (2001), 18 NWLR (Pt.745), 330*.**

5. **On the scope of the appellate jurisdiction of the FCT Customary Court of Appeal**

   Per Saddeeq, JCCA:

   This provision which is a drift from the rather limited context of the second part of section 267 vested this court with appellate and supervisory jurisdiction on any question arising from the court below provided such issue is related to the subject matter of the claim which is on customary law. This contrast with the second limb of section 267 which has nothing to do with the claim or subject matter at the court below, but strictly on the issues raised in the appeal which must involve questions of customary law as rightly submitted by counsel

to the respondent. Similarly, if the meaning read into the provision of section 48(1) referred to earlier is anything to go by, the provision of section 1(a) under consideration, being a provision of a later enactment of the National Assembly touching directly not by inference on the appellate jurisdiction of this court will have the effect of altering the perception read into section 48(1). To this end, I hold the candid opinion that the jurisdiction of this court as far as appeals from the court below is concerned is now expanded by the provision of section 1(a) to accommodate any issue provided it emanated from a subject matter of a claim which relates to customary law before the court below. I think this construction fall within the first limb of section 267 of the 1999 Constitution (as amended).

Cases cited in this Judgment

A – G. Federation and 5 Ors vs. Usman Abubakar and 26 Ors (2008), 6 – 7 SC (Pt. 1), 210
Ifeajuna v. Ifeajuna (2000) 9 NWLR (Pt. 671)107
Mashuwareng v. Abdu (2003) 11 NWLR (Pt. 831), 416
Misc. Offences Tribunal v. Okoroafor (2001), 18 NWLR (Pt.745), 330
Nwaigwe v. Okere (2008) 13 NWLR (Pt. 1105), 477

Statutes/Rules of Court/Books referred to in this Judgment

1999 Constitution FRN (as amended)
Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011.
FCT Customary Court Act, 2007

APPEARANCES:

OLAMIDE ADARAMOLA Esq; for the Appellant.
TITOJU, A. O. Esq. for the Respondent.

Hon. Justice A.M.A. Saddeeq, JCCA: This interlocutory appeal is against the ruling of the Customary Court, Grade 1, Bwari, Abuja, delivered on the 8th day of March, 2012, against the appellant. The brief facts of this case are as follows:

The respondent filed an application on the 16th day of November, 2011 for the issuance of a civil summons against the appellant at the Grade 1 Customary Court, sitting at Bwari, in the FCT. The claim of the respondent before the court below was for the dissolution of their marriage and access to the off springs of the marriage, in addition to other injunctive reliefs such as the appellant should not continue to parade herself as the wife of the respondent, to stop answering the respondents'

name, and detinue. The matter came up for mention on 23rd day of November, 2011 and was adjourned to the 24th day of January, 2012 for the commencement of hearing. A day prior to the return date i.e. on the 23rd day of January, 2012, the respondent was alleged to have driven out the appellant and the children from their matrimonial home. Consequent upon this development, on the 22nd day of February, 2012, the appellant filed a Motion on Notice of a Preliminary Objection (sic). In the said application, the appellant sought for the following reliefs:-

"1. *An order of this honourable court, dismissing the case of the Respondent/petitioner for an abuse of court process;*

2. *An order of this honourable court, directing the Applicant/counter claimant to return to her matrimonial home pending the determination of the substantive suit;*
3. *An order of this honourable court compelling the Respondent/Petitioner to maintain the status quo pending the determination of the substantive suit;*
4. *And for such further order or other orders as this honourable court may deem just to make in the circumstances."*

After the hearing of the preliminary objection, the court delivered its ruling. Dissatisfied with the said ruling, the appellant filed, this appeal on the 20th day of March, 2012 vide Notice of Appeal dated same day. The Notice of Appeal contained 1 ground of Appeal which reads thus:-

> "*The Learned trial Customary Court Judges erred in law when they failed to determine in their ruling the fate of the application filed by the Respondent/Counter claimant (herein after refers to as Appellant/Respondent) dated 8th March, 2012". (sic).*

In compliance with the rules of this court, both parties who are represented by counsel, settled and exchanged their briefs of argument. One issue was distilled for determination in the appellants' brief of argument settled by Olamide Adaramola Esq., of learned counsel.

During the prejudgment conference, an issue relating to the competence of this appeal arose and consequently, the court called for address from the parties in respect of the issue which is"-

1. Whether this appeal is competent having regard to the provision of section 267 of the 1999 Constitution (as amended) read with section 48(1) of the Federal Capital Territory

Customary Court Act, 2007 and section 1(a) of the Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011;

While the issue raised in appellant's brief and adopted by respondent is-

2. '' Whether the learned trial customary court judges were right in law by failing to pronounce on the prayers in the motion on notice of the preliminary objection of the appellant".

Making submission on the first issue as raised by the court, Olamide Adaramola Esq. of the learned counsel to the appellant submitted that jurisdiction is the fundamental basis for the courts' adjudicatory power in any matter. It was counsels' argument that pursuant to the provisions of sections 267 of the 1999 Constitution (as amended) and 1(a) of the Customary Court of Appeal of the Federal Capital Territory (Jurisdiction on Chieftaincy Matters) Act, 2011 and the suit before the court below, this court has appellate jurisdiction on customary law matters, though the present appeal was not based on a ground involving the question of customary law.

However, continuing with his submissions in response to questions from the court in respect of the first limb of section 267 of the 1999 Constitution, Olamide Esq. contended that the provision can be understood to mean that this court can entertain matters unconnected with customary law and since section 1(a) of the Customary Court of Appeal of the Federal Capital Territory (Jurisdiction on Chieftaincy Matters) Act, 2011, is concerned, the court can exercise its jurisdiction on this appeal because the claim before the court below is on customary law. He finally argued that should this court hold that this appeal is incompetent, learned counsel urged the court to do justice to the matter by transferring the appeal to a competent court.

Titoju, A.O. Esq, counsel for the respondent stated that this issue can be raised at any time before judgment. He maintained that perusing the provisions of section 267 of the 1999 Constitution (as amended) and section 1(a) of the Customary Court of Appeal of the (Jurisdiction on Chieftaincy Matters) Act, 2011, the issue of the jurisdiction of a court is a matter of law which the court is its repository. It was argued further that it is a trite law that when the court lacks the jurisdiction, the court is at liberty to strike out the matter because it is the jurisdiction that gives the court the teeth to bite. Counsel submitted further that this court only have the competence to entertain an appeal with customary law flavor, therefore the present appeal whose sole ground does not involve a

question of customary law is incompetent. The court was urged to strike out this appeal for being incompetent.

This issue touches on the competence of this appeal; therefore its resolution first is very significant as it will provide the bearing of whether or not to consider the second issue formulated by the appellant. To this end a restatement of the principle of law that in every adjudicatory process of a court, the issue of jurisdiction is always important will not be misplacement. Every court is a creation of statute from where it derives its jurisdiction. *"Jurisdiction is a hard matter of law which can only be determined in the light of the enabling statute..."* see ***Ifeajuna v. Ifeajuna (2000) 9 NWLR (Pt. 671)107***. It is the live-wire or blood which gives life to any adjudication: see ***Nwaigwe v. Okere (2008) 13 NWLR (Pt. 1105), 477***, therefore the competence of this court in relation to the appeal arising from the decisions of the court below is circumscribed by the provision of its enabling statute, the 1999 Constitution (as amended) and any other relevant enactment made pursuant thereto.

Before the consideration of this issue, I will not hesitate to note that the court is not unmindful that it *"... has no power to interpret the statute ..."* see ***Mashuwareng v. Abdu (2003) 11 NWLR (Pt. 831), 416***. With humility I consider the above pronouncement as the general rule, which like any other rule has an exception. Though this court may not have the competence to interpret the statute, it however has the inherent power to decide on whether or not it has the jurisdiction to entertain any appeal before it: see ***Nwaigwe v. Okere (supra) 476; A – G. Federation and 5 Ors vs. Usman Abubakar and 26 Ors (2008), 6 – 7 SC (Pt. 1), 210.*** Thus where the provisions of any statute must inevitably be construed to found on the jurisdiction of this court, I am of the conviction that this inevitable situation should operate as an exception to the above pronouncement: see ***Misc. Offences Tribunal v. Okoroafor (2001), 18 NWLR (Pt.745), 330***.

With the submissions of both counsel in mind, at this juncture, it is worthy to note that competence of this appeal depend on the construction of the provision of section 267 of the 1999 Constitution (as amended) which is the enabling statute of this court, read with other relevant provisions of other enactments. It is therefore proper to reproduce the provision to ease reference. The section provides as follows"-

> *"267. 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 appellate and supervisory jurisdiction in civil proceedings involving questions of Customary law".

My simple understanding of the above provision is that the first limb gives this court the jurisdiction on any other such matter (other than on customary law) which an Act of the National Assembly may confer upon it. This other jurisdiction is in addition to that conferred under the second limb of the provision which is limited to question involving customary law. The first limb is obviously so construed in the absence of any jurisdiction on issues relating to customary law which cannot be considered by this court under the second limb of the provision.

Considering this provision, this court had in its majority Ruling of the 8th day of December, 2009, in the unreported case of ***Chief Rolf Schneider v. Felicia Ochuole Schneider, Appeal No. FCT/CCA/CVA/17/08***, read by the Honourable President of the Court, held the view that the provision of section 48 (1) of the Customary Court Act, 2007 which is an Act of the National Assembly, did confer such additional jurisdiction as contemplated under the first limb of section 267 of the 1999 Constitution (as amended). This construction though still subsisting and valid is only of persuasive value to me due to my strong reservation on the meaning read into section 48 (1) of the Customary Court Act, 2007 in relation to the first limb of section 267. Section 48 (1) provides thus:-

"48 (1) Any party who is aggrieved by the decision or order of a customary court, may within thirty days from the date of such decision or order appeal to the Customary Court of Appeal…"

My reservation stemmed from my perception of the above clear and unambiguous provision which provided for the period within which to appeal and the court to which such an appeal will lie from the decision or order of a customary court, irrespective of the nature of the appeal in the absence of any other court being vested with the jurisdiction to hear appeals from the courts below, and that is why by extension the provision was construed (in the majority decision referred to) as conferring any such additional jurisdiction on this court within the context of the first part of section 267.

Be that as it may, the provision of section 1 (a) of the Customary Court of Appeal of the Federal Capital Territory Abuja,(Jurisdiction on Chieftaincy Matters) Act, 2011, provided as follows:-

"1. Subject to section 267 of the Constitution, the Customary Court of Appeal of the Federal Capital Territory Abuja, shall-

(a) exercise appellate and supervisory jurisdiction in proceedings where the subject matter of the claim is on, or relates to customary law; and…"

This provision which is a drift from the rather limited context of the second part of section 267 vested this court with appellate and supervisory jurisdiction on any question arising from the court below provided such issue is related to the subject matter of the claim which is on customary law. This contrast with the second limb of section 267 which has nothing to do with the claim or subject matter at the court below, but strictly on the issues raised in the appeal which must involve questions of customary law as rightly submitted by counsel to the respondent. Similarly, if the meaning read into the provision of section 48(1) referred to earlier is anything to go by, the provision of section 1(a) under consideration, being a provision of a later enactment of the National Assembly touching directly not by inference on the appellate jurisdiction of this court will have the effect of altering the perception read into section 48(1). To this end, I hold the candid opinion that the jurisdiction of this court as far as appeals from the court below is concerned is now expanded by the provision of section 1(a) to accommodate any issue provided it emanated from a subject matter of a claim which relates to customary law before the court below. I think this construction fall within the first limb of section 267 of the 1999 Constitution (as amended). In view of the foregoing I find the submission of learned counsel to the respondent hard to accept because section 1(a) did not provide that the appeal must involve a question of customary law, only the second part of section 267 of the 1999 Constitution (as amended) did. On the other hand learned counsel to the appellant, on the provision of section 1(a) holds the opinion that this appeal is competent before this court because the claim before the court below is on customary law.

At this point, to ascertain the competence of this appeal, it becomes necessary to find out whether it arose from the subject matter of a claim which is on customary law within the context of section 1(a) of Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011.

I now examine the claim from which this appeal emanates to determine its competence before this court. Though the copy of the writ of summon does not form the appeal record, from the application for a civil summons dated 16th November, 2011 and filed same day, there existed nothing thereon to indicate that the claim at the court below related to customary law neither can such be inferred from the testimony of the respondent himself as PW1 from pages 16 – 18 of the appeal record. The submission of learned counsel to the appellant that the appeal arose from a

claim related to customary law is not supported by the appeal record which is binding on this court. I am therefore left with no option than to conclude that the appeal does not arise from a claim related to customary law as contemplated under the provision of section 1(a) under focus neither can the appeal be competent under the 2nd part of section 267 of the 1999 Constitution (as amended) having not involved any question of customary law.

This issue must therefore be resolved against the appellant.

With the resolution of this first issue, this appeal should eventually terminate at this point as consideration of the second issue will amount to an academic exercise in the absence of the competence to exercise appellate jurisdiction over this appeal. Accordingly this appeal is hereby struck out for want of competence.

Hon. Justice M.G. Gwagwa, JCCA: I read, in advance, the lead judgment prepared by my learned brother, A.M.A. Saddeeq, JCCA and I agree entirely with his reasoning and conclusion.

I too hereby struck out the appeal for want of competence.

Hon. Justice Usman N. Ahmed, JCCA: I have read before now the judgment of my lord Saddeeq JCCA, just delivered. His Lordship has meticulously and comprehensively dealt with all the issues submitted for determination of this appeal. Actually the appeal does not arise from the claim that related to the customary law as contemplated under section 1 (a) of the Act No. 5(2011) which confers the original jurisdiction on this court.

Hon. Justice Istifanus Gandu, JCCA: I have had the opportunity to read the draft of the judgment just delivered by my lord, Hon. Justice A.M.A Saddeeq JCCA. I agree with him that section 1 (a) of the Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy matters) Act, 2011 has broadened the scope of the Jurisdiction of this Court. This Court can now hear appeals from Customary Courts even if the appeals are not on questions of Customary Law. All the appeals need only show that they relate to subject matter of Customary Law. In the instant case, the only thing one can deduce from the records is that the proceedings at the trial Court relates to a matrimonial cause. There is nothing on the record to show what type of matrimonial cause is in issue. The result is that neither the issue formulated by this Court suo motu or the one formulated by the appellant can be sustained under both section 267 of the 1999 Constitution or section 1 (a) of the Customary Court of Appeal of the Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011.

Based on all these, the appeal is incompetent. It is hereby struck out by me.

APPEAL STRUCK OUT

MR. AMUGO DI-MEZ

V

THERESA O. DI-MEZ

Appeal No.**: FCT/CCA/CVA/2/2011**

HON. JUSTICE A.M.A. SADDEEQ, JCCA (Presided)

HON. JUSTICE M.G. GWAGWA, JCCA

HON. JUSTICE USMAN N. AHMED, JCCA

HON JUSTICE ISTIFANUS GANDU, JCCA (Delivered the Lead Judgment)

16TH JANUARY, 2013

APPEAL-	*Issues for determination – formulation of issues – issues formulated by Respondent – Whether proper without a cross appeal*
COURT-	*FCT Customary Court of Appeal – Jurisdiction of – Exercise on non natives of FCT – competence of*
CUSTOMARY LAW-	*Issue of – whether issue of jurisdiction is*
CUSTOMARY LAW-	*Applicable Customary Law – FCT Customary Court*
CUSTOMARY LAW-	*Decisions on customary law – how determined*
CUSTOMARY MARRIAGE-	*Elements of – whether the same as Statutory marriage*
JURISDICTION -	*Classification of*
JURISDICTION-	*Nature and scope of – Defect in – effect of on competence of court*
MARRIAGE –	*Statutory Marriage – What amounts to - Whether certificate of marriage from church is enough*
STATUTES-	*FCT Customary Court Act, 2007 – Section 14(1) – import of*
STATUTES-	*Section 1(a) Customary Court of Appeal, FCT (Jurisdiction on Chieftaincy Matters) Act, 2011 – import of*

ISSUE:

Whether the Lower Court was right in holding that it has jurisdiction to determine the petition.

FACTS:

This is an appeal against the Ruling of Customary Court, Garki, Abuja, delivered on the 18th day of January, 2011. At the Garki Customary Court, the Respondent as Petitioner on the 30th day of August, 2010 petitioned for dissolution of her marriage with the Appellant and for custody of the two children of the marriage.

In response to this petition, the Appellant by a Motion on Notice dated 23rd day of September, 2010 raised a preliminary objection to the effect that the Court has no jurisdiction because the marriage between the parties is governed by the Marriage Act. After taking arguments from both Counsel on the preliminary objection, the Court dismissed it. Dissatisfied with the Ruling, the Appellant has applied to this Court.

HELD (Dismissing the Appeal):

1. **On the validity of issues formulated by a respondent who did not cross-appeal**

   A Respondent who has not cross-appealed is not competent to formulate issues outside the Appellant's Grounds of Appeal. The result is that the issue formulated by the Respondent is invalid and liable to be struck out. See ***Nya v. Edem (2005) 4 NWLR (PT 915) 362; Udom v. Micheleti & Sons Ltd (1997) 8 NWLR (PT 516) 87. Alhaji Samuel Olayemi Akimbola v. The State (1991) 8 NWLR PART 208 at Page 200 Paras B – E.***

2. **On the import of section 1(a) of the Customary Court of Appeal, FCT (Jurisdiction on Chieftaincy Matters) Act, 2011 and section 267 of the 1999 Constitution**

   The combine import of these Sections is that the Customary Court of Appeal, Abuja, can hear Appeals and review decision of the Lower Courts in civil proceedings provided they involve questions of Customary Law.

3. **On when a decision is in respect of Customary Law.**

   A decision is in respect of a question of Customary Law when the controversy involves a determination of what a relevant Customary Law is and the application of Customary Law so ascertained to the question in controversy. Where the parties are in agreement as to what the applicable Customary Law is and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable Customary Law is, no decision as to any question of Customary Law arises. However, where notwithstanding the agreement of the parties as to the applicable Customary Law, there is a dispute as to the extent and manner in which such applicable Customary Law determine, regulates the rights obligation or relationship of parties having regard to facts established in the case, a resolution of such

dispute can, in my opinion be regarded as a decision with respect to question of Customary Law; where the decision of the Customary Court of Appeal turn purely on facts, or on question of procedure, such decision is not with respect a question of Customary Law notwithstanding that the application Law is Customary Law".(Section 48 (1) and (2) of the Federal Capital Territory Customary Court Act, No. 8, 2007.; Section 1 (a) of the Customary Court of Appeal, Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011, Section 267 of the Constitution of the Federal Republic of Nigeria, 1999). See **Hirmor v. Yongo (2003) 9 NWLR (PART 824) at Page 98 – 99; Pam v. Gwom (2000) 2 NWLR (PT. 644) 322. Particularly at 335 – 336**

4. **On whether jurisdiction is an issue of customary law**

   The concept of jurisdiction is of universal application and known to Customary Courts. An error of jurisdiction by a Customary Court which is a defect intrinsic to the adjudication is an issue of Customary Law. See the case of ***Nwaigwe v. Okere (2008) 13 NWLR (PT 1105) 477*.**

5. **On the nature and scope of jurisdiction**

   The issue of jurisdiction is very fundamental and must be determined by the Court. Jurisdiction is the authority which a Court has to decide matters which are litigated before it. The limits of this authority are limited by the constitution or by statute under which the Court is constituted and may be extended or restricted by similar means.

6. **On the effect of a defect in a court's jurisdiction**

   Any defect in competence is fatal or the proceedings are a nullity however well conducted and decided. See ***Nwaigwe v. Okere (2008) 13 NWLR (PART 1105) 476 – 477 Paras H – C.***

7. **On whether a certificate of marriage issued by a church ordinarily connotes marriage under the Act**.

   Per Gandu, JCCA:

   I have gone through the findings of the trial Court on this, I agree with the Court below that there was nothing before it to show that the Appellant complied with the Marriage Act requirements. I do not have any reason to alter the reasoning and conclusion of the trial Court in view of the clear lack of proof that the Catholic Church in which the parties celebrated the wedding is a licensed place of worship. I do not think and it is not provided anywhere that a certificate of marriage from any Church is a conclusive evidence of marriage under the Act.

8. **On the competence of the FCT Customary Court to exercise jurisdiction over non natives of the FCT**.

At a close look at the provision of the Act relied upon by Counsel to the Appellant, can it be said that the drafters intended that a party who is resident within the Federal Capital Territory, Abuja and sued before a Customary Court over a customary cause or transaction is at will to submit or refuse to submit to the jurisdiction of the Court? By Section 6 (i) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), the judicial powers are vested in the Courts of the Federal Capital Territory, Abuja as provided for in the provisions herein before cited and Section 14 (1) and (2) of FCT Customary Court Act, 2007. It has jurisdiction over all persons who are resident within the Federal Capital Territory and over causes and matter designated in the schedule to the Act. A Court would normally and legally lack jurisdiction over matters and persons outside its jurisdiction. See **IBORI VS OGBORU (2005) 5 NWLR PT 920 at 102.** Where a Court has jurisdiction over a person, the subject matter, and over the territory, his non-submission to the Court will be unlawful. Non submission to Customary Court, FCT, Abuja becomes relevant when a party is not bound by Customary Law or is not within the Territorial limit of the Federal Capital Territory. In such a situation, the parties would have a hearing elsewhere otherwise there will be a breach of fundamental right of fair hearing guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria, 1999.

9. **On the customary law applicable in the FCT Customary Court**

Parties who are non-natives and are residents within the Federal Capital Territory, the Customary Courts of the Federal Capital Territory are enjoined to administer the Customary Law binding between them and only subject to the repugnancy test and incompatibility provided in Section 16 (1) and (2) of the Federal Capital Territory, Customary Court Act, 2007. See specifically Section 17 (2) (i) to (iii) and (b).

10. **On whether mere issuance of a church certificate of marriage connotes statutory marriage**

The celebration of a Church marriage and a subsequent issuance of a certificate not done in accordance with the provisions of the Marriage Act has no statutory flavour. It merely gives divine blessing to the customary marriage which for all intent and purpose remains a marriage under Customary Law. In order to convert a customary marriage into statutory marriage, the parties must consciously take the steps to adopt the procedure contained in the Marriage Act. see ***NWANGWA vs. UBANI (1997) 10 NWLR (Pt. 526) 559***.

11. **On when a customary marriage can be said to have become a statutory marriage**

For the Customary Marriage between the parties to become a statutory marriage, the applicant should have shown that the relevant procedures contained from Sections 7 – 30 of the Marriage Act has been complied with before Section 32 becomes effective. This will necessitate the exhibition of some statutory documents referred to in some of the provisions mentioned above. In the absence of any evidence showing that the parties have complied with the statutory procedures of the Marriage Act, the certificate of marriage alone cannot be evidence that the marriage between the parties was a statutory marriage within the context of the Marriage Act which is capable of divesting the Court below of its jurisdiction, because the marriage still remains a customary marriage. I am therefore left with no option but to conclude on this point that the marriage certificate only serves to show that the customary marriage between the parties only received divine not statutory flavour. The burden of satisfying this Court that the marriage between the parties is a statutory marriage still rests upon the Appellant who alleges that. At this point, there is no burden on the Respondent to show that the Court below has jurisdiction until the Appellant has fully discharged the burden on him as earlier noted.

12. **On the classification of jurisdiction**

Per Saddeeq, JCCA

For the avoidance of any erroneous understanding of the submission to jurisdiction as employed in Section 14 (1) of the Act, it is important to appreciate the classification of jurisdiction. To this end, I make bold to state that there are broadly two types of jurisdictions and a distinction must be drawn between them, namely (a) jurisdiction as a matter of procedural law and (b) jurisdiction as a matter of substantive law. While a litigant may submit to a procedural jurisdiction, he or she cannot confer jurisdiction on a court where the constitution or statute of any provision of the common law says the Court does not have jurisdiction. See ***Ndayako v. Dantoro (2004) 13 NWLR (889) 187, Obiuweubi v. CBN (2011) LPELR-SC, 266/2006***. From the foregoing, while a litigant has the option to submit to the procedural law jurisdiction which is often regulated by the Rules of Practice and Procedure of a Court, the litigants' submission to this type of jurisdiction cannot vest the Court with jurisdiction where the Court has no substantive law jurisdiction. Similarly, non submission per se to that category of jurisdiction cannot operate to divest the Court of its substantive law jurisdiction. It must be followed by convincing and compelling jurisdiction(s) before the Court below can be divested of its substantive law jurisdiction,

albeit temporarily because the Court can still assume its jurisdiction upon the removal of the impediment in the procedural law jurisdiction.

13. **On the import of section 14(1) of the FCT Customary Court Act, 2007**

To understand the provision of Section 14 (1) of the Act, it should be read with the entire provisions of the Act: see ***Abiodun v. C.J. Kwara State (2007) 18 NWLR (Pt. 1065) 109, Ika L.G.A. v. Mba (2007) 12 NWLR (Pt. 1049) 676***. The substantive law jurisdiction vested on the Customary Court under the provision of Section 14 (2) item 1 of part 1 of the schedule to the Act is not made to be subject to the provision of Section 14 (1) of the Act, which with due respect related to procedural law jurisdiction. Construing the provision of Section 14 (1) of the Act to imply submission to the Court's substantive law jurisdiction will mean that the other litigants' constitutional right to fair hearing would have been violated by that construction because he will be left with no avenue from where to seek redress in the absence of any other Court of first instance being vested with jurisdiction on Customary Law causes and matters. Similarly, the provision of Section 14 (1) of the Act would have been inconsistent with the provision of Section 36 (1) of the 1999 Constitution (as amended). This Court must not and cannot interpret the provision of Section 14 (1) of the Act in such a manner that it expropriates the existing right of the Respondent: see ***A.G. Federation v. Abubakar (2007) 10 NWLR (Pt. 1041) 1***. I therefore hold the view that submission to jurisdiction as used in Section 14 (1) of the Act meant submission to the "procedural law jurisdiction" of the Court as distinct from submission to "substantive law jurisdiction" on which the Appellant does not have any option open to him than to submit, provided the Court below is vested with the jurisdiction on the matter by the law. It is only the procedural law jurisdiction that a litigant has the option of either submitting to or not submitting to. ***Per Saddeeq, JCCA***

14. On whether the FCT Customary Court can exercise jurisdiction over non indigenes of the FCT

There is nowhere in the said provision where it is said or can be implied that the Customary Court can only have jurisdiction over persons who are indigenes of the FCT or it can only apply laws applicable to the indigenes of the FCT. The jurisdiction of the Court below is over persons within the territorial limits of the FCT, Abuja, provided the cause of action or matter falls within the confines of its statutory jurisdiction as spelt out in Section 14 (2), items 1, 2, 3 and 4 of the 1st Part of the Schedule to the Act.

Cases cited in this Judgment

A.G. Federation v. Abubakar (2007) 10 NWLR (Pt. 1041) 1

Abiodun v. C.J. Kwara State (2007) 18 NWLR (Pt. 1065) 109

Alhaji Samuel Olayemi Akimbola v. The State (1991) 8 NWLR PART 208 at Page 200

Hirmor v. Yongo (2003) 9 NWLR (PART 824) at Page 98 – 99

Ibori v Ogboru (2005) 5 NWLR PT 920 at 102

Ika L.G.A. v. Mba (2007) 12 NWLR (Pt. 1049) 676

Ndayako v. Dantoro (2004) 13 NWLR (889) 187

Nwaigwe v. Okere (2008) 13 NWLR (PT 1105) 477

Nwangwa v. Ubani (1997) 10 NWLR (Pt. 526) 559.

Nya v. Edem (2005) 4 NWLR (PT 915) 362

Obiuweubi v. CBN (2011) LPELR-SC, 266/2006

Pam v. Gwom (2000) 2 NWLR (PT. 644) 322

Udom v. Micheleti & Sons Ltd (1997) 8 NWLR (PT 516) 87

Statutes/Rules of Court/Books referred to in this Judgment

1999 Constitution FRN

Customary Court of Appeal, FCT (Jurisdiction on Chieftaincy Matters) Act, 2011

FCT Customary Court Act, 2007

APPEARANCES:

Kenneth Nkwocha Esq. for the Appellant

K. AondohembafanAchabo Esq. for the Respondent

JUDGMENT:

Hon. Justice Istifanus Gandu, JCCA (Delivering the leading judgment): This is an appeal against the Ruling of Customary Court, Garki, Abuja, delivered on the 18th day of January, 2011. At the Garki Customary Court, the Respondent as Petitioner on the 30th day of August, 2010 petitioned for dissolution of her marriage with the Appellant and for custody of the two children of the marriage.

In response to this petition, the Appellant by a Motion on Notice dated 23rd day of September, 2010 raised a preliminary objection to the effect that the Court has no jurisdiction because the marriage between the parties is governed by the Marriage Act. After taking arguments from both Counsel on

the preliminary objection, the Court dismissed it. Dissatisfied with the Ruling, the Appellant has applied to this Court.

Initially, the Appellant via his first Counsel filed three Grounds of Appeal which later were amended to four. On change of Counsel, the Notice and Grounds of Appeal was further amended with five Grounds of Appeal. For ease of reference, the further amended grounds are as follows:

(i) "The Honourable trial Court erred in Law when it held that the marriage between the parties is Customary Marriage and not one contracted under the Act.

(ii) The Honourable trial Court erred in Law when it held that Catholic Church is not licensed place of worship.

(iii) The Honourable trial Court erred in Law in rejecting the unchallenged evidence of compliance with formal requirements of notices under the Marriage Act but in finding that the marriage was conducted under Customary Law.

(iv) The Honourable Court erred in Law by relying on Counsel's submission rather than the evidence before it in holding that the marriage between the parties was conducted in accordance with Customary Law.

(v) The trial Court lack jurisdiction over this matter.

PARTICULARS

a. *Under Section 14 (1) of the Customary Court of the Federal Capital Territory Act, 2007, only persons who submit to the jurisdiction of the trial Court are subject to it.*

b. *Throughout the trial at the trial Court, the Appellant challenged the jurisdiction of the said Court and never submitted to it either expressly or by conduct by filing a preliminary objection and arguing same; thee Ruling of the Lower Court is what is on appeal herein."*

The Appellant seeks the following reliefs:

"a. An Order setting aside the Ruling of the Lower Court dated the 18th day of January, 2011.

b. An Order striking out the suit for want of jurisdiction".

Parties via their Counsel have exchanged briefs of argument. With the leave of this Court, the Appellant filed an amended Appellant's brief on the 27th day of July, 2012 dated the same day. The Respondent's brief is dated 14th day of August, 2012 and filed the same day. By the leave of this

Court, the Appellant's reply brief dated the 20th day of September was filed on the 28th day of September, 2012. At the hearing, both Counsel adopted their briefs as filed. The Appellant has outlined in his Appellant's Brief three issues for the proper determination of this appeal thus:

"i. Given that the evidence of celebrating a statutory marriage at the Catholic Church before the Lower Court was not contradicted; whether the Lower Court was right in holding that the marriage was contracted under Native Law and Custom.

ii. Whether the Lower Court was right on relying on Counsel's argument in holding that the Catholic Church is not a licensed place of worship.

iii. Whether the Lower Court was right in holding that it has jurisdiction to determine the petition."

The Respondent was by oral application granted leave to respond to the issues raised by the Appellant and has framed additional issue for determination thus:-

"Whether it was ripe for the Appellant to challenge the Jurisdiction of the Court before the Court would commence hearing".

Starting with the issue raised by the Respondent, can she be allowed to raise an issue not founded on any Ground of Appeal? I do not think so. The Respondent has not cross appealed to this Court nor filed any Respondent's Notice in this Court. A Respondent who has not cross appealed is not competent to formulate issues outside the Appellant's Grounds of Appeal. See ***Nya v. Edem (2005) 4 NWLR (PT 915) 362; Udom v. Micheleti & Sons Ltd (1997) 8 NWLR (PT 516) 87. Alhaji Samuel Olayemi Akimbola v. The State (1991) 8 NWLR PART 208 at Page 200 Paras B – E.*** The result is that the issue formulated by the Respondent is invalid and it is hereby struck out.

I shall now proceed to deal with issues formulated by the Appellant, their propriety and the argument of both Counsel on same, where need be. In doing so let me quickly state that the issues raised by the Appellant must be within the jurisdiction of this Court. The jurisdiction of this Court is clearly stated in Section 48 (1) and (2) of the Federal Capital Territory Customary Court Act, No. 8, 2007. The Section provides thus:

"(1) *Any person who is aggrieved by the decision or Order of a Customary Court may within thirty days from the date of such decision or Order appeal to Customary Court of Appeal.*

(2) The right of appeal to the Customary Court of Appeal shall be subject to the conditions and in accordance with the provision of any Law or rules of Court, if any, for the time being in force regulating the practice and procedure of that Court with respect to appeals."

In close terms, Section 1 (a) of the Customary Court of Appeal, Federal Capital Territory, Abuja (Jurisdiction on Chieftaincy Matters) Act, 2011 provides:

> *"Subject to Section 267 of the Constitution, the Customary Court of Appeal, Federal Capital Territory, Abuja shall:*
>
> *Exercise appellate and supervisory jurisdiction in proceedings where the subject matter of the claim is on or relates to Customary Law."*

These Sections of the two Acts are subject to Section 267 of the Constitution of the Federal Republic of Nigeria, 1999. The Section provides as follows:

> "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 National Assembly exercise such appellate and supervisory jurisdiction in civil proceeding involving questions of Customary Law".

The combine import of these Sections is that the Customary Court of Appeal, Abuja, can hear Appeals and review decision of the Lower Courts in civil proceedings provided they involve questions of Customary Law. What then is a question of Customary Law? In the case of ***Hirmor v. Yongo (2003) 9 NWLR (PART 824) at Page 98 – 99*** Ogundadare JSC**,** quoted the dictum of Ayoola JSC in ***Pam v. Gwom (2000) 2 NWLR (PT. 644) 322. Particularly at 335 – 336*** **thus:**

"I venture to think that a decision is in respect of a question of Customary Law when the controversy involves a determination of what a relevant Customary Law is and the application of Customary Law so ascertained to the question in controversy. Where the parties are in agreement as to what the applicable Customary Law is and the Customary Court of Appeal does not need to resolve any dispute as to what the applicable Customary Law is, no decision as to any question of Customary Law arises.

However, where notwithstanding the agreement of the parties as to the applicable Customary Law, there is a dispute as to the extent and manner in which such applicable Customary Law determine, regulates the rights obligation or relationship of parties having regard to facts established in the case, a resolution of such dispute can, in my opinion be regarded as a decision with respect to question of Customary Law; where the decision of the Customary Court of Appeal turn purely on facts, or on question of procedure, such decision is not with respect a question of Customary Law notwithstanding that the application Law is Customary Law".

If the above dictum is placed against the grounds and issues formulated by the Appellant in this appeal, can it be said that Appellant has raised question of Customary Law for the determination of this Court?

I have carefully considered the grounds and the issues formulated by the Appellant. Grounds 1 and 5 are complaining on jurisdiction of the trial Court. The concept of jurisdiction is of universal application and known to Customary Courts. An error of jurisdiction by a Customary Court which is a defect intrinsic to the adjudication is an issue of Customary Law. See the case of ***Nwaigwe v. Okere (2008) 13 NWLR (PT 1105) 477*.**

Consequently, issues raised by the Appellant that relates to jurisdiction are within the jurisdiction of this Court. Grounds 2 complains of trial Court holding that the Catholic Church is not a licensed place of worship, Ground 3 is complaining of rejection of unchallenged evidence of compliance with formal requirements of the Marriage Act and Ground 4 is on the trial Court's reliance on the Respondent Counsel's submission in place of evidence before it. I am unable to see how these grounds raise questions of Customary Law. Having failed to raise questions of Customary Law, I hereby decline jurisdiction to entertain them and same are hereby struck out. The surviving grounds are grounds 1 and 5 and the surviving issue is issue three which in my view cover both grounds. The issue is:

"Whether the Lower Court was right in holding that it has jurisdiction to determine the petition".

Counsel to the Appellant's argument in support of this issue is on two legs. Firstly, the Counsel argued that the trial Court does not have jurisdiction because of the unchallenged evidence before the trial Court. He referred this Court to Section 2 of the Matrimonial Causes Act to the effect that, it is the High Court of any State of the Federation that has jurisdiction to entertain this matter. He

cited Section 7 of the Marriage Act which set out formalities to be fulfilled by parties who intend to marry under the Act.

Secondly, Counsel argued that in the event that this Court disagrees with the Appellant's contention that what the parties celebrated was a marriage under the Act. It would be the humble contention of the Appellant that he did not and cannot be deemed by intent and purposes to have submitted to jurisdiction of the trial Customary Court hence, the said Customary Court still lack jurisdiction to entertain this petition. He referred this Court to Section 14 (1) of the Federal Capital Territory, Customary Court Act, 2007. He argued that the Appellant never submitted to jurisdiction either expressly or by conduct. He urged this Court to take note that the Appellant's participation in the matter is the preliminary objection which outcome the Appellant is challenging in this appeal. He referred this Court to Page 1 – 24 and 50 – 53 of the printed record. The Appellant argued that besides none submission, the parties are not indigenes of the area of the jurisdiction of the Court. He argued that where conditions precedents to the assumption of jurisdiction have not been complied with, the Courts have been held to be without jurisdiction. He referred to ***Sken-Consult v. Ukey (1981) 1 SC. 6.*** He submitted further that the Appellant having exercised his prerogative power conferred upon him by Section 14 (1) by withholding his submission to jurisdiction, the trial Court ought to have declined jurisdiction on the strength of non-submission simpliciter. In further argument, the Appellant Counsel submitted that the burden of establishing the jurisdiction of the trial Court rest squarely on the Respondent and that burden does not shift. He referred this Court to the case *of* ***Ejike v. Ifeadi (1990) 4 NWLR pt 142 100*** and ***Siwoniku v. Odufuwa (1969) 1 ALL NLR 216 at 220.*** He concluded that the Respondent has not discharged that burden and that the Appellant has not waived his right to raise the jurisdiction issues at this stage as it cannot be waived by any Party to a proceeding. He referred us to the cases of ***EFCC v. Ekeocha (2008) 14 NWLR (PART 1106) at 170, D; Bello v. Yakubu (2008) 14 NWLR (PART 1106) 104 AT 179.*** He urged us to resolve this issue in favour of the Appellant in view of the fact that the only evidence before the trial Court shows that parties hereto fulfilled the statutory requirement for a valid marriage under the Act and the marriage is evidenced by a marriage certificate. He referred us further to the cases of ***Osho & Ors v. Philip & Ors (1971 – 1972) NSCC 172 at 176 – 180; Wallace v. Wallace (1896) 74 LTR 253*****;** *S. 117 of Evidence Act.*

In response to the Appellant's argument on issue 3, the Respondent adopted his argument on issues I and ii of the Appellant. The summary of the Respondent's argument is that if this Court perused the affidavit in support of the motion challenging the jurisdiction of the trial Court, where this

appeal is hinged on, there is no where the Appellant averred that parties filed any notice under the Marriage Act before celebrating same. This assertion is only found in the Appellant's Paragraph 3.03 of their brief in support of the motion. The Respondent further argued that even if the averment were made, it was not enough for the trial Court to grant the application. He contends that the Appellant has not placed any documentary proof to support the assertion that they filled certain forms that qualified their marriage as statutory marriage. He referred this Court to Section 30 of the Marriage Act which explicitly provides that before celebrating the marriage, the officiating Priest must first be given the Registrar's Certificate or special license issued by the Minister under Section 13 of the Marriage Act. He further referred us to Sections 25 and 26 to the effect that immediately after the celebration of the marriage, the officiating Minister is expected to fill Form E, (Certificate) and give it to the Parties.

Counsel further argued that the Appellant's marriage certificate is grossly at variance with Form E in the first schedule of the Marriage Act. He said the Exhibit 1 relied on by the Appellant only shows that the Appellant and Respondent were joined in accordance with the laws of the Catholic Church. He maintained that the trial Court was right in its ruling. He referred us to the case of ***Nwangwa v. Ubani (1997) 10 NWLR PART 526*** on the difference between the Church marriage and celebration of marriage and under the Act. He urges this Court to affirm the decision of the lower Court.

The argument in respect of issue ii adopted by the Respondent for issue iii is that, it is not in all cases that a Respondent must file a counter affidavit especially when he intends to rely on points of law. He referred us to the case of ***Oduwole v. Famakiwa (1990) 4 NWLR PART 143 AT 239 PP 247 – 8*** where the Court of Appeal held that a counter affidavit will not be necessary to counter legal dispositions. He further referred us to the case of ***Odunsi v. UNMIC Ltd (1998) 2 NWLR PART 536 at 107*** to the same effect. Still on issue iii, the Respondent referred this Court to our own decision in the case of ***Christopher Ifeanyi Oputa v. Ifenyinwa Georgina Umunakwe, SUIT NO. FCT/CC/GK/CV/27/11, Appeal No. FCT/CVA/20/11*** to the effect that to ascertain the jurisdiction of a Customary Court, the Customary Court is bound to consider not only the claims before it but also the defence of the Defendant in order to determine what the real issue between the parties is and whether it has jurisdiction to entertain the suit. In other word, the Customary Court ought to consider the totality of the case of both the Plaintiff and the Defendant in order to form a balanced and objective opinion as whether or not it has jurisdiction to entertain the suit. See ***Erhunmwuse v. Ehanire (2003) FWLR PART 170*** in consonance with the above authority, he urged this Court to dismiss the appeal.

In reply brief, the Appellant submitted that the issue of jurisdiction can be raised at any stage of the proceedings. He referred us to the cases of ***State v. Onagoruwa (1992) 2 SCN 51; Adeyemi v. Opyiri (1976) 9 – 10 SC. 31; Ojofodomi v. Okonkwo (1982) ALL NLR 229.*** He argued that if facts in support of the challenge on jurisdiction are either pleaded or are apparent on the face of the document so far filed in Court, including Writ of Summons, as it is the Plaintiff's claim that determines the jurisdiction of the Court. He referred us further to the cases of ***Abdulkadir v. Musa (1999) NWLR PART 589 at 348 and Erhunmwuse v. Ehanire (2003) FWLR PART 170 Pg 1511 at 1522 Paras E-F.*** He submitted that the ERHUNMWUSE's case never lays down any general rule of procedure that jurisdiction of Customary Court shall never be challenged until evidence is led by the parties. He argued that a proper understanding of the case will be that where there are no pleading as it is usually the case with Customary Courts. He said ERHUNMWUSE's case is different from the present case because there are elaborate pleadings filed by the Respondent at the trial Court. He further argued that the other jurisdictional issue raised by the Appellant is premised on Section 14 of the Federal Capital Territory Customary Court Act, 2007 which import issues of Law and not facts and therefore does not require evidence of the parties to resolve.

The foregoing are the argument of both Counsel on the surviving issues which in my candid view is capable of resolving this appeal. I agree entirely with both Counsel that the issue of jurisdiction is very fundamental and must be determined by the Court. Jurisdiction is the authority which a Court has to decide matters which are litigated before it. The limits of this authority are limited by the constitution or by statute under which the Court is constituted and may be extended or restricted by similar means.

In the case of ***Madukolu v. Nkemdilim (1965) 1 ALL NLR Page 1,*** the Supreme Court has this to say:

> ***"A Court is competent when:***
>
> ***(a) It is properly constituted as regard numbers and qualification of members of the bench and no member is disqualified for one reason or another.***
> ***(b) The subject matter of a case is when its jurisdiction and there is no feature in the case which prevents the Court from exercising it jurisdiction.***
> ***(c) The case comes from the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."***

Any defect in competence is fatal or the proceedings are a nullity however well conducted and decided. See ***Nwaigwe v. Okere (2008) 13 NWLR (PART 1105) 476 – 477 Paras H – C.***

The thrust of this appeal is whether the trial Court was right in holding that it has jurisdiction to determine the Respondent's petition. It is clearly not in contention that it is the High Court of a State that has jurisdiction over matrimonial causes of marriages contracted under the Marriage Act. What is in contention is whether Customary Court, Garki was right in assuming jurisdiction over the petition filed by the Respondent. Put differently, whether the marriage between the parties is a Customary Marriage in view of Exhibit 1 presented to the trial Court.

Counsel to the Appellant has argued both at the trial Curt and before this Court in the main that the marriage between the parties in the instant case is not governed by Native Law and Custom since same was celebrated in Catholic Church which is a licensed place of worship. He relied on Exhibit 1 and Sections 6, 21 and 26 of the Marriage Act. In response to this contention, the Respondent's Counsel countered that for a marriage to qualify as marriage under the Act, it must be a marriage at the Registry or at a licensed place of worship. The Appellant has not shown any gazette to prove that the Catholic Church is licensed as required by the Marriage Act. He relied on Section 4 and 6 of the Marriage Act.

I have gone through the findings of the trial Court on this, I agree with the Court below that there was nothing before it to show that the Appellant complied with the Marriage Act requirements. I do not have any reason to alter the reasoning and conclusion of the trial Court in view of the clear lack of proof that the Catholic Church in which the parties celebrated the wedding is a licensed place of worship. I do not think and it is not provided anywhere that a certificate of marriage from any Church is a conclusive evidence of marriage under the Act.

The second leg of the issue of jurisdiction contended by the Appellant is that the Appellant did not submit to the jurisdiction of the Court below. He argued that the Appellant exercised the prerogative right conferred upon him to submit to jurisdiction by Section 14 of the Federal Capital Territory, Customary Court Act, 2007. This point was never raised before the trial Court. I agree that it can be raised before this Court for the first time, being an issue that bothers on the jurisdiction of the Court. See ***Obaseki v. Orukwo (2007) 17 NWLR (PART 1062) 138.***

Section 14 of the Federal Capital Territory, Customary Court Act, 2007 provides as follows:

"(i) A Customary Court shall have and exercise jurisdiction over all persons within the Territorial limits of the Federal Capital Territory, Abuja, who submit to the Jurisdiction of the Court.

(ii) A Customary Court shall have and exercise jurisdiction over causes and matters set out in the schedule to this Act".

Based on Section 14 above, the Appellant's Counsel is clearly saying that it is the Appellant's right to decide whether he wants the Court below to try the petition against him or not.

At a close look at the provision of the Act relied upon by Counsel to the Appellant, can it be said that the drafters intended that a party who is resident within the Federal Capital Territory, Abuja and sued before a Customary Court over a Customary cause or transaction is at will to submit or refuse to submit to the jurisdiction of the Court? By Section 6 (i) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), the judicial powers are vested in the Courts of the Federal Capital Territory, Abuja as provided for in the provisions herein before cited and Section 14 (1) and (2) of FCT Customary Court Act, 2007. It has jurisdiction over all persons who are resident within the Federal Capital Territory and over causes and matter designated in the schedule to the Act. A Court would normally and legally lack jurisdiction over matters and persons outside its jurisdiction. See ***Ibori v. Ogboru (2005) 5 NWLR PT 920 at 102.*** Where a Court has jurisdiction over a person, the subject matter, and over the territory, his non-submission to the Court will be unlawful. Non submission to Customary Court, FCT, Abuja becomes relevant when a party is not bound by Customary Law or is not within the Territorial limit of the Federal Capital Territory. In such a situation, the parties would have a hearing elsewhere otherwise there will be a breach of fundamental right of fair hearing guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria, 1999.

I do not agree with the Counsel to the Appellant that it is this Appellant's prerogative to submit or refuse to submit to jurisdiction of the trial Court. Parties who are non-natives and are residents within the Federal Capital Territory, the Customary Courts of the Federal Capital Territory are enjoined to administer the Customary Law binding between them and only subject to the repugnancy test and incompatibility provided in Section 16 (1) and (2) of the Federal Capital Territory, Customary Court Act, 2007. See specifically Section 17 (2) (i) to (iii) and (b). The Section provides as follows:

"(2) Subject to the provision of subsection 1 above of this Section:

(a) In civil causes or matters

(i) Both parties are not natives of the area of jurisdiction of the Court; or

(ii) The trans]action, the subject of the cause or matter was not entered into in the area of jurisdiction of the Court, or

(iii) One of the parties is not a native of the area of jurisdiction of the Court and the parties agreed or may be presumed to have agreed that their obligation shall be regulated wholly or partly by the Customary Law applicable to that parties, the appropriate Customary Law binding between the parties which appeared to have regulated the subject matter in dispute;

(b) In all other civil causes and matters, the appropriate Customary Law to be administered shall be the Customary Law prevailing in the area of jurisdiction of the Court".

From the terms of the above Section, non-indigenes or natives are adequately covered by the jurisdiction of Customary Courts of the FCT, Abuja.

I shall now deal with the applicability of the authority of ERHUNMWUSE's case (Supra). I agree with the Appellant Counsel's submission and the authorities cited that jurisdiction of a Court can be challenged at any stage of the proceedings even on appeal to the Supreme Court. I also agree that ERHUNMWUSE's case did not lay any general rule of procedure that Customary Courts jurisdiction cannot be challenged until after hearing the totality of evidence of both parties before it. Where there are clear and unambiguous grounds to challenge the jurisdiction of a Customary Court, ERHUNMWUSE's case becomes inapplicable. But where evidence is needed to ascertain the jurisdiction of the Court whose jurisdiction is in issues, the safest and reasonable procedure to adopt is to follow the authority of ERHUNMWUSE's case (Supra). In the instant case, the assertion by the Appellant's Counsel that the marriage is not governed by Customary Law hence the Customary Court, Garki does not have jurisdiction but the High Court is the assertion of the Appellant. This case is clearly different and distinguishable from the cases of ***Ejike v. Ifeadi*** and ***Siwoniku v. Odufuwa (Supra*)** which the Appellant referred to. In that case, the Plaintiff asserted that the trial Customary Court had jurisdiction. In this case, the Respondent is the one in position to

present the material that will divest the trial Court of jurisdiction. There is no where in these cases that the Court says the burden of establishing jurisdiction does not shift.

In conclusion, I am of the firm view that the Customary Court, Garki was not in error when it held that certificate of marriage without anything more does not suffice as prove of statutory marriage. The trial Court needed to have all the materials to ascertain whether or not it has jurisdiction.

Accordingly, the appeal lacks merit. All the reliefs sought by the Appellant are hereby refused. The trial Court shall proceed to hear the matter accordingly.

Hon. Justice A.M.A. Saddeeq, JCCA: The genesis leading to this interlocutory appeal have been vividly and succinctly captured by my brother, Gandu, JCCA, in his lead judgment which I had privilege of reading before now. The relevant issues have been exhaustively reviewed and related authorities considered reaching to the conclusion contained therein, with which I entirely agreed. I therefore also strike out grounds 2, 3 and 4 contained in the further amended Notice of Appeal for being incompetent, having not raised any question of customary law. The consequence of my conclusion leads to the striking out of any canvassed argument made in respect of those grounds. I adopt the Appellant's issue 3 which appears to cover grounds 1 and 5, being the only surviving germane issue for consideration in this appeal.

Being an issue questioning the jurisdiction of the Court below, in line with the pronouncement in ***Nwaigwe v. Okere (2008) 13 NWLR (Pt. 1105), 477****;* it is an issue of customary law within the context of Section 267 of the 1999 Constitution (as amended). This issue seemed to have predicated on (1) the contention that the marriage between the parties was a statutory marriage having been celebrated in a licensed place of worship in accordance with the Marriage Act, and (2) on the provision of Section 14 (1) of the FCT Customary Court Act, 2007. My contribution is to give a further in-depth consideration of the Appellant's grounds of contention.

Kenneth Nwocha Esq., of Learned Counsel to the Appellant, is opined that by reason of the provisions of the Marriage Act and the Matrimonial Causes Act, and the uncontested evidence below the Court below, the latter does not possess the jurisdiction to entertain the Respondent's petition before it. Sections 2 (1) of the Matrimonial Causes Act and 7 of the Marriage Act were referred to. According to Kenneth, the evidence before the Court below disclosed that the marriage between the parties was conducted under the Marriage Act; therefore, the Court below has no jurisdiction. He urged this Court to so hold.

Also, placing reliance on Section 14 (1) of the FCT Customary Court Act, 2007, the appellate argued that he never submitted to the jurisdiction of the Court below and this he did by filing and moving his preliminary objection. To further strengthen his submission on this leg, referring to page 1 of the Respondent's petition contained at page 9 of the appeal record, the Appellant said the Respondent even admitted therein that as a spinster, she was married to the Appellant "… *traditionally on the 27th day of October, 2001 at Ebu Oshimili North Local Government Area Council, Delta State…".* The Appellant therefore contended that neither of the parties is an indigene of the area of jurisdiction of the Court below, and having withheld his submission to the jurisdiction of the Court below as vested on him by operation of Section 14 (1), the said Court ought to have declined jurisdiction.

Citing ***Ejike v. Ifeadi (1990) 4 NWLR (Pt. 142) 89, 1010*** wherein the decision in ***Siwoniku v. Odufuna (1969) 1 ALL NLR, 216 at 220****,* was followed, the Appellant submitted that having raised the issue of jurisdiction of the Court below, the burden lies squarely upon the Respondent to establish that the Court had jurisdiction and this the Respondent had failed to discharge.

In reply to the Respondent's brief of argument, the Appellant submitted that he does not need to wait for the trial of the matter to commence before he can challenge the jurisdiction of the Court below. He also maintained that the decision in ***Erhunmwuse v. Ehanire (2003) 13 NWLR (Pt. 837), 377****;* is not applicable to the instant matter which relates to whether the issuance of "… *marriage certificate was evidence of statutory marriage as to divest the lower court of jurisdiction".* Learned Counsel hold the view also that the clear provision of Section 14 (1) does not require any oral evidence from the parties.

In his response, Achabo K. A. Esq.*,* on behalf of the Respondent placed reliance on the unreported decision of this Court in ***Christopher Ifeanyi Oputa v. Ifenyinwa Georgina Umunakwe*** **in** ***APPEAL NO. FCT/CCA/CVA/20/2011*** which relied on *ERHUNMWUSE's* case (supra), to urge this Court to decline consideration whether the Court below has jurisdiction or indeed the entire appeal (sic), for reason of there been no sufficient material before the said Court below upon which it could form a balanced opinion that the marriage between the parties was a statutory marriage.

I will first state here that Erhunmwuse's case and Oputa's case are distinguishable from the instant appeal which is predicated on the statutory provisions of the Marriage Act, Matrimonial Causes Act, FCT Customary Court Act and the documentary evidence exhibited to the preliminary objection before the Court below. That was not the situation in any of the two cases above. The objection at

the Court below was not grounded on facts alone which would have required evidence. All the Court below needed to consider to make a finding on the preliminary objection before it was the relevant statutory provisions referred to it by both parties and the documentary evidence so presented. There can be no better material which oral evidence would have provided in that circumstance than the documentary evidence exhibited. Neither did any situation arise to warrant the need to call in any oral evidence. I therefore agree with the Appellant's argument that the Court below in the instant matter was "… *not bound to hear the totality of the case"* of the parties herein in order to form a balanced opinion as to whether it has jurisdiction to entertain the petition or not. This is one of the reasons which should serve as an exception to the general principle of law enunciated in Erhunmwuse's case, which like any other principle of law, cannot be devoid of an exception. I therefore hold the opinion that the principle in the cited cases cannot be applied to the instant matter which must be considered according to its peculiar situation.

Coming to the Appellants' argument, can the Court below, given the materials placed before it, be faulted for reaching the conclusion that it had the jurisdiction to entertain the petition? Does the presentation of the certificate per se amount to a conclusive proof that the marriage between the Parties was a statutory marriage? It is trite law that to get the proper understanding of any provision it cannot be read in isolation of other relevant provisions of the statute. Therefore, section 32 of the Marriage Act cannot be read in isolation from other preceeding provisions of that Act. The provisions on the preliminary procedures to marriage which comes before section 32 must have been shown to have been complied with by the Parties. This, the Court below was quick to note in its ruling at page 60 of the appeal record, before it arrived to the conclusion that the marriage between the Parties does not qualify as a statutory Marriage. The Court below noted that "…*Beyond the ipse dixit of Counsel to the Applicant, there is nothing before the Court to show that the Parties filled the required statutory forms, obtained the Registrar's certificate or to show that the Church is a licensed place of worship within the intendment of section 6 of the marriage Act. Furthermore, the certificate of marriage issued in which the Applicant places reliance is completely at variance with the prescribed Form E in the Marriage Act."* In addition to these lapses, on the face of the exhibited marriage certificate, the marriage was said to be in accordance "… *to the laws of the Catholic Church",* which has not been shown to be the same as or to be part of the Marriage Act neither am I aware of the existence of any such law known as the Laws of the Catholic Church in our Statutes. The certificate did comply with the provisions of either Sections 26 or 28 having not been signed by the parties, their witnesses, the officiating Priest or the Registrar as mandatorily required. Neither was it shown to have been registered in accordance with the provision of Section

30 of the Marriage Act. I therefore do not have any reason to reverse the findings of fact of the Court below which I endorse.

The celebration of a Church marriage and a subsequent issuance of a certificate not done in accordance with the provisions of the Marriage Act has no statutory flavour. It merely gives divine blessing to the customary marriage "… *which for all intent and purpose remains a marriage under Customary Law. In order to convert a customary marriage into statutory marriage, the parties must consciously take the steps to adopt the procedure contained in the Marriage Act."*; see ***Nwangwa v. Ubani (1997) 10 NWLR (Pt. 526) 559*** (underlined for emphasis).

For the Customary Marriage between the parties to become a statutory marriage, the applicant should have shown that the relevant procedures contained from Sections 7 – 30 of the Marriage Act has been complied with before Section 32 becomes effective. This will necessitate the exhibition of some statutory documents referred to in some of the provisions mentioned above. In the absence of any evidence showing that the parties have complied with the statutory procedures of the Marriage Act, the certificate of marriage alone cannot be evidence that the marriage between the parties was a statutory marriage within the context of the Marriage Act which is capable of divesting the Court below of its jurisdiction, because the marriage still remains a customary marriage. I am therefore left with no option but to conclude on this point that the marriage certificate only serves to show that the customary marriage between the parties only received divine not statutory flavour. The burden of satisfying this Court that the marriage between the parties is a statutory marriage still rests upon the Appellant who alleges that. At this point, there is no burden on the Respondent to show that the Court below has jurisdiction until the Appellant has fully discharged the burden on him as earlier noted.

Before I lay rest this point, I am not unmindful of the provision of Section 33 (2) (c) of the Marriage Act, which stipulates that a marriage shall be null and void if the parties knowingly and willfully acquiesce in its celebration "… *without a registrar certificate of notice or license issued under Section 13 of this Act duly issued* …"; see ***Obiekwe v. Obiekwe (1963) 7 NLR, 196; and Ajih v. Ajih (1975) 6 ECS NLR***, which is of persuasive value being a decision of a Court of co-ordinate jurisdiction. Since the issue of the validity of the marriage under the Act is not in issue, it is not for this Court to make a finding of whether the marriage between the parties was null and void therefore I limit myself to my finding before now that it is not a statutory marriage as the Appellant urged the Court to find.

The other point on which the jurisdiction of the Court below was contested by the Appellant falls under the provision of Section 14 (1) of the FCT Customary Court Act, 2007, which is here below reproduced for ease of reference as follows:

"*14 (1) a Customary Court shall have and exercise jurisdiction over all persons within the territorial limits of the Federal Capital Territory, Abuja, who submit to the jurisdiction of the court".*

My simple understanding of the above provision is that the Court below is vested with the jurisdiction over every person residing within the Federal Capital Territory, Abuja who submits to its jurisdiction. By the act of his filling and arguing his preliminary objection to the jurisdiction of the Court below, the Appellant contended that he has not submitted to the Court's jurisdiction over him as contemplated by the above provision. Further to this contention, the Appellant maintained that since neither the marriage between them took place in the Federal Capital Territory, Abuja, nor either of them is an indigene of the Federal Capital Territory, Abuja, the Court below cannot exercise its jurisdiction over him or the subject matter.

Apart from the provision of Section14 (1) of the enabling statutes which is the Customary Court Act, 2007, the locus classicus on the issue of jurisdiction of a Court to entertain a matter before it is ***Madukolu v. Nkemdilim (1965) ALL NLR, 1***, wherein it was declared that "… *a Court is competent when (a) it is properly constituted as regards its members and qualification of the members of the bench and no member is disqualified for any reason or the other, (b) the subject matter of the case is within its jurisdiction and (c) the case comes before the Court initiated by due process of the law and upon fulfillment of any condition precedent to the exercise of jurisdiction."* Before now, I made a finding that the celebrated church marriage between the parties falls short of a statutory marriage, therefore it is obvious that the said marriage still remains a customary marriage, which vests jurisdiction on the Court below pursuant to the provision of item 1 of Part 1 of the Schedule to the Act and the locus classicus above irrespective of where the customary marriage took place.

For the avoidance of any erroneous understanding of the submission to jurisdiction as employed in Section 14 (1) of the Act, it is important to appreciate the classification of jurisdiction. To this end, I make bold to state that "… *there are broadly two types of jurisdictions and a distinction must be drawn between them, namely (a) jurisdiction as a matter of procedural law and (b) jurisdiction as a matter of substantive law. While a litigant may submit to a procedural jurisdiction, he or she cannot confer jurisdiction on a court where the constitution or statute of any provision of the common law says the Court does not have jurisdiction..."*see ***Ndayako v. Dantoro (2004) 13 NWLR (889) 187,***

Obiuweubi v. CBN (2011) LPELR-SC, 266/2006. From the foregoing, while a litigant has the option to submit to the procedural law jurisdiction which is often regulated by the Rules of Practice and Procedure of a Court, the litigants' submission to this type of jurisdiction cannot vest the Court with jurisdiction where the Court has no substantive law jurisdiction. Similarly, non submission per se to that category of jurisdiction cannot operate to divest the Court of its substantive law jurisdiction. It must be followed by convincing and compelling jurisdiction(s) before the Court below can be divested of its substantive law jurisdiction, albeit temporarily because the Court can still assume its jurisdiction upon the removal of the impediment in the procedural law jurisdiction.

To understand the provision of Section 14 (1) of the Act, it should be read with the entire provisions of the Act: see ***Abiodun v. C.J. Kwara State (2007) 18 NWLR (Pt. 1065) 109, Ika L.G.A. v. Mba (2007) 12 NWLR (Pt. 1049) 676***. The substantive law jurisdiction vested on the Customary Court under the provision of Section 14 (2) item 1 of part 1 of the schedule to the Act is not made to be subject to the provision of Section 14 (1) of the Act, which with due respect related to procedural law jurisdiction. Construing the provision of Section 14 (1) of the Act to imply submission to the Court's substantive law jurisdiction will mean that the other litigants' constitutional right to fair hearing would have been violated by that construction because he will be left with no avenue from where to seek redress in the absence of any other Court of first instance being vested with jurisdiction on Customary Law causes and matters. Similarly, the provision of Section 14 (1) of the Act would have been inconsistent with the provision of Section 36 (1) of the 1999 Constitution (as amended). This Court must not and cannot interpret the provision of Section 14 (1) of the Act in such a manner that it expropriates the existing right of the Respondent: see ***A.G. Federation v. Abubakar (2007) 10 NWLR (Pt. 1041) 1***. I therefore hold the view that submission to jurisdiction as used in Section 14 (1) of the Act meant submission to the "procedural law jurisdiction" of the Court as distinct from submission to "substantive law jurisdiction" on which the Appellant does not have any option open to him than to submit, provided the Court below is vested with the jurisdiction on the matter by the law. It is only the procedural law jurisdiction that a litigant has the option of either submitting to or not submitting to.

Considering the Appellant's argument from the perspective of not being an indigene of the Federal Capital Territory, or from the angle of the marriage having taken place in Delta State, I view this contention as introducing extraneous considerations into the provision of Section 14 (1) of the FCT Customary Court Act, 2007, which is clear and unambiguous, therefore ought to be construed and applied as it is: ***Onyeanusi v. Misc Offences Tribunal (2002) 12 NWLR (Pt. 781) 250***. There is

nowhere in the said provision where it is said or can be implied that the Customary Court can only have jurisdiction over persons who are indigenes of the FCT or it can only apply laws applicable to the indigenes of the FCT. The jurisdiction of the Court below is over persons within the territorial limits of the FCT, Abuja, provided the cause of action or matter falls within the confines of its statutory jurisdiction as spelt out in Section 14 (2), items 1, 2, 3 and 4 of the 1st Part of the Schedule to the Act. The argument of the Appellant fails because the parties in the instant manner are persons within the territorial limits of the FCT, Abuja, upon who the Court below can exercise its jurisdiction as contemplated under the provision of Section 14 (1) of the Act. Further to this understanding, the provisions of Section 17 (2) (a) (i) (ii) and (iii) of the Act vividly showed that the Customary Court in the FCT have jurisdiction over non indigene and the subject matter irrespective of where the cause or matter was entered into, provided it is on customary law.

For the aforementioned reasons and the detailed reasons contained in the lead judgment of my brother, I come to the inevitable conclusion that this appeal is unmeritorious, consequently, I hereby dismiss it. The ruling of the Court below is accordingly affirmed.

Hon. Justice M.G. Gwagwa, JCCA: I was privileged to read in draft the judgment just delivered by my lord, Gandu (JCCA). I agree with the reasoning and conclusion reached in the lead judgment and I have nothing to add.

Hon. Justice Usman N. Ahmed, JCCA: I have had the opportunity to read in advance the judgment of my learned brother, Gandu (JCCA) just delivered with which I entirely agree. For the same reason so eloquently and comprehensively set out in judgment which I respectively adopt as time.

The trial Customary Court needed to have all the materials of the case being a Court of summary trial where issues as to its jurisdiction are raised. Presently before the Customary Court, Garki, a copy of the marriage certificate without any gazette to prove the authenticity of the certificate of the exhibit before it. The appeal therefore lacks merit and I too find it unmeritorious and consequently dismiss it.

APPEAL DISMISSED