Case Title:

AONDOAKAA

v.

OBOT & ANOR

(2021) LPELR-56605(SC)

# AONDOAKAA v. OBOT & ANOR

(2021) LPELR-56605(SC)

In The Supreme Court

On Friday, December 10, 2021
SC.939/2015

Before Our Lordships

| | |
|---|---|
| Mary Ukaego Peter-Odili | Justice of the Supreme Court of Nigeria |
| Kudirat Motonmori Olatokunbo Kekere-Ekun | Justice of the Supreme Court of Nigeria |
| Mohammed Lawal Garba | Justice of the Supreme Court of Nigeria |
| Ibrahim Mohammed Musa Saulawa | Justice of the Supreme Court of Nigeria |
| Emmanuel Akomaye Agim | Justice of the Supreme Court of Nigeria |

Between

MICHAEL K. AONDOAKAA, SAN — APPELANT(S)

And

1. EMMANUEL BASSEY OBOT 2. ATTORNEY GENERAL OF THE FEDERATION & MINISTER OF JUSTICE — RESPONDENT(S)

# RATIO DECIDENDI

COURT – COURT OF APPEAL – **Whether all election appeals from both the State Assemblies and the National Assembly all end in the Court of Appeal**

"It is noteworthy that by Section 246(2) of the 1999 Constitution, as amended, the decisions of the Court of Appeal in respect of Appeals arising from National and State Houses of Assembly elections are final."

PRACTICE AND PROCEDURE – SERVICE OF COURT PROCESS(ES) – **Importance of service of originating process and effect of failure to serve same**

"It is well settled beyond any equivocation, that the service of an originating process on a named party, who ought to be served, is an indispensable aspect of any adjudication. It goes to the root of the Court's competence and jurisdiction to entertain the suit. Service of an originating process accords with the guarantee of the right to fair hearing as provided for in Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended. It notifies the party of the institution of an action against him and affords him the opportunity, if he so desires, to defend the claim. Failure to serve an originating process renders the entire proceedings a nullity, See: Kida vs Ogunmola (2006) 13 NWLR (Pt. 997) 377, Obimonure vs Erinosho (1966) 1 ALL NLR 250; Skenconsult vs Ukey (1981) 1 SC 6 @ 26; Mgbenwelu vs Olumba (2016) LPELR-42811 (SC) @ 36-37 E -D."

EVIDENCE – ADMINISTRATION OF OATHS – **Implication or legal effect of an oath**

"The implication or legal effect of an oath is to subject the person who took the oath to penalties for perjury in the event that the averments or testimony turn out to be false. See: Akpatason Vs Adjoto & Ors. (2011) LPELR-48119 (SC) @ 15 D-E; Chukwuma vs Nwoye & Ors. (2009) LPELR-4997 (CA); Action Congress & Anor. vs INEC (2007) LPELR-66 (SC) @ 88 A-C."

EVIDENCE – AFFIDAVIT EVIDENCE – **Content of an affidavit; effect when the affidavit is unchallenged**

"An affidavit consists of averments deposed to under a solemn oath. In the absence of any challenge to averments therein, the Court is bound to accept them as true."

CONSTITUTIONAL LAW – BREACH OF RIGHT TO FAIR HEARING – **Instance where it cannot be said that a right to fair hearing has been breached**

"Learned counsel for the 1st respondent referred to Order 9 Rule 36(1) and (2) of the Federal High Court (Civil Procedure) Rules, 2009, which provides as follows: "Rule 36(1) Where a legal practitioner who has acted for a party in a cause or matter ceases to act and the party has not given notice of change in accordance with Sub-rule 1 of Rule 35 of this Order, the legal practitioner may apply to the Court for an order declaring that the legal representative has ceased to be the one acting for party in the cause or matter and the Court may make an order accordingly. (2) An order under Sub-rule 1 of this rule shall not be made until the legal practitioner serves on every party to the cause or matter a copy of the notice otherwise he shall be considered the legal practitioner of the party for the remaining duration of the cause or matter." (Emphasis mine) Learned counsel also referred to the case of Magna Maritime Ltd. vs Oteju (2005) NSC QR (Pt.1) 295 @ 317 H, where this Court held: "A Court of law can indulge a party only within the confines of its rules. In other words, a Court of law can indulge a party in so far as its rules permit. Where Rules of Court in line with the fair hearing principles order a specific conduct on the part of the parties, the Court has a duty to enforce the rules. In such a situation, a defence of fair hearing is not available to the aggrieved party because the rule itself has complied with fair hearing." The authority is quite apposite to the facts at hand. Having filed a Memorandum of Appearance on behalf of both defendants, Mrs. Nene Akpan was the counsel on record for both parties. On 31/3/2010, when she orally informed the Court of her intention to withdraw appearance for the 2nd defendant, she was ordered to comply with the rules of Court and put the parties, including the 2nd defendant, on notice by filing a formal application. She failed and/or neglected to do so. By virtue of Order 9 Rule 36(2) of the Federal High Court Rules reproduced above, she remained the counsel on record for both parties. From the various proceedings leading up to the delivery of the judgment, it was evident that Mrs. Akpan was fully aware of the various dates to which the case was severally adjourned. The appellant's contention of non-service of hearing notices therefore has no leg to stand on. The allegation that there was a breach of the appellant's right to fair hearing is unfounded in my humble view. The appellant was duly represented by counsel, submitted to the jurisdiction of the Court, but failed to avail himself of the opportunity of being heard. He is deemed to have waived any alleged

irregularity in the service of the originating processes on him. See: Zakarai vs Muhammad (2017) 17 NWLR (Pt.1590) 181 @ 230-231 H-E; N.B.C. vs Ubani (2014) NWLR (Pt1421) @ 449 A-E. It is too late in the day to complain. See: Job Charles Nig. Ltd. Vs Okonkwo (2002) FWLR (Pt.117) 1007."

COURT - JURISDICTION - **What confers jurisdiction on a Court**

"It is necessary to note at the outset that Courts of law are creations of statute and their jurisdiction is prescribed and/or circumscribed by the Constitution or the statute that created them, See: Obiuweubi Vs C.B.N. (2011) 7 NWLR (Pt.1247) 465; Onuorah vs K.R.P.C. (2005) 6 NWLR (Pt. 921) 393; Skye Bank Plc vs Iwu (2017) 16 NWLR (Pt.1590) 24; (2017) LPELR- 42595 (SC) @ 163-164 G - A."

JURISDICTION - JURISDICTION OF THE FEDERAL HIGH COURT - **Exclusive jurisdiction of the Federal High Court in matters pertaining to the Federal Government or any of its agencies**

"Section 251(1) (r) of the Constitution of the Federal Republic of Nigeria, 1999 as amended, provides: "251(1) Notwithstanding anything to the contrary, contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil cases and matters - (r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action by the Federal Government or any of its agencies."

COURT - JURISDICTION - **What determines jurisdiction of Court to entertain a cause/matter**

"In order to determine whether a cause of action falls within the jurisdiction of a Court as provided for in the Constitution or the statute that created it, regard will be had to the originating processes only. Where the action is commenced by a Writ of Summons, the processes to be examined are the Writ of Summons and Statement of Claim. Where the action is commenced by Originating Summons, it is only the Originating Summons and the affidavit in support that would be considered. See: Adeyemi Vs Opeyori (1976) 9-10 SC (Reprint) 18, A.G. Federation Vs Guardian Newspapers Ltd. & Ors. (1999) 9 NWLR (Pt. 618) 187; A.G. Anambra State vs A.G. Federation (2007) 12 NWLR (Pt. 1047) 1."

TRIBUNAL - CODE OF CONDUCT TRIBUNAL - **Whether the Code of Conduct Tribunal has jurisdiction over matters involving injury to an individual in a civil case**

"It is the appellant's contention that the suit ought to have been instituted vide a petition before the Code of Conduct Tribunal. The reliefs sought in the instant suit are purely civil. It was held in Saraki Vs F.R.N (2016) 3 NWLR (Pt. 1500) 531 @ 579 E-H & 581 F-G, that proceedings before the Code of Conduct Tribunal are quasi-criminal. Its proceedings are guided by the Criminal Procedure Code or Criminal Procedure Act (now the Administration of Criminal Justice Act, 2015). See paragraph 17 of the Third Schedule to the Code of Conduct Bureau and Tribunal Act. A careful perusal of the Code of Conduct Tribunal Rules of procedure confirms the fact that the proceedings thereof are conducted in the style and manner of a criminal prosecution with a prosecutor, an accused, taking of plea, etc. I am of the considered opinion that the suit was properly commenced before the Federal High Court to assuage an injury done to a private citizen as a result of the administrative actions of the defendants. I am in complete agreement with the learned Justices of the Court below that the quasi-criminal jurisdiction of the Code of Conduct Bureau does not extend to matters involving injury to an individual in a civil case."

ACTION - CAUSE(S) OF ACTION - **What the Court considers in determining whether or not a suit discloses a cause of action**

"As to the issue whether or not the Originating Summons disclosed a cause of action against the defendants, it is necessary to reiterate that it is the originating processes filed by the plaintiff that determine whether a cause of action is disclosed or not."

ACTION - ORIGINATING SUMMON(S) - **Whether originating summons should be heard on affidavit evidence**

"A trial conducted on the basis of an Originating Summons is by affidavit evidence."

EVIDENCE – AFFIDAVIT EVIDENCE – **Effect of unchallenged facts in an affidavit; whether such unchallenged facts must be cogent and strong enough to sustain the case of an applicant**

"Averments in an affidavit, not challenged, are deemed admitted and the Court is entitled to act on them. See Owuru vs Adigwu & Anor. (2018) 1 NWLR (Pt.1599) 1; (2017), LPELR-42763 (SC.) @ 28-29 D-C, Inakoju vs Adeleke (2007) 4 NWLR (Pt.1025) 427 @ 684-685 H-B, Ogoejeofo vs Ogoejeofo (2006) 3 NWLR (Pt. 966) 205. It is also trite that such uncontradicted evidence must be cogent and strong enough to sustain the applicant's claim. See: Ogoejeofo vs Ogoejeofo (supra)."

EVIDENCE – AFFIDAVIT EVIDENCE – **Whether documents attached to an affidavit form part of the affidavit**

"In a matter fought on affidavit evidence, the documentary evidence relied upon is attached to the affidavit and therefore forms part of the evidence adduced in the case before the Court. The distinction between averment of facts in pleadings and averment of facts contained in an affidavit was explained by this Court in Magnusson vs Koiki (1993) 12 SCNJ 114; (1993) 9 NWLR (Pt.317) 287 @ 303 C, as follows: "Averments of facts in pleadings must be distinguished from facts deposed to in an affidavit in support of an application before a Court. Whereas the former, unless admitted constitutes no evidence, the latter are by law, evidence upon which a Court of law may, in appropriate cases, act." The holding of Mbaba, JCA in Ilorin East Local Government vs Alasinrin & Anor (2012) LPELR 8400 (CA) referred to and relied on in the case of: B.A.T (Nig) Ltd Vs International Tobacco Co. Plc (2013) 2 NWLR (Pt. 1339) 493 @ 520-521 D-A, following the reasoning in Magnusson Vs Koiki (supra), is quite instructive. His Lordship held, inter alia: "I have already held that a document attached to or exhibited with affidavit forms part of the evidence adduced by the deponent and is deemed to be properly before the Court to be used, once the Court is satisfied that it is credible. Being already an evidence before the Court (on oath), the formality of certification for admissibility (if it required certification) had been dispensed with ... The reason for this is easy to deduce, the first being that affidavit evidence is already admitted evidence before the Court unlike pleading, which must be converted to evidence at the trial, at which time issues of admissibility of an exhibit is decided. The second point is that an exhibited copy of a document attached to an affidavit evidence must necessarily be a photocopy or secondary copy (except where the document was executed in several parts or counterparts and the deponent has many of the parts to exhibit in original forms)."

EVIDENCE – DOCUMENTARY EVIDENCE – **When to raise an objection to the admissibility of a document attached to an affidavit**

"...In effect, any objection to any of the documents attached to the supporting affidavit could only be raised at the hearing of the suit, see: C.R.P.D. & Investment Co. Ltd. vs Obongha (2008) 8 NWLR (Pt. 670) 751 @ 765 G; Adejumo Vs Gov. of Lagos State (1970) ALL NLR 187 @ 191."

JUDGMENT AND ORDER – CONSEQUENTIAL ORDER – **Whether courts have the power to grant a relief not specifically asked for as a consequential order**

"The aspects of the orders complained of are in the nature of consequential orders naturally flowing from the declarations made and are intended to give effect to the judgment. See: the recent decision of this Court in U.O.O, Nigeria Plc Vs Mr. Maribe Okafor & Ors, (2020) LPELR-49570 (SC) @ 45-46 F-C, per Mary Peter-Odili, JSC, where His Lordship held thus: "In respect of the arguments of the appellant that the trial Court and affirmed by the Court below erroneously awarded claims not part of the reliefs sought ... That concern would not fly in the light of the evidence before the Court upon which the trial Court made the orders which clearly were consequential and the Court was acting in due exercise of its powers. There are consequential orders which are incidental to the decision of the Court and which followed necessarily, naturally directly and consequently from the judgment and not extraneous nor could be classified as strange and did not need to have been claimed earlier to be given or granted." (Underlining mine)."

COURT – DUTY OF COURT – **Duty of Court to do justice**

"In Amaechi Vs INEC (supra) per Oguntade, JSC, this Court held inter alia, "This Court and indeed all Courts in Nigeria have a duty which flows from a power granted by the Constitution of Nigeria to ensure that citizens of Nigeria, high and low, get the justice which their case deserves ... The Judiciary, like all citizens of this country, cannot be a passive onlooker when any person attempts to subvert the administration of justice and will not hesitate to use the power available to it to do justice in the case before it." See also: Ezeonwu Vs Onyechi (1996) 3 NWLR (Pt. 438) 499; (1996) LPELR-1212 (SC) @ 24-25 D B; Eze & Ors. Vs Governor Abia State and Ors. (2014) 14 NWLR (Pt.1426) 192; (2014) LPELR-23276 (SC) @ 30 B-E."

CONSTITUTIONAL LAW – OFFICE OF THE ATTORNEY GENERAL – **Whether the Attorney General of the Federation can advise on non-compliance with the decisions of Courts**

"Section 150(1) of the Constitution provides: "There shall be an Attorney General of the Federation who shall be the Chief Law Officer and a Minister of the Government of the Federation." By virtue of Section 149 of the Constitution: "A minister of the Government of the Federation shall not enter upon the duties of his office, until and unless he has declared his assets and liabilities as prescribed in this Constitution and has subsequently taken and subscribed to the Oath of Allegiance and the Oath of the due execution of the duties of his office prescribed in the Seventh Schedule to this Constitution." The Oath of office prescribed in the Seventh Schedule states, inter alia: "That I will, to the best of my ability, preserve, protect and defend the Constitution of the Federal Republic of Nigeria; that I will abide by the Code of Conduct contained in the Fifth Schedule to the Constitution of the Federal Republic of Nigeria; that in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill will..." Section 287(2) of the Constitution provides: "287(2) The decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities and persons and by Courts with subordinate jurisdiction to the Court of Appeal." The undisputed facts in this case are that by two letters dated 8th January 2008 and 16th February 2009, the appellant categorically advised non-compliance with decisions of the Court of Appeal, which decisions by virtue of Section 246(3) of the 1999 Constitution, as amended, which he swore to uphold, are final decisions. There could be no further appeal on the matters decided to finality by the Court of Appeal. The President of the Court of Appeal, the Speaker of the House of Representatives and the Chairman of INEC, all had a bounden duty, as prescribed by Section 287(2) of the Constitution, to obey and give effect to the judgment of the Court of Appeal. It was indeed highly reprehensible for the Chief Law Officer of the Federation to counsel disobedience to any judgment at all, talk less of a judgment from which there is no further right of appeal. I am in complete agreement with the learned trial Judge, as affirmed by the Court below, that having regard to the conduct of the appellant while occupying the sacred office of Chief Law Officer of the Federation, he ought not to be entrusted with any other public office at all."

COURT – DUTY OF COURT – **Duty of Court to do justice**

"As held in Amaechi Vs INEC (supra) the Court has a duty to use its powers to do justice in the case where an attempt to subvert the administration of justice has occurred."

LEGAL PRACTITIONER – CONDUCT OF COUNSEL – **Duty of counsel not to conduct himself in a manner that may obstruct delay or adversely affect the administration of justice**

"Rule 30 thereof provides: "A lawyer is an officer of the Court and accordingly, he shall not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice."

CASE LAW – OBITER DICTUM – **Meaning and import of an obiter dictum**

"...The comments reproduced above do not form part of the ratio of the decision appealed against but are comments made in passing by His Lordship to express his dismay and disappointment at the state of affairs. Such comments passing are otherwise known as obiter dictum See: Babarinde & Ors. vs The State (2014) 3 NWLR (Pt.1395) 568; Oshodi vs Eyifunmi (2000) 7 SC (Pt.II,) 145; Omisore vs Aregbesola & ors. (2015) NWLR (Pt.1482) 205. While agreeing with the sentiments expressed by His Lordship, I agree with the Hon. Justices of the Court below that the portions of the judgment complained of are mere obiter dicta and cannot be the basis for a reversal of the decision."

DAMAGES – EXEMPLARY DAMAGES – **Guiding principles for award of exemplary damages; instance(s) in which it will be awarded**

"The decision of this Court in Nursing and Midwifery Council of Nigeria Vs Patrick Ogu & Anor (2019) LPELR-53899 (SC) @ 15-17 F-A is quite germane to the resolution of this issue. The Court per Mary Peter-Odili, JSC held thus: "This Court has laid down the guiding principles guiding the award of exemplary damages in the case of CBN vs Okojie (2015) 14 NWLR (Pt.1479) 231; (2015) LPELR-24740 (SC) thus: 'Exemplary damages are awarded with the object of punishing the defendant for his conduct in inflicting injury on the plaintiff. They can be made in addition to normal compensatory damages and should be made only: (a) In a case of oppressive arbitrary or unconstitutional acts by government servants; (b) where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff and (c) where expressly authorised by statute." The Supreme Court went on at page 263 of the case of C.B.N Vs Okojie (supra) as follows: "for example damages to be awarded it need not be specifically

claimed, but facts to justify it must be pleaded and proved. Thus, once the facts in the pleadings support the award of exemplary damages, the Court should award it since the adverse party is in no way taken by surprise." (Emphasis mine). ?There is no doubt that the pleadings in this case support the award of exemplary damages against the defendants, having established unconstitutional acts committed by the writing of letters to the President of the Court of Appeal, The Speaker of the House of Representatives and the Chairman of INEC, advising them to disregard orders made by the Court of Appeal, in flagrant breach of Section 287(2) of the Constitution which the appellant swore to uphold, which provides that the decisions of the Court of Appeal shall be enforced in any part of the Federation and by all authorities and persons and by Courts with subordinate jurisdiction to the Court of Appeal and Section 246(3) thereof, which provides that the decision of the Court of Appeal in the election matter in issue, is final."

PRACTICE AND PROCEDURE - SERVICE OF COURT PROCESS(ES) - **Instance where a party will be deemed to have waived his right to challenge an irregularity or invalidity in the service of process on him**

"On the issue of non-service of process, it has to be restated that though service of process is fundamental to the jurisdiction of the Court, the absence of it or an improper service can be waived by the defendant who voluntarily, submits to the jurisdiction of the Court and takes part in the proceedings up to judgment. Such a defendant loses the right to be heard on a later objection on the basis of service of process on him. That is the situation on hand in this instance where the appellant did not raise any issue of service at the earliest opportunity and appeared in Court through counsel and conducted the case up to judgment, only to bring up the matter of non-service at the appeal stage. The legal necessity of service of Court process is to put the other side on notice of the existence of the suit or particular process and not being technical rule of practice cannot be weaponised for technical mischief to frustrate the course of justice. See Ogbuanyinya v Okudo (1990) 4 NWLR (pt. 146) 551 at 576; Ezomo v Oyakhire (1985) 2SC 269; (1985) 1 NWLR (pt.2) 195; Job Charles Nig. Ltd v Okonkwo (2002) FWLR (pt. 117) 1007; N.U.B. Ltd. v Samba Pet Co. Ltd; Odua Inv. Co, Ltd. v Talabi (1991) 1 NWLR (pt.170) 761 at 779. The law cannot be stretched to such a degree of elasticity upon which it can be founded that since at the material time, the appellant occupying the office of the Attorney-General of the Federation and Minister of Justice should have been served separately thereafter him as Attorney-General had been served to confer a valid service on him. Therefore, in this case at hand, once he had as Attorney-General been served with the process, the appellant had notice of the process, hence if he had any objection as to that mode of service he ought to have so raised it in protest immediately and not wait after he had participated in the proceedings to use that peculiar service to invalidate the suit. The situation has been streamlined by the Record of Proceedings which shows that appellant as the 1st defendant and the Attorney-General, of which he was as 2nd defendant were represented by the same counsel in the Federal Ministry of Justice. Also of note is that subsequently when appellant ceased to be Attorney General, the same counsel represented him and the Attorney-General. It follows that being seised with the change if he did not desire that same counsel representing him, he was in a position to do something but he did not change the position of things hence, the counsel remained for him and the 2nd defendant till the end. He cannot thereafter orally change the narrative borne out of the record of appeal which is the compass or guide of the appellate Court which that Court cannot operate outside of, as it binds all parties. See Sapo v Sunmonu (2010) 42 NSCQR 910 at 927; Audu v FRN (2013). 5 NWLR (Pt.1348) 397 at 408; Ibikunle v State (2007) 2 NWLR (pt. 1019) 546 at 572; Agwarangbo v Nakande (2000) 9 NWLR (pt. 672) 341 at 360; Abatan v Awudu (2004) 17 NWLR (pt. 902) 430. From the record, it is clear that appellant was duly served with the originating processes in this case and even if there was some lapse in the propriety of the service, appellant lost the right to complain having entered appearance and submitted to the jurisdiction of the Court. I rely on Umeanadu v A.G. Anambra State (2008) 3-4 SC 1-31. My learned brother, Amina Augie, JSC captured what is playing out at this point in the case of HUSSAINI ISA ZAKIRAI V SALISU DAN AZUMI MUHAMMAD (2017) 17 NWLR (PT. 1594) 181 at 230-231 paras H-E, Augie JSC emphatically held, "Any defect amounted to a mere irregularity that can be waived by the parties. Was the said irregularity in this case waived? This Court nailed this issue to the ground in Adegoke Motors Ltd Adesanya (Supra), wherein it stated categorically that in similar circumstances like this, the filing of a memorandum of appearance, as was done in this case, constitutes a waiver of any irregularity, and constitutes a submission to the jurisdiction of the Court. In that case, Oputa JSC, observed at p. 271, paras F-H. A writ of summons (valid or invalid is immaterial at this stage) was served on the defendants. The defendants could, if they wanted to either:- i. Enter an appearance on protest; or ii. Enter a conditional appearance; iii. To file a motion asking the Court seised of the matter - to set aside the purported writ and the purported service on the ground of essential invalidity of both writ and service. The defendants did not do this. Rather they entered an appearance through their solicitors ... this implies that they wanted and intended to contest the case of all the plaintiffs. In this case, the appellant entered a conditional appearance and also filed a counter-affidavit, which means he waived the irregularity that he complained of, and had submitted to the jurisdiction of the Court." See also NBC v. Ubani (2014) NWLR (Pt. 1398) 421 at 459-461 The appellant had insisted that he was not served with the originating summons and turns around to argue about the non-service of hearing notice of the proceedings. That translates to a tacit admission that appellant was served with the originating summons and an admission that he entered appearance and participated in the proceedings. Again to be said is that a party either as plaintiff or defendant who is aware of a pending suit concerning him or her has a duty to check the Registry of Court if nothing has been heard after a reasonable lapse of time for the current status of the case. This is so because a person with a case in Court in whatever capacity cannot afford the luxury of defiant complacency and expect miracles will take place to protect his interest at stake in litigation. In this instance the appellant was represented for 13 months in the trial Court and the legal practitioner did

not formally and properly withdraw the appearance thereof, the appellant clearly did not take seriously the matter as weighty as the one under discourse to personally follow up the developments. Clearly he waived his right and opportunity to complain, See NACB Lt v Ozoemelam (2016) 9 NWLR (pt. 15 17) 376 at 407-408 per Ngwuta JSC; Saude v Abdullahi (1989) 4 NWLR (pt. 116) 389 at 405; NBC PLC v Ubani (2014) 4 NWLR (pt. 1398) 421 at 449."

CONSTITUTIONAL LAW – RIGHT TO FAIR HEARING – **What can influence and determine the application or inapplicability of the principle of fair hearing**

"It is to be noted that the principle of fair hearing is not a magic wand to cure all inadequacies at the trial Court nor can it be applied in the abstract at the comfort and convenience of a party. It is a principle founded and has to be based on the facts of a given case before the Courts, hence only the facts of the case can influence and determine the application or applicability of the principle, from the reliefs sought in the suit. See Governor of Ekiti State v Olubunmo (2017) 3 NWLR (pt. 1551) 1 at 39-40, 42 & 48."

EVIDENCE – PUBLIC DOCUMENT – **Position of the law on public documents attached to an affidavit**

"The appellant had taken exception to the admissibility of Exhibits B, C, D since they were photocopies of public documents. The point has to be made that, copies of public documents attached to an affidavit as exhibits need not be certified, true copies because the documents already form part of the evidence adduced, by the deponent before the Court and are available to the Court to use once it is satisfied that they are credible. Again to be said is that such documents need not be certified true copies where the contents of the documents are not in dispute as in this case because the appellant did not disown his signature on the document he is contending ought to have been certified. I refer to Onobruchere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373; Araka v. Egbue (2003) 17 NWLR (Pt. 848) 1; Ogu v. M.T. & M.C.S. Ltd (2011) 8 NWLR Ltd (2011) 8 NWLR (Pt. 1249) 345; Ojuya v. Nzeogwu (1996) 1 NWLR (Pt. 427) 713; Ilorin East L.G. v. Alasinrin (2012) LPELR 8400; B.A.T. (Nig.) Ltd. V. Int'l Tobacco Co. Plc. (2013) 2 NWLR (Pt. 1339) 493. It is of note that the appellant never denied authoring those documents. It would have been a different thing if the appellant had denied that he did not write and sign the said Exhibits. In any event, the appellant quarreled seriously with the trial Court admission of Exhibits B, C and D and opined that since the documents were not certified, they ought not be admitted. It is the law that any documents attached to an affidavit need not be certified. See B.A.T. (NIG.) LTD. V. INT'L TOBACCO CO. PLC. (2013) 2 NWLR (PT. 1339) P. 496 at 520-523 PARAS A-E. "...certificate of registration of Dorchester trade mark, certificate of assignment of the trade mark and certificate of renewal of the trade mark, respectively at the state. For the purpose of the application, Exhibits W01, W02 and W03 must certainly true copies, since the applicant was expected to photocopy the originals of those documents given to them by the issuing registry, as exhibited copies for this application. One cannot expect the applicant to have taken the documents (photocopies) to the issuing registry for certification before using the same for this application. Only recently, we had cause to explain, in a well-considered judgment, that public documents, exhibited as secondary copies in affidavit evidence cannot, necessarily, be certified true copies, and that documents exhibited to an affidavit evidence which a Court is entitled to look at, and use. See the unreported decision of this Court in the case of Ilorin East L.G. v. Alh. Woli Alasinrin & Anor - CA/IL/38/2011, delivered on 20/2/2011 wherein we state thus:- "I do not think the issue of certification of a secondary evidence (photocopy) as in exhibit C, can rise in this case, being one sought on affidavit evidence and the respondents not claiming to have obtained it from the appellant, lawfully..."

EVIDENCE – ADMISSIBILITY OF EVIDENCE – **Whether admissibility of evidence is governed by relevance**

"I agree with learned counsel for the respondents that relevance is key to admissibility as it is settled law that it is relevance of a document and not the weight to be attached to it that is paramount. Admissibility is not the same thing as the probative value that may be placed on the document or exhibit. Relevance and admissibility of a document are separate matters in contradistinction to the weight to be attached to it. Therefore, in the consideration of the admissibility of any evidence, oral or documentary, the test remains that once it is relevant, it is admissible and the Court is not bothered with how it was obtained or the proper custody of the evidence. The position of the law which I have been trying to articulate is well set out in the judgment of this Court in Abubakar v. Chuks (2007) LPELR-52 (SC) at 13, paras. C- G, (2007) 18 NWLR (Pt. 1066) 386 at page 403 Tobi, JSC articulated the law and the basis for it as follows:- "Relevancy and weight are in quite distinct compartments in our law of evidence. They convey two separate meanings in our adjectival law and not in any form of dovetail. In the order of human action or activity, in the area of the law of evidence, relevancy comes before weight. Relevancy, which propel admissibility, is invoked by the trial Judge immediately the document is tendered. At that stage, the Judge applies Sections 6, 7, 8 and other relevant provisions of the Evidence Act to determine the relevance or otherwise of the document tendered. If the document is irrelevant, it is rejected with little or no ado. Weight comes in after the document has been admitted. This is the stage of writing the judgment or ruling as the case may be."

EVIDENCE – AFFIDAVIT EVIDENCE – **Effect of uncontroverted facts in an affidavit**

"It is of interest that the facts deposed to in the supporting affidavit were not controverted and so are taken as true and deemed admitted with the Court bound to act on them. The documents were further evidence of those facts already deposed and unchallenged and so cannot be disturbed at this stage on admissibility. See Alagbe v Abimbola (1978) 2 SC 39; Egbuna v. Egbuna (1989) 2 NWLR (Pt. 106) 773; Yar'Adua v. Yandoma (2015) All FWLR (pt.770) 1215 at 1259; Long John v. Blakk (1998) 6 NWLR (pt. 555) 524 at 532; Ogoejeofo v Ogoejeofo (2006) 3 NWLR (pt. 966) 205; Owners MV Gongola Hope v. SC (Nig) Ltd (2007) 15 NWLR (pt. 1059) 189 at 215 - 216."

COURT – COURT OF APPEAL – **Whether all election appeals from both the State Assemblies and the National Assembly all end in the Court of Appeal**

"By virtue of S. 246(2) and (3) of the 1999 Constitution, the Court of Appeal is the final Court of Appeal on post-election litigations concerning National and House of Assembly elections. No authority or person, not even the Supreme Court of Nigeria can review the decision of the Court of Appeal on such post-election matters concerning National and House of Assembly elections."

PUBLIC OFFICER – PUBLIC OFFICE – **Whether the holder of a public office will be personally liable where he commits an unlawful act**

"The holder of a public office who with malice aforethought uses the public office held by him to commit an unlawful act for the purpose of depriving a person of his lawful right or interest so as to secure an advantage or benefit for himself or another should be personally liable for the deprivation of a person's lawful right or any injury the person suffers on account of such deprivation. The use of a public office to commit the unlawful act in pursuit of a private or personal interest will not qualify the act as an official one so as to make the public office or authority vicariously liable for such unlawful act."

## JUDGEMENT SUMMARY

### INTRODUCTION:

This appeal borders on conduct of public officers.

### FACTS:

This appeal is against the judgment of the Court of Appeal Calabar Division.

The Peoples Democratic Party (PDP) held primary elections, in December 2006, to determine its candidate for the Uyo Federal Constituency of Akwa Ibom State in the general election fixed for April 2007. The 1st Respondent emerged winner and was duly presented to the Independent National Electoral Commission (INEC) as the party's candidate. A dispute however arose when the 1st respondent's name was substituted with the name of another candidate and a suit was instituted.

The Court of Appeal, Calabar Division in Appeal No. CA/C/45/2007, delivered judgment in favour of the 1st Respondent and ordered the President of the Court of Appeal to set up a new Tribunal to try the 1st Respondent's petition in Uyo. The Appellant at the time was the Attorney General of the Federation and Commissioner for Justice (AGF). It was the 1st Respondent's contention that in his capacity as AGF, the Appellant wrote to the President of the Court of Appeal (PCA), urging His Lordship not to comply with the judgment ordering the constitution of a new panel in view of a petition he had received from the person who had been substituted for the 1st Respondent. The PCA however went ahead and complied with the order of the Court.

The new panel ordered that the 1st Respondent be sworn into the House of Representatives as the member representing Uyo Federal Constituency. An appeal was filed to the Court of Appeal which was however unsuccessful. The appeal was dismissed with an order that INEC should issue a Certificate of Return to the 1st Respondent. The Appellant again wrote to the Chairman of INEC, and the Speaker of the House of Representatives urging and advising them not to obey the judgment of the Court of Appeal. Consequent upon the letters written to the Chairman of INEC and the Speaker of the House of Representatives, the 1st Respondent was neither issued with his Certificate of Return nor sworn into office. He therefore instituted an action at the Federal High Court vide an originating summons, against the Appellant and 2nd Respondent. The Appellant was sued in his capacity as Attorney General of the Federation as 1st Defendant and in his personal capacity as 2nd Defendant.

The learned trial Judge entered judgment in favour of the 1st Respondent and made the declarations and orders sought in his favour. The appellant was dissatisfied with the decision and filed an appeal at the Court of Appeal. However, the Court of Appeal affirmed the judgment of the Federal High Court. The Appellant, still dissatisfied, further appealed to the Supreme Court.

## ISSUES:

The Supreme Court determined the appeal on the following issues:

"(1) Whether the learned Justices of the Court of Appeal were right to hold that the Appellant was granted fair hearing and thereby affirming the judgment of the trial Court, when the entire proceedings of the trial Court was tainted and vitiated by the non-service of the Originating Summons and subsequent hearing notices on the Appellant.

(2) Whether the learned Justices of the Court of Appeal were right to affirm the trial Court's order granting reliefs not claimed by the Plaintiff/1st Respondent against the Appellant.

(3) Whether the Court below was right to hold that the trial Court had jurisdiction to entertain the suit, the subject matter of which was the alleged breach by the Appellant of his Oath of Allegiance and Oath of Office, and the outcome of which had been overtaken by events.

(4) Whether Exhibit B, C, D being uncertified photocopies of Public Documents were admissible in evidence, having regard to Section 97, 109, 111 and 112 of the Evidence Act.

(5) Whether the learned Justices of the Court of Appeal were right in affirming the order of the trial Court awarding exemplary damages in the sum of N50 Million against the Defendant/Appellant and 2nd Respondent, contrary to the legal principles and factors governing award of damages."

## DECISION/HELD:

In a unanimous decision, the appeal was dismissed and the judgment of the Court of Appeal was affirmed.

**KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, J.S.C. (Delivering the Leading Judgment)**: This is an appeal against the judgment of the Court of Appeal, Calabar Division, delivered on 3/9/2015 affirming the judgment of the Federal High Court, Calabar Judicial Division per A.F.A. Ademola, J. delivered on 1st June 2010.

The facts that gave rise to this appeal are as follows: The Peoples Democratic Party (PDP) held primary elections, in December 2006 to determine its candidate for the Uyo Federal Constituency of Akwa Ibom State in the General Election fixed for April 2007. The 1st respondent, Hon. Emmanuel Bassey Obot, emerged winner and was duly presented to the Independent National Electoral Commission (INEC) as the party's candidate. A dispute however arose when the 1st respondent's name was substituted with the name of another candidate

On 5/12/2007, the Court of Appeal, Calabar Division in Appeal No. CA/C/45/2007, delivered judgment in favour of the 1st respondent and ordered the President of the Court of Appeal to set up a new Tribunal to try the 1st respondent's petition in Uyo. The appellant at the time was the

Attorney General of the Federation and Commissioner for Justice (AGF). It was the 1st respondent's contention that in his capacity as AGF, he wrote to the President of the Court of Appeal (PCA) urging His Lordship not to comply with the judgment ordering the constitution of a new panel in view of a petition he had received from one Bassey Etim, the person who had been substituted for the 1st respondent. The Hon. PCA however went ahead and complied with the order of the Court and set up the new panel.

The new panel delivered judgment on 18th April 2008 and ordered that the 1st respondent be sworn into the House of Representatives as the member representing Uyo Federal Constituency. An appeal to the Court of Appeal was unsuccessful. The appeal was dismissed with an order that INEC should issue a Certificate of Return to the 1st respondent. It was contended that by a letter dated 16/2/2009, the appellant wrote to the Chairman of INEC, Maurice Iwu, urging him not to obey the judgment of the Court of Appeal, which he described as "an obvious desecration of the Institution of the Judiciary." He also wrote to the Speaker of the House of Representatives advising

him not to obey the judgment but "to allow the status quo ante to remain until the last or final word is heard from the Supreme Court on the issue."

It is noteworthy that by Section 246(2) of the 1999 Constitution, as amended, the decisions of the Court of Appeal in respect of Appeals arising from National and State Houses of Assembly elections are final.

Consequent upon the letters written to the Chairman of INEC and the Speaker of the House of Representatives, the 1st respondent was neither issued with his Certificate of Return nor was he sworn into office. He therefore instituted an action before the Federal High Court, Calabar Judicial Division vide an Originating Summons dated 15/5/2009, against the appellant and 2nd respondent. The appellant was sued in his capacity as Attorney General of the Federation as 1st defendant and in his personal capacity as 2nd defendant. The 1st respondent, as plaintiff, raised the following questions for determination:

***1. Whether the conduct of the 2nd Defendant in purported exercise of the powers of the 1st Defendant in the letters of 8th January 2008 and 16th February 2009 does not constitute abuse of the***

***powers conferred by Section 150(1) of the 1999 Constitution and do not undermine and/or subvert the administration of justice, the rule of law and independence, authority and integrity of the judiciary established under Section 36(1) of the said Constitution which he is obliged to uphold and defend and, particularly, to breach of Section 149 of the said Constitution.***

***2. Whether, in the circumstances of the said letters aforesaid, the 1st Defendant is a fit and proper person to hold office as the 1st Defendant in conformity with Section 149 of the 1999 Constitution.***

In the event that the questions were answered in his favour, he sought the following declarations:

***1. That the 2nd Defendant undermined and/or subverted the rule of law, the due administration of justice and the independence, authority and integrity of the judiciary in the letters of 8th January 2008 and 16th February 2009 written by him in the capacity of the 1st Defendant***

***2. That the 2nd Defendant is not a competent, fit and proper person to hold and/or continue to hold office as the 1st Defendant having regards to the Oaths of Allegiance and Office.***

***3. N100m damages***

***against the Defendants jointly and severally.***

***4. Perpetual injunction restraining the 2nd Defendant from further and/or continued occupation of the office of the 1st Defendant and/or the discharge of the functions of the said office.***

The Originating Summons was supported by an 18-paragraph affidavit and exhibits marked A-F, along with a written address. An application by the defendants for extension of time to file their Memorandum of Appearance was granted by the Court. Consequently, a Conditional Memorandum of Appearance was filed on behalf of both defendants by one Nene C.A. Akpan (Mrs) of the Federal Ministry of Justice, South-South Zone, Port-Harcourt. Between the filing of the Memorandum of Conditional Appearance on 3rd December 2009 and 31st March 2010, the said Mrs. Akpan represented both defendants in Court and sought a number of adjournments at their instance. On 31/3/2010, she informed the Court of her intention to withdraw her appearance for the appellant (2nd defendant) in his personal capacity, having filed a written address the previous day on behalf of the 1st defendant alone. She was ordered to comply with the relevant rules of

Court by filing a formal application and serving the parties, This was never done.

On 1/6/2010, the learned trial Judge entered judgment in favour of the plaintiff/1st respondent and made the declarations and orders sought in his favour. The appellant was dissatisfied with the decision and filed an appeal at the Court below. In a considered judgment delivered on 3rd September, 2015, the lower Court affirmed the judgment. The appellant is still dissatisfied and has further appealed to this Court vide his amended Notice of Appeal filed on 14/4/2016 but deemed filed on 27/5/2019. It contains 9 grounds of appeal.

At the hearing of the appeal on 20th September, 2021, OKON N. EFUT, SAN adopted and relied on the Appellant's brief filed on 6/1/2017 and deemed filed on 27/5/2019, in urging the Court to allow the appeal. UWEMDIMO NWOKO, SAN, adopted and relied on the 1st Respondent's brief filed on 1/8/2018 but deemed filed on 27/5/2019, in urging the Court to dismiss the appeal.

Learned counsel for the appellant distilled 5 issues for determination thus:

*(1) Whether the learned Justices of the Court of Appeal were right to hold that the*

*appellant was granted fair hearing and thereby affirming the judgment of the trial Court, when the entire proceedings of the trial Court was tainted and vitiated by the non-service of the Originating Summons and subsequent hearing notices on the appellant, (Distilled from Grounds 1 and 2).*

*(2) Whether the learned Justices of the Court of Appeal were right to affirm the trial Court's order granting reliefs not claimed by the Plaintiff/1st Respondent against the Appellant (Distilled from Grounds 3 and 9).*

*(3) Whether the Court below was right to hold that the trial Court had jurisdiction to entertain the suit, the subject matter of which was the alleged breach by the appellant of his Oath of Allegiance and Oath of Office, and the outcome of which had been overtaken by events (Distilled from Grounds 4, 5 and 7),*

*(4) Whether Exhibit B, C, D being uncertified photocopies of Public Documents were admissible in evidence, having regard to Section 97, 109, 111 and 112 of the Evidence Act. (Distilled from Ground 6).*

*(5) Whether the learned Justices of the Court of Appeal were right in affirming the order of the trial Court awarding exemplary*

*damages in the sum of N50 Million against the Defendant/Appellant and 2nd Respondent, contrary to the legal principles and factors governing award of damages (Distilled from Ground 8)*

The 1st respondent adopted the issues as formulated by the appellant. I shall consider issues 1, 3 and 4 first, as they address the competence of the suit and processes therein, followed by issues 2 and 5, which deal with the orders made by the learned trial Judge and affirmed by the Court below.

**Issue 1**

Relying on the authority of **Skenconsult Vs Ukey (1981) 1 SC 6**, learned counsel for the appellant submitted that service of originating processes is fundamental to adjudication and that where there is no evidence of service, the Court would have no jurisdiction to entertain the matter. He submitted that the record of appeal shows that service of the Originating Summons was effected on the office of the 2nd respondent in Abuja on one OKO CLETUS on 25/5/2009 and that there is no document in the record evidencing proof of service on the appellant. He submitted that the appellant having been sued in his personal capacity was entitled to be served personally. He

referred to Order 6 Rule 2 of the Federal High Court (Civil Procedure) Rules 2009. He argued that in law, the person of the appellant is a separate entity from the office of AGF and therefore he ought to have been served personally. He referred to Section 150 (1) of the 1999 Constitution, as amended, and Sections 2 and 4 of the Law Officers Act Cap. L8 Laws of the Federation (LFN) 2004. He submitted that having regard to the reliefs sought and the Orders made by the learned trial Judge, the appellant ought to have been given the opportunity of a fair hearing as envisaged by Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended.

Learned counsel submitted that it was evident from the record and the fact that Nene C.A. Akpan (Mrs), of counsel, filed a written address on behalf of the 1st defendant only, that she did not have the appellant's authority to represent him and that he was not aware of the pendency of the suit and was therefore denied the opportunity of defending himself. He submitted that there was no evidence that hearing notices were served on him before judgment was entered against him. He argued that the

authorities relied upon by the lower Court to the effect that he had taken steps in the proceedings are not applicable to the facts of this case.

He submitted that MRS AKPAN having announced appearance for 1st defendant only at the proceedings of 31/3/2010, and having filed a written address on behalf of the 1st defendant alone on 30/3/2010, the Court ought to have satisfied itself that the appellant was personally served with hearing notices. He referred to **Odutola Vs Kayode (1994) 2 NWLR (Pt. 324) 1 @ 15; Wema Bank vs Odulaja (2000) 7 NWLR (Pt.663) 1 @ 7; Saidu V. Mahmood (1998) 2 NWLR (Pt. 536) 130 @ 138-139 (Court of Appeal decision).**

In response, learned counsel for the 1st respondent submitted that there was no doubt, from the record, that the appellant was duly served with the Originating Summons and that he entered appearance through a counsel in his office. He submitted that the best evidence that a party has been put on notice of the institution of a suit against him, is his appearance in Court either personally or through his counsel. He submitted that although service of process is fundamental to the jurisdiction of the Court, non-service

or improper service can be waived by a defendant who may voluntarily submit to the jurisdiction of the Court and take part in the proceedings till judgment. He submitted that such a defendant cannot be heard as regards any objection relating to the service of process on him. He referred to **Ogbuanyinya vs Okudo (1990) 4 NWLR (Pt.146) 551 @ 576; Husseini Isa Zakirai Vs Salisu Daa Azumi Muhammad (2017) 17 NWLR (Pt. 1594) 181 @ 230-231 H- E** per Augie, JSC.

Relying on the authority of **Job Charles Nig. Ltd. VS Okonkwo (2002) FWLR (Pt.117) 1007**, he submitted that having submitted to the jurisdiction of the Court by entering appearance thereto and being represented by counsel, he is estopped from complaining about non-service. He also cited: **N.U.B Ltd. Vs Samba Pet. Co. Ltd. (2006) 12 NWLR (Pt. 993) 98 @ 129 (F) & Odua Investments Co. Ltd. Vs Talabi (1991) NWLR (Pt.170) 761 @ 779**.

Learned counsel submitted that the essence of service of Court process is to put the other side on notice of the existence of a suit or a particular process and having entered appearance in the suit, the appellant can no longer complain. He noted further that the appellant

failed to raise the issue of non-service at the earliest opportunity and before taking any steps in the proceedings. He observed that at the time service of the Originating Summons was effected, the appellant was occupying the office of Attorney-General of the Federation and Minister for Justice. He argued that it is absurd for the appellant to acknowledge service on him in his official capacity but to deny personal service.

Learned counsel submitted that a case is only authority for what it actually decided. He submitted that in the cases relied upon by the appellant, the issue of a party being sued in a dual capacity did not arise and that the said cases are not applicable in the circumstances of this case. He submitted that there is nowhere that the appellant challenged the authority of Mrs. Nene Akpan, of counsel, to represent him. He submitted that both the parties and the Court are bound by the printed record of proceeding.

He submitted further that a Memorandum of Appearance was filed on behalf of the appellant in his dual capacities and that although learned counsel intimated the Court that she intended to withdraw appearance for the 2nd

defendant, she never did so, He referred to Order 9 Rule 36(1) and (2) of the Federal High Court (Civil Procedure) Rules, 2009 and argued that the effect of failure of learned counsel to formally withdraw appearance for her client is that the said counsel shall be considered as the party's legal practitioner for the duration of the suit.

With regard to the contention that the appellant was not served with hearing notices of subsequent dates in the proceedings, learned counsel submitted that it is rather incongruous for the appellant to allege that he was not served with the originating processes and at the same time complain that he was not served with hearing notices. Relying on the dictum of Ngwuta, JSC (of recent blessed memory) in **NACB Ltd VS Ozoemelam (2016) 9 NWLR (Pt. 1517) 376 @ 407-408**, he submitted that it is the duty of a party, either as plaintiff or as defendant, who is aware of the pendency of a suit, to check with the Registry of the Court if nothing has been heard after a reasonable lapse of time to ascertain the current status of the case. He noted that in any event, the appellant was duly represented by counsel who had not formally

withdrawn representation for him.

He submitted that in the circumstances of this case, the appellant was accorded a reasonable opportunity of being heard and failed to take advantage of it. He submitted further that fair hearing is not a magic wand to be waved according to whims and caprices of a litigant and that where he fails to take advantage of the opportunity of being heard, it does not lie in his mouth to complain of a denial of fair hearing. He referred to: **Pam vs Mohammed (2008) 16 NWLR (Pt.1112) 1 @ 49 A-C per Oguntade, JSC; Kolo vs C.O.P. (2017) 9 NWLR (Pt. 1569) 118 @ 157-158 D- C**. He urged the Court to resolve this issue against the appellant,

**Resolution of Issue 1**

It is well settled beyond any equivocation, that the service of an originating process on a named party, who ought to be served, is an indispensable aspect of any adjudication. It goes to the root of the Court's competence and jurisdiction to entertain the suit. Service of an originating process accords with the guarantee of the right to fair hearing as provided for in Section 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended. It

notifies the party of the institution of an action against him and affords him the opportunity, if he so desires, to defend the claim. Failure to serve an originating process renders the entire proceedings a nullity, See: **Kida vs Ogunmola (2006) 13 NWLR (Pt. 997) 377, Obimonure vs Erinosho (1966) 1 ALL NLR 250; Skenconsult vs Ukey (1981) 1 SC 6 @ 26; Mgbenwelu vs Olumba (2016) LPELR-42811 (SC) @ 36-37 E -D.**

The circumstances of the instant appeal are somewhat unique because at the time the action was instituted at the trial Court, the appellant occupied the office of Attorney General of the Federation and Minister for Justice. He was sued in a dual capacity — in his official capacity as Attorney General as 1st defendant and in his personal capacity as 2nd defendant.

It is not in dispute that the Originating Summons was duly served on the office of the Hon. AGF. By a motion on notice filed on 3/12/2009 one Mrs. Nene C.A. Akpan, of counsel, sought an order for extension of time within which the 1st and 2nd defendants could file their Memorandum of Appearance out of time and an order deeming the Memorandum of Appearance attached thereto as

having been properly filed and served. In the affidavit in support of the application, the said Nene C.A. Akpan deposed as follows:

*"1. That I am Senior Counsel in the Chambers of the 1st and 2nd Defendants at their South-South zonal office, Port Harcourt, and by virtue of my duties, conversant with the facts of this case.*

*2. That I have the consent of the 1st and 2nd Defendant/Applicants to depose to this affidavit.*

*3. That owing to delay in the South-South zonal office receiving the Court processes in this action by the Federal Ministry of Justice, Abuja, I could not file the Memorandum of Appearance for the 1st and 2nd Defendants within time.*

*4. That in view of the time lapse as mentioned in paragraph 3 above, it is necessary to apply for leave for extension of time to file same and same is hereby annexed and marked as Exhibit 1.*

*5. That the interest of justice will be better served if this application is granted*

*6. That the Plaintiff/Respondent will not be prejudiced if this application is granted*

*7. That I swear to this affidavit in good faith conscientiously believing its contents to be true and in accordance*

*with the Oaths Act, 1990."*

(Emphasis mine)

I have taken the time to reproduce the affidavit in extenso because it is germane to the issue of non-service raised by the appellant. In paragraph 2 thereof, the deponent states categorically that she has the consent of both defendants to depose to the affidavit. In paragraph 3, she admits that the processes were duly served on her clients and explains the reason for the delay in filing the Memorandum of Appearance on their behalf, paragraph 7 she avers that the affidavit is deposed to in good faith while believing its contents to be true.

An affidavit consists of averments deposed to under a solemn oath. In the absence of any challenge to averments therein, the Court is bound to accept them as true.

The implication or legal effect of an oath is to subject the person who took the oath to penalties for perjury in the event that the averments or testimony turn out to be false. See: **Akpatason Vs Adjoto & Ors. (2019) LPELR-48119 (SC) @ 15 D-E; Chukwuma vs Nwoye & Ors. (2009) LPELR-4997 (CA); Action Congress & Anor. vs INEC (2007) LPELR-66 (SC) @ 88 A-C**.

Having averred that

she had the consent of both defendants to depose to the affidavit and having admitted service of the originating processes on both, it no longer lies in the mouth of the appellant to contend that he was not served. He did not, at any stage, challenge the authority of Mrs. Nene Akpan, to represent him in the proceedings. The Memorandum of Appearance dated 3/12/2009 states:

***"Please enter a Conditional appearance for the above-named sued as the Defendants in this action."***

Even though a Conditional Memorandum of Appearance was filed, no step was taken to challenge service of the originating processes on either of the defendants nor to challenge the Court's jurisdiction to entertain the suit. It is also on record that on 3/12/2009 Mrs. Nene Akpan announced appearance for both defendants and sought a short adjournment to enable her respond to the plaintiff's originating papers and his written address. The suit was adjourned to 18/1/2010. After several more adjournments, the matter came up on 4th March 2010 for the adoption of written addresses. Mrs, Akpan announced appearance for both defendants. The following exchange ensued:

*"Mrs. Akpan: Due to some unforeseen circumstances, I apply for 14 days to file our written address.*

*U. Nwoko: I send my credentials to Mrs Akpan and concede the 14 days to her.*

*Court: Mrs. Akpan is given 14 days to file and serve her written address in this suit*

*(ii) Suit adjourned to 24/4/2010 (Sic: 24/3/2010) for adoption of address by counsels (sic)."*

By this, it is evident that after filing the Memorandum of Appearance, further steps were taken on behalf of both defendants to defend the suit.

On 24/3/2010, the suit was further adjourned to 31/3/2010. On the said date, Mrs. Akpan informed the Court orally of her intention to withdraw her appearance for the 2nd defendant. The suit was adjourned to 29/4/2010 to enable Mrs. Akpan file and serve the necessary application on the parties, including the 2nd defendant. On 29/4/2010 the suit was adjourned to 11/5/2010 for the adoption of written addresses, as Mrs. Akpan was absent due to ill health as informed by the Court Registrar. On 11/5/2010, learned counsel was again absent. The plaintiff's counsel adopted his written address. The Court invoked the provisions of

Order 22 Rule 9 of the Federal High Court (Civil Procedure) Rules 2009 and deemed the written address filed by Mrs. Akpan on behalf of the 1st defendant as adopted and thereafter reserved judgment to 1st June 2010.

Learned counsel for the 1st respondent referred to Order 9 Rule 36(1) and (2) of the Federal High Court (Civil Procedure) Rules, 2009, which provides as follows:

***"Rule 36(1) Where a legal practitioner who has acted for a party in a cause or matter ceases to act and the party has not given notice of change in accordance with Sub-rule 1 of Rule 35 of this Order, the legal practitioner may apply to the Court for an order declaring that the legal representative has ceased to be the one acting for party in the cause or matter and the Court may make an order accordingly.***

***(2) An order under Sub-rule 1 of this rule shall not be made until the legal practitioner serves on every party to the cause or matter a copy of the notice otherwise he shall be considered the legal practitioner of the party for the remaining duration of the cause or matter."***

(Emphasis mine)

Learned counsel also referred to the case of Magna Maritime Ltd. vs Oteju

**(2005) NSC QR (Pt.1) 295 @ 317 H**, where this Court held:

***"A Court of law can indulge a party only within the confines of its rules. In other words, a Court of law can indulge a party in so far as its rules permit. Where Rules of Court in line with the fair hearing principles order a specific conduct on the part of the parties, the Court has a duty to enforce the rules. In such a situation, a defence of fair hearing is not available to the aggrieved party because the rule itself has complied with fair hearing."***

The authority is quite apposite to the facts at hand. Having filed a Memorandum of Appearance on behalf of both defendants, Mrs. Nene Akpan was the counsel on record for both parties. On 31/3/2010, when she orally informed the Court of her intention to withdraw appearance for the 2nd defendant, she was ordered to comply with the rules of Court and put the parties, including the 2nd defendant, on notice by filing a formal application. She failed and/or neglected to do so. By virtue of Order 9 Rule 36(2) of the Federal High Court Rules reproduced above, she remained the counsel on record for both parties. From the various

proceedings leading up to the delivery of the judgment, it was evident that Mrs. Akpan was fully aware of the various dates to which the case was severally adjourned.

The appellant's contention of non-service of hearing notices therefore has no leg to stand on.

The allegation that there was a breach of the appellant's right to fair hearing is unfounded in my humble view. The appellant was duly represented by counsel, submitted to the jurisdiction of the Court, but failed to avail himself of the opportunity of being heard. He is deemed to have waived any alleged irregularity in the service of the originating processes on him. See: **Zakarai vs Muhammad (2017) 17 NWLR (Pt.1590) 181 @ 230-231 H-E; N.B.C. vs Ubani (2014) NWLR (Pt1421) @ 449 A-E**. It is too late in the day to complain. See: **Job Charles Nig. Ltd. Vs Okonkwo (2002) FWLR (Pt.117) 1007.**

This issue is accordingly resolved against the appellant,

**Issue 3**

In support of this issue, it is submitted on behalf of the appellant that the main complaint before the trial Court was that the appellant had acted in breach of his oath of office as prescribed by Section 149 of the 1999 Constitution, as amended.

Learned counsel submitted that the proper forum for such a complaint is the Code of Conduct Tribunal established under the Constitution. He submitted further that the allegations contained in paragraph 13 and the following paragraph of the 1st respondent's affidavit in support of the Originating Summons (also erroneously numbered 13), border on criminality and constitute a breach of paragraph 1 of the 5th Schedule to the Constitution - a matter within the exclusive jurisdiction of the Code of Conduct Tribunal. He referred to Paragraph 15(1) of Part 1 of the 5th Schedule as well as paragraph 18 thereof, to contend that the reliefs sought by the plaintiff could only be granted by the Code of Conduct Tribunal. He noted that by Paragraph 6 of Part II of the 5th Schedule, the Attorney General of the Federation is defined as a Public Officer for the purposes of the Code of Conduct for Public Officers.

Learned counsel submitted that there is nothing in Section 251 of the 1999 Constitution, as amended, that confers jurisdiction on the Federal High Court to adjudicate in a matter involving a breach of the Code of Conduct by any Public

Officer. He submitted that the orders made preventing the appellant from holding any public office in Nigeria, were made without jurisdiction. He referred to **Nwankwo Vs Nwankwo (1992) 4 NWLR (Pt.238) 693 @ 710**, per Onu, JCA (as he then was). He submitted that the Court below also erred in failing to hold that the trial Court exceeded the maximum punishment for a public officer alleged to have contravened the Code of Conduct by barring the appellant from holding public office for life, whereas the Code of Conduct prescribes a maximum of 10 years. He contended that the trial Court condemned the appellant to a far more severe punishment than that contemplated by the Constitution. He referred to Section 137(1)(e) of the 1999 Constitution which sets out the factors that would disqualify a person from election into public office. He referred to similar provisions relating to disqualification for election to the office of Governor of a State (Section 182(1) (e) of the Constitution) and membership of a House of Assembly (Section 107(1) (d) of the Constitution), or Senate/House of Representatives (Section 66(1) (d) of the Constitution).

It was further argued that

the suit had become academic as the appellant had ceased to hold office as at 11/5/2010 when the suit was heard and 1/6/2010 when judgment was delivered and therefore the question of his fitness or otherwise to continue to occupy the office had become otiose. He referred to **Olaniyi Vs Aroyehun (1991) 5 NWLR (Pt.194) 652 @ 692** per Nnaemeka-Agu, JSC. He submitted that in so far as the facts relied upon to sustain the claim have no relationship or nexus with the reliefs sought, there was no reasonable cause of action before the Court and the suit ought to have been struck out. He submitted that with the demise of late President Umaru Musa Yar'adua, the appellant ceased to hold office as Attorney General of Federation and with the assumption of office by the Acting President Goodluck Jonathan, he was redeployed to the Ministry of Special Duties. He contended that the purpose of the suit, which was the removal of the appellant from office, was defeated once he no longer occupy the office. He submitted that the Court ought to have taken judicial notice of these facts. He referred to Section 74 of the Evidence Act. He submitted that the Court does not dissipate

energy on academic issues.

In reaction to the above submission, learned counsel for the 1st respondent asserted that the trial Federal High Court was vested with the necessary jurisdiction to entertain the suit by virtue of Section 251(1) of the 1999 Constitution, as amended because the subject matter relates to an act of an officer of the Federal Government. He submitted that at the time the appellant was the substantive Attorney General of the Federation. He referred to the reliefs sought and submitted that the issue as to whether the appellant met the constitutional qualification for appointment as AGF did not arise. That the issue before the Court was as to his emotional, psychological and moral capacity to hold or continue to hold that office. He submitted further that the issue in contention was whether it was not unbecoming of the Chief Law Officer of the Federation to use the status of his office to urge individuals and institutions not to obey the judgment of the Court of Appeal, particularly having regard to the fact that the judgment of the Court of Appeal was final as regards the election petition in issue. He urged the Court to

discountenance the authorities relied upon by learned counsel for the appellant as being irrelevant,

**Resolution of Issue 3**

It is necessary to note at the outset that Courts of law are creations of statute and their jurisdiction is prescribed and/or circumscribed by the Constitution or the statute that created them, See: **Obiuweubi Vs C.B.N. (2011) 7 NWLR (Pt.1247) 465; Onuorah vs K.R.P.C. (2005) 6 NWLR (Pt. 921) 393; Skye Bank Plc vs Iwu (2017) 16 NWLR (Pt.1590) 24; (2017) LPELR- 42595 (SC) @ 163-164 G - A**.

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

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

*(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action by the Federal Government or any of its agencies"*

In order to determine

whether a cause of action falls within the jurisdiction of a Court as provided for in the Constitution or the statute that created it, regard will be had to the originating processes only. Where the action is commenced by a Writ of Summons, the processes to be examined are the Writ of Summons and Statement of Claim. Where the action is commenced by Originating Summons, it is only the Originating Summons and the affidavit in support that would be considered. See: **Adeyemi Vs Opeyori (1976) 9-10 SC (Reprint) 18, A.G. Federation Vs Guardian Newspapers Ltd. & Ors. (1999) 9 NWLR (Pt. 618) 187; A.G. Anambra State vs A.G. Federation (2007) 12 NWLR (Pt. 1047) 1.**

The questions submitted to the trial Court for determination and the reliefs sought by the plaintiff thereof, have been reproduced earlier in this judgment. For ease of reference, the questions are again reproduced below:

***1. Whether the conduct of the 2nd Defendant in purported exercise of the powers of the 1st Defendant in the letters of 8th January 2008 and 16th February 2009 does not constitute abuse of the powers conferred by Section 150(1) of the 1999 Constitution and do not undermine***

***and/or subvert the administration of justice, the rule of law and independence, authority and integrity of the judiciary established under Section 36(1) of the said Constitution which he is obliged to uphold and defend and, particularly, to breach of Section 149 of the said Constitution.***

***2. Whether, in the circumstances of the said letters aforesaid, the 1st Defendant is a fit and proper person to hold office as the 1st Defendant in conformity with Section 149 of the 1999 Constitution.***

It is evident to me that what the plaintiff was seeking from the Court was a determination as to whether the administrative action of the 1st defendant through the 2nd defendant, in writing the letters dated 8th January 2008 and 16th February 2009, are not ultra vires his powers as AGF vis a vis Section 150(1) of the 1999 Constitution and in breach of his oath of office and whether, in view of said conduct, he is a fit and proper person to continue to hold that office. In other words, the suit is challenging administrative acts carried out by the 2nd defendant while occupying the office of AGF. The reliefs sought are consequent upon the questions being determined in

the plaintiff's favour.

It is the appellant's contention that the suit ought to have been instituted vide a petition before the Code of Conduct Tribunal. The reliefs sought in the instant suit are purely civil. It was held in **Saraki Vs F.R.N** **(2016) 3 NWLR (Pt. 1500) 531 @ 579 E-H & 581 F-G,** that proceedings before the Code of Conduct Tribunal are quasi—criminal. Its proceedings are guided by the Criminal Procedure Code or Criminal Procedure Act (now the Administration of Criminal Justice Act, 2015). See paragraph 17 of the Third Schedule to the Code of Conduct Bureau and Tribunal Act. A careful perusal of the Code of Conduct Tribunal Rules of procedure confirms the fact that the proceedings thereof are conducted in the style and manner of a criminal prosecution with a prosecutor, an accused, taking of plea, etc.

I am of the considered opinion that the suit was properly commenced before the Federal High Court to assuage an injury done to a private citizen as a result of the administrative actions of the defendants. I am in complete agreement with the learned Justices of the Court below that the quasi—criminal jurisdiction of

the Code of Conduct Bureau does not extend to matters involving injury to an individual in a civil case.

As to the issue whether or not the Originating Summons disclosed a cause of action against the defendants, it is necessary to reiterate that it is the originating processes filed by the plaintiff that determine whether a cause of action is disclosed or not. At the time the suit was instituted, the appellant was the AGF and Minster for Justice. The fact that he subsequently ceased to occupy that office, does not alter the fact that a cause of action was disclosed.
This issue is resolved against the appellant.

**Issue 4**

It is the contention of learned counsel for the appellant under this issue that the lower Court was wrong when it held that the objection to the admissibility of Exhibits B, C and D, being uncertified photocopies of public documents in breach of Sections 102, 104, 105 and 106(a) (ii) of the Evidence Act, ought to have been raised at the trial Court. He submitted that the lower Court ought to have expunged the inadmissible documents from its record. He submitted that inadmissible documents can be expunged from the record

even at the point of writing the judgment. He referred to: **Olalomi Ind. Ltd. Vs N.I.D.B. Ltd. (2009) 16 NWLR (Pt. 1167) 266 @ 303 E-F**. He submitted that secondary evidence of documents attached to an affidavit (as in this case), must comply with the requirements for admissibility under Sections 102, 104 105 and 106 of the Evidence Act. He referred to: **Fawehinmi vs I.G.P. (2002) 5 SCNJ 103 @ 129 and 132; Kwara State Ministry of Agriculture Vs S.G.B Ltd. (1998) 11 NWLR (Pt. 575) 574 @ 583**.

He submitted further that this Court has held in a plethora of cases that the only admissible secondary evidence of a public document, is a certified true copy. He cited: **Ojo vs Gharoro (1999) 8 NWLR (Pt. 695) 374 @ 387; C.C.B. Nig. Ltd. vs Odogwu (1999) 3 NWLR (Pt.140) 646 @ 656**. He is of the view that once the offending documents are expunged, the 1st respondent's case would collapse and urged us to allow the appeal on this issue,

Learned counsel for the 1st respondent argued that the present attitude of the Courts regarding the admissibility of documents is to determine the relevance of such documents. He submitted that once the Court finds the documents to

be relevant to a fact in issue, they will be admitted in evidence. He noted that the Courts have always held that once a document is found to be relevant and admissible, the probative value to attached to it is a different matter entirely, he submitted that where, as in this case, the content of the documents are not in dispute, they need not be certified. He observed that the appellant did not deny his signature on the documents. He referred to: **Onobruchere vs Esegina (1986) 1 NWLR (Pt.19) 799, Nzekwu vs Nzekwu (1989) 2 NWLR (Pt. 104) 3737 Araka vs Egbue (2003) 17 NWLR (Pt.848) 1; B.A.T. (Nig) Ltd. vs International Tobacco Co. Plc (2013) 2 NWLR (Pt.1339) 496 @ 520-523 A-E.**

On the distinction between relevancy and weight, he referred to **Abubakar vs Chuks (2007) LPELR—52 (SC) @ 13- C-G (2007) 18 NWLR (Pt.1066) 380 @ 403 F-N**, per Tobi, JSC. He submitted that assuming, without conceding, that the documents were inadmissible, the learned trial Judge did not base his judgment solely on those documents. He submitted that the judgment was based on the affidavit evidence of the 1st Respondent which stood uncontroverted, submitted that the Court was

entitled to treat the uncontroverted facts as true and act upon them, provided they are not frivolous, contrary to reason or unsupported by documents where it is expected that they be so supported. He relied on: **Alagbe vs Abimbola (1978) 2 SC 39; Egbuna vs Egbuna (1989) 2 NWLR (Pt.106) 773.**

He submitted that in the absence of any counter affidavit, the Appellant is deemed to have admitted the averments in the supporting affidavit. He referred to: **Yar'adua vs Yandoma (2015) All FWLR (Pt.770) 1215 @ 1259 A; Long John vs Blakk (1998) 6 NWLR (Pt.555) 524 @ 532; Ogoejeofo vs Ogoejeofo (2006) 3 NWLR (Pt.966) 205**. He urged us to resolve this issue against the appellant.

**Resolution of Issue 4**

I deem it necessary to reiterate my finding in the course of resolving the first issue, that the appellant was duly served with the originating processes in the suit and was represented by counsel throughout the proceedings. He did not file a counter-affidavit, neither did he raise any objection whatsoever to the processes served on him, including the exhibits attached to the supporting affidavit. A trial conducted on the basis of an Originating Summons is

by affidavit evidence.

Averments in an affidavit, not challenged, are deemed admitted and the Court is entitled to act on them. See **Owuru vs Adigwu & Anor.(2018) 1 NWLR (Pt.1599) 1; (2017), LPELR-42763 (SC.) @ 28-29 D-C, Inakoju vs Adeleke (2007) 4 NWLR (Pt.1025) 427 @ 684-685 H-B, Ogoejeofo vs Ogoejeofo (2006) 3 NWLR (Pt. 966) 205**. It is also trite that such uncontradicted evidence must be cogent and strong enough to sustain the applicant's claim. See: **Ogoejeofo vs Ogoejeofo (supra).**

In a matter fought on affidavit evidence, the documentary evidence relied upon is attached to the affidavit and therefore forms part of the evidence adduced in the case before the Court.

The distinction between averment of facts in pleadings and averment of facts contained in an affidavit was explained by this Court in **Magnusson vs Koiki (1993) 12 SCNJ 114; (1993) 9 NWLR (Pt.317) 287 @ 303 C**, as follows:

***"Averments of facts in pleadings must be distinguished from facts deposed to in an affidavit in support of an application before a Court. Whereas the former, unless admitted constitutes no evidence, the latter are by law, evidence upon which a***

***Court of law may, in appropriate cases, act."***

The holding of Mbaba, JCA in **Ilorin East Local Government vs Alasinrin & Anor (2012) LPELR 8400 (CA)** referred to and relied on in the case of: **B.A.T (Nig) Ltd Vs International Tobacco Co. Plc (2013) 2 NWLR (Pt. 1339) 493 @ 520-521 D-A**, following the reasoning in **Magnusson Vs Koiki (supra)**, is quite instructive. His Lordship held, inter alia:

***"I have already held that a document attached to or exhibited with affidavit forms part of the evidence adduced by the deponent and is deemed to be properly before the Court to be used, once the Court is satisfied that it is credible. Being already an evidence before the Court (on oath), the formality of certification for admissibility (if it required certification) had been dispensed with … The reason for this is easy to deduce, the first being that affidavit evidence is already admitted evidence before the Court unlike pleading, which must be converted to evidence at the trial, at which time issues of admissibility of an exhibit is decided. The second point is that an exhibited copy of a document attached to an affidavit evidence must***

***necessarily be a photocopy or secondary copy (except where the document was executed in several parts or counterparts and the deponent has many of the parts to exhibit in original forms)."***

In effect, any objection to any of the documents attached to the supporting affidavit could only be raised at the hearing of the suit, see: **C.R.P.D. & Investment Co. Ltd. vs Obongha (2008) 8 NWLR (Pt. 670) 751 @ 765 G; Adejumo Vs Gov. of Lagos State (1970) ALL NLR 187 @ 191**. The affidavit and the documents thereto stood unchallenged and uncontroverted and the Court was entitled to rely on them.

This issue is accordingly resolved against the appellant.

**Issue 2**

Learned counsel for the appellant argued that the Court below erred in affirming reliefs granted by the trial Court, which were not claimed by the plaintiff/1st respondent. He submitted that the law is trite that a Court of law must not grant to a party a relief not sought. He referred to: **Ekpenyong Vs Nyong (1975) 2 SC 71 @ 81-82; Awodi & Anor vs Ajagbe (2014) 12 SC (Pt.1) 73 @ 113**. He contended that the learned trial Judge expanded the boundaries of the litigation in this case by

making an order referring the appellant to the Nigerian Bar Association for appropriate disciplinary action and making a declaration that he abused the powers conferred on him by Section 150(1) of the Constitution and acted in breach of Section 149 thereof. He submitted further that the learned trial Judge restrained the appellant from holding public office instead of limiting himself to the prayer restraining him from holding office as the Attorney General.

Learned counsel reproduced portions of the judgment at pages 75, 76, and 77 of the record and contended that the comments of the learned trial Judge are illustrative of a personal bias against the appellant and a descent into the arena of conflict.

Per contra, learned counsel for the 1st respondent submitted that the Court is entitled to make consequential orders which give effect and meaning to the judgment and that they must be incidental to and flow directly from the relief sought in the suit. He referred to: **Governor, Ekiti State vs Olubunmo (2017) 3 NWLR (Pt. 1551) 1 @ 39-40, 42 and 48**. He submitted that the Court bears both the moral and constitutional burden to condemn and reprimand

unscrupulous and fraudulent characters in the strongest possible terms. He submitted further that there is nothing wrong with a Judge passing a comment in the course of his judgment, which is in effect an obiter dictum, for which the appellant has not suffered any injustice.

On the authority of the Court to grant consequential orders he referred to: **Amaechi & Ors. Vs INEC & Ors. (2008) 33 NSCQR (Pt.1) 33 @ 529-530 D-A & 437 A-C** and urged the Court to resolve this issue against the appellant.

**Resolution of Issue 2**

I have examined once again, the questions submitted to the trial Court for determination. The questions were answered in the affirmative at pages 77-78 of the record. The declarations made were also in line with the relief sought, save for the fact that the appellant was restrained from occupying the office of Attorney General of the Federation and Minister for Justice in addition to any public office in the Federal Republic of Nigeria and a further order made, referring him to the Nigerian Bar

Association for appropriate disciplinary action.

The aspects of the orders complained of are in the nature of



consequential orders naturally flowing from the declarations made and are intended to give effect to the judgment. See: the recent decision of this Court in **U.O.O, Nigeria Plc Vs Mr. Maribe Okafor & Ors, (2020) LPELR-49570 (SC) @ 45-46 F-C**, per Mary Peter-Odili, JSC, where His Lordship held thus:

***"In respect of the arguments of the appellant that the trial Court and affirmed by the Court below erroneously awarded claims not part of the reliefs sought … That concern would not fly in the light of the evidence before the Court upon which the trial Court made the orders which clearly were consequential and the Court was acting in due exercise of its powers. There are consequential orders which are incidental to the decision of the Court and which followed necessarily, naturally directly and consequently from the judgment and not extraneous nor could be classified as strange and did not need to have been claimed earlier to be given or granted." (Underlining mine)***

In **Amaechi Vs INEC (supra)** per Oguntade, JSC, this Court held inter alia,

***"This Court and indeed all Courts in Nigeria have a duty which flows from a power granted by the***

*Constitution of Nigeria to ensure that citizens of Nigeria, high and low, get the justice which their case deserves … The Judiciary, like all citizens of this country, cannot be a passive onlooker when any person attempts to subvert the administration of justice and will not hesitate to use the power available to it to do justice in the case before it."*

See also: **Ezeonwu Vs Onyechi (1996) 3 NWLR (Pt. 438) 499; (1996) LPELR-1212 (SC) @ 24-25 D B; Eze & Ors. Vs Governor Abia State and Ors. (2014) 14 NWLR (Pt.1426) 192; (2014) LPELR-23276 (SC) @ 30 B-E.**

Section 150(1) of the Constitution provides:

*"There shall be an Attorney General of the Federation who shall be the Chief Law Officer and a Minister of the Government of the Federation."*

By virtue of Section 149 of the Constitution:

*"A minister of the Government of the Federation shall not enter upon the duties of his office, until and unless he has declared his assets and liabilities as prescribed in this Constitution and has subsequently taken and subscribed to the Oath of Allegiance and the Oath of the due execution of the duties of his office prescribed in the*

***Seventh Schedule to this Constitution."***

The Oath of office prescribed in the Seventh Schedule states, inter alia:

***"That I will, to the best of my ability, preserve, protect and defend the Constitution of the Federal Republic of Nigeria; that I will abide by the Code of Conduct contained in the Fifth Schedule to the Constitution of the Federal Republic of Nigeria; that in all circumstances, I will do right to all manner of people, according to law, without fear or favour, affection or ill will..."***

Section 287(2) of the Constitution provides:

***"287(2) The decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities and persons and by Courts with subordinate jurisdiction to the Court of Appeal."***

The undisputed facts in this case are that by two letters dated 8th January 2008 and 16th February 2009, the appellant categorically advised non-compliance with decisions of the Court of Appeal, which decisions by virtue of Section 246(3) of the 1999 Constitution, as amended, which he swore to uphold, are final decisions. There could be no further appeal on the matters decided to finality by the

Court of Appeal. The President of the Court of Appeal, the Speaker of the House of Representatives and the Chairman of INEC, all had a bounden duty, as prescribed by Section 287(2) of the Constitution, to obey and give effect to the judgment of the Court of Appeal.
It was indeed highly reprehensible for the Chief Law Officer of the Federation to counsel disobedience to any judgment at all, talk less of a judgment from which there is no further right of appeal. I am in complete agreement with the learned trial Judge, as affirmed by the Court below, that having regard to the conduct of the appellant while occupying the sacred office of Chief Law Officer of the Federation, he ought not to be entrusted with any other public office at all.

I agree with the Court below that the order made, though not specifically asked for, is a consequential order naturally flowing from the resolution of the questions for determination in the 1st respondent's favour and the grant of his reliefs. As held in **Amaechi Vs INEC** **(supra)** the Court has a duty to use its powers to do justice in the case where an attempt to subvert the administration of justice has occurred.

Similarly, it was within the Court's power to make a consequential order referring the appellant to the NBA for disciplinary action having regard to his condemnable conduct which is against the ethics of the profession and in breach of the Rules of Professional Conduct for Legal Practitioners, 2007. Rule 30 thereof provides:

***"A lawyer is an officer of the Court and accordingly, he shall not do any act or conduct himself in any manner that may obstruct, delay or adversely affect the administration of justice."***

The portions of the judgment of the learned trial Judge at pages 75, 76, and 77 of the record complained of, read thus:

***Page 75: "The hallowed office of the Attorney General of the Federation and Minister of Justice in Nigeria has been gradually desecrated and put into disrepute over the years with the likes of the 2nd defendant being appointed and occupying it ... it is meant for learned eminent members of the Bar and not for Political charlatans, jobbers, or latter day praise singers/converts, which this country has been experiencing.***

***Gone are the days when this exalted office was occupied by distinguished and***

*reputable gentlemen of the Bar with pedigree like Dr. T.O. Elias, QC, who later became the second Chief Justice of Nigeria (CJN) after the Rt. Hon, Chief G.C.M. Onyiuke, SAN, Mr. Kehinde Sofola, SAN, Chief Bola Ige, to mention a few."*

*Page 76: "In conclusion, it is my hope that the present occupier of the 1st Defendant's office, Mohammed Adoke, a past Chairman NBA Kano Branch, will apply the legal maxim, that there must be an end to litigation, in many suits pending in our Courts which have no business being there."*

*Page 77: "It is our humble and sincere desire whilst congratulating you on your new appointment you proffer sound legal advice similar to that in Igbeke Vs Emordi case to those concerned and bring unnecessary litigation to an end in the interest of the litigants, the judiciary and the public at large."*

I find myself unable to agree with learned counsel for the appellant that the portion of the judgment quoted from page 75 of the record shows personal bias against the appellant by the learned trial Judge. His Lordship had dispassionately considered the affidavit and documentary before him in reaching the conclusion that

the appellant had, by his conduct, undermined and subverted the administration of justice and the independence, authority and integrity of the judiciary in the letters of 8th January 2008 and 16th February 2009 written by him in his capacity as AGF.

The comments reproduced above do not form part of the ratio of the decision appealed against but are comments made in passing by His Lordship to express his dismay and disappointment at the state of affairs. Such comments passing are otherwise known as obiter dictum See: **Babarinde & Ors. vs The State (2014) 3 NWLR (Pt.1395) 568; Oshodi vs Eyifunmi (2000) 7 SC (Pt.II,) 145; Omisore vs Aregbesola & ors. (2015) NWLR (Pt.1482) 205**.
While agreeing with the sentiments expressed by His Lordship, I agree with the Hon. Justices of the Court below that the portions of the judgment complained of are mere obiter dicta and cannot be the basis for a reversal of the decision. This issue is accordingly resolved against the appellant.

**Issue 5**

This issue complains about the award of damages made by the learned trial Judge. Learned counsel for the appellant submitted that the learned trial Judge



awarded exemplary damages against the defendants whereas the 1st respondent did not seek this specie of damages. He submitted that exemplary damages, which are punitive are awarded in situations where a party has failed to show remorse or where the party had an opportunity to redress the wrong but refused to do so. He argued that these factors do not apply in this case. He referred to **Odogu vs A.G. Federation (1996) 6 NWLR (Pt.456) 508 @ 521 E—H**, per Onu, JSC, where it was held that exemplary damages are recoverable if the plaintiff is the victim of the punishable behaviour of the defendant. He contended that in the instant case, the appellant's action was advisory and had no effect on the 1st respondent, as he was eventually sworn in as a member of the House of Representatives.

On the principles which should have guided the Court in the award of damages, he referred to **Guardian Newspaper & Anor. Vs Ajeh (2011) 4 SC (Pt.II) 69 @ 92 paras 20-30**. He submitted that the Court acted upon a wrong principle of law in making the award. He contended further that the injury allegedly suffered by the 1st respondent was not attributable to the appellant

so as to make the award of damages against him grantable because, in writing the letters complained of, he merely gave advice in his capacity as the AGF and the recipients were not under any constitutional obligation to act on the advice.

Relying on the case of **U.T.C. (Nig) Plc Vs Philips (2012) 6 NWLR (Pt. 1295) 136 @ 167 G-H,** he submitted that, assuming without conceding that the 1st respondent was entitled to damages, the Court still had a duty to exercise its discretion judicially and judiciously. He submitted that affirming the award would amount to punishing the appellant for the action or inaction of others.

Learned counsel for the 1st respondent submitted that the primary objective of an award of damages is to compensate the plaintiff for the harm done to him, while a

secondary objective is to punish the defendant for inflicting that harm. He submitted that exemplary damages would come into play where the defendant's conduct is sufficiently outrageous to merit punishment. He reproduced the views expressed by His Lordship, Oyewole, JCA in his concurring judgment at the Court below. The judgment appealed against is reported in (2016) 6 NWLR



(Pt.1508) 280. Hon. Justice Oyewole's contribution is at pages 327-329 (or pages 299-300 of the record). He adopted the view expressed by His Lordship in urging us to resolve this issue against the appellant.

**Resolution of Issue 5**

The decision of this Court in **Nursing and Midwifery Council of Nigeria Vs Patrick Ogu & Anor (2019) LPELR-53899 (SC) @ 15-17 F-A** is quite germane to the resolution of this issue. The Court per Mary Peter-Odili, JSC held thus:

***"This Court has laid down the guiding principles guiding the award of exemplary damages in the case of CBN vs Okojie (2015) 14 NWLR (Pt.1479) 231; (2015) LPELR-24740 (SC) thus:***

***'Exemplary damages are awarded with the object of punishing the defendant for his conduct in inflicting injury on the plaintiff. They can be made in addition to***

*normal compensatory damages and should be made only: (a) In a case of oppressive arbitrary or unconstitutional acts by government servants; (b) where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff and (c) where expressly authorised by statute."*



*The Supreme Court went on at page 263 of the case of C.B.N Vs Okojie (supra) as follows: "for example damages to be awarded it need not be specifically claimed, but facts to justify it must be pleaded and proved. Thus, once the facts in the pleadings support the award of exemplary damages, the Court should award it since the adverse party is in no way taken by surprise." (Emphasis mine)*

There is no doubt that the pleadings in this case support the award of exemplary damages against the defendants, having established unconstitutional acts committed by the writing of letters to the President of the Court of Appeal, The Speaker of the House of Representatives and the Chairman of INEC, advising them to disregard orders made by the Court of Appeal, in flagrant breach of Section 287(2) of the Constitution which the appellant swore to uphold, which provides that the decisions of the Court of Appeal shall be enforced in any part of the Federation and by all authorities and persons and by Courts with subordinate jurisdiction to the Court of Appeal and Section 246(3) thereof, which provides that the decision of the Court of Appeal in the election matter in

issue, is final.

It is quite unfortunate that the learned Senior counsel representing the appellant would argue before us that the appellant merely gave advice in his capacity as AGF and that the recipients of the advice were not obliged to comply. It is patently clear from the facts before the Court that it was in compliance with the letters written by the appellant that the 1st respondent was neither issued with a Certificate of Return nor sworn into office, as ordered by the Court. As a result, the Federal Constituency he was to represent at the House of Representatives was denied representation.

The appellant, as the Chief Law Officer of the Federation and a Senior Advocate of Nigeria to boot was reckless and acted in a manner most unbecoming of the

occupant of such an exalted office.

His Lordship, Oyewole, JCA captured the mood of the learned trial Judge when he observed at pages 299-300 of the record:

***"The fact leading to this appeal captured a most sordid low in the administration of justice in this country. It is unthinkable that the occupier of the exalted office of Attorney General would subvert the ends of justice, as was***



***crudely done in this case by the appellant, When an Attorney General acts imperiously, placing himself above the laws of the land, impunity and anarchy are enthroned.***

***Public office is a sacred trust and an Attorney General should epitomize all that is good and noble in the legal profession. That office should never again be occupied by individuals of such poor quality as the appellant It is ironic that the appellant should approach the same temple he so brazenly desecrated for succor against the consequences of his appalling conduct.***

***To restore the dignity of the legal profession and reinforce the confidence of the administration of justice, the Nigerian Bar Association is invited to the facts of this case and the judicial reactions thereto and subject the appellant to its appropriate disciplinary processes."***

His Lordship has said it all. I agree entirely. The appellant has failed to persuade me to interfere with the award of exemplary damages made by the trial Court. It reflects the gravity of the appellant's conduct. This issue is resolved against the appellant.

In conclusion, I hold that this appeal is devoid of merit. It is hereby



dismissed. The judgment of the Court below, affirming the judgment of the trial Court, is affirmed. Cost of N2 Million is awarded against the appellant in favour of the 1st respondent.

MARY UKAEGO PETER-ODILI, J.S.C.: I agree with the judgment just delivered by my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC and to underscore the support I have in the reasonings that brought about the decision, I shall make some remarks.

This is an appeal against the judgment of the Calabar Division of the Court of Appeal or Court below or lower Court, Coram: P.O. Elechi, J.O. Oyewole and O. Nwosu-

Iheme, JJCA, delivered on 3rd September, 2015 affirming the judgment of A.F.A. Ademola J. sitting at the Federal high Court, Calabar on 1st June, 2010.

**FACTS BRIEFLY STATED**

Before the trial Court, the 1st respondent as the plaintiff, commenced the suit by originating summons on the 15/5/2009 raising the following questions for determination, namely:

*(1) Whether the conduct of the 2nd defendant in purported exercise of the powers of the 1st defendant in the letters of 8th January, 2008 and 16th February,*



*2009 does not constitute abuse of the powers conferred by Section 150(1) of the 1999 Constitution and do not undermine and/or subvert the administration of justice, the rule of law and independence, authority and integrity of the judiciary established under Section 36(1) of the said Constitution which he is obliged to uphold and defend and, particularly, the breach of Section 149 of the said Constitution.*

*(2) Whether, in the circumstances of the said letters aforesaid, the 1st defendant is a fit and proper person to hold office as the 1st defendant in conformity with Section 149 of the 1999 Constitution.*

Pursuant to the determination of those questions, the 1st respondent sought the following reliefs:

*(1) That the 2nd defendant undermined and/or subverted the rule of law, the due administration of justice and the independence, authority and integrity of the judiciary in the letters of 8th January, 2008 and 16th February, 2009 written by him in the capacity of the 1st defendant.*

*(2) That the 2nd defendant is not a competent, fit and proper person to hold and/or continue to hold office as the 1st defendant having regards to the Oaths of*



*Allegiance and Office.*

*(3) N100 million damages against the defendants jointly and severally,*

*(4) Perpetual injunction restraining the 2nd defendant from further and/or continued occupation of the office of the 1st defendant and/or the discharge of the functions of the said office.*

As at the time the suit was commenced, the Appellant was holding the office of the Attorney General of the Federation and Minister of Justice. He was thus sued in his

dual capacity as the Appellant and the 2nd respondent (at the trial Court as both 1st and 2nd defendants). He was served in that dual capacity and he entered appearance without raising the issue of non-service or improper service.

Shockingly, another person who did not win the election was unlawfully substituted by the National Secretariat of the Peoples' Democratic Party. This resulted in a long and hard battle.

After several adjournments, at the instance of the Appellant, and a long delay spanning about 13 months, the trial Court heard the case and delivered judgment on the 1st June, 2010.

The appellant appealed against the judgment of the trial Court and the Court of Appeal



affirmed the decision of the trial Court. The appellant has now further appealed against the judgment of the Court of Appeal.

The 1st respondent emerged the winner of the Peoples Democratic Party primary election in December, 2006 to fly the party's flag for Uyo Federal Constituency of Akwa Ibom State in April, 2007 election and was presented to the Independent National Electoral Commission (INEC). A dispute arose following his unlawful substitution by the party.

On the 5/12/2007, the Court of Appeal, Calabar in Appeal No. CA/C/45/2007 delivered judgment in favour of the 1st respondent and ordered that the President of the Court of Appeal should set up a new Tribunal to try the 1st respondent's election petition in Uyo. The Appellant in his capacity as the Attorney-General of the Federation and Minister of Justice wrote to the President of the Court of Appeal urging him not to obey the decision of the Court of Appeal by setting up the new Tribunal. That letter is Exhibit A in this matter.

The President of the Court of Appeal rightly ignored the letter and reconstituted another Election Petition Tribunal to try the 1st respondent's petition.



That Tribunal delivered judgment on the 18th April, 2008 and ordered that the 1st respondent be sworn into the House of Representatives. There was an appeal to the Court of Appeal, Calabar by the 1st respondent's opponent.

On the 12/2/2009, the Court of Appeal, Calabar, dismissed the appeal and ordered INEC to issue a Certificate of Return to the 1st respondent. Again the Appellant, wrote a letter dated 16/2/2009 to the then Chairman of INEC, Prof. Maurice Iwu urging him not to obey the judgment of the Court of Appeal. In the said letter, he

described the judgment of the Court of Appeal as "AN OBVIOUS DESECRATION OF THE INSTITUTION OF THE JUDICIARY". That letter is Exhibit C. This is found at page 16 of the Record of Appeal.

The appellant also wrote to the speaker of the house of Representative, Hon, Dimeji Bankole directing him not to obey the judgment of the Court of Appeal in the matter. That said letter is Exhibit D. This is found at page 22 of the Record of Appeal.

On the strength of those letters, emanating from the Chief Law Officer of the country; INEC refused to issue a Certificate of Return to the 1st respondent and the Speaker of



the House of Representatives, Dimeji Bankole refused to invoke Section 76(2) of the Electoral Act, 2006 to swear-in the 1st respondent. The 1st respondent felt grievously injured by the deprivation of his right as pronounced by the Court.

The 1st respondent felt that the actions of the, Appellant were in violation of his constitutional responsibility first, as a lawyer and also as the Chief Law Officer of the Federation. He was in breach of his mandatory duty under Section 287 of the 1999 Constitution. That by these letters, the appellant had grossly undermined the

authority of the Court of Appeal in particular and the judiciary in general.

As a result of the above chronicled actions of the appellant, the 1st respondent lost his occupation of the office and the corollaries of the office, including financial benefits, the dignity of the office; this injured the 1st respondent, who sought redress to remedy the situation.

The 1st respondent therefore instituted the suit against the appellant both in his personal capacity and in his capacity as the 2nd respondent, the Attorney-General of the Federation and Minister of Justice on account of the



injuries inflicted on him by the acts of the appellant.

The appellant did not complain of service at the trial Court and participated throughout the proceedings.

On the 31/3/2010, appellant's counsel indicated her intention to withdraw her appearance for the appellant in his personal capacity and when advised to file a motion in

that regard, failed to do so and so remained counsel for both appellant and 2nd respondent till judgment.

The trial Court delivered its judgment on the 1/6/2010 granting the reliefs in the originating summons which decision was affirmed by the Court below.

On the 20/9/2021 date of hearing, learned counsel for the appellant, Okon Efut SAN adopted the brief of the appellant filed on 6/1/2017 and deemed filed on 27/5/2019. In it were distilled five issues for determination, viz:-

*(i) Whether the learned Justices of the Court of Appeal were right to hold that the Appellant was granted fair hearing and thereby affirming the judgment of the trial Court, when the entire proceedings of the trial Court was tainted and vitiated by the non-service of the originating summons and subsequent hearing notices on the*



*Appellant. (Distilled from Grounds 1 and 2),*

*(ii) Whether the learned Justices of the Court of Appeal were right to affirm the trial Court's order granting reliefs not claimed by the Plaintiff/1st Respondent against the Appellant. (Distilled from Grounds 3 and 9)*

*(iii) Whether the Court below was right to hold that the trial Court had jurisdiction to entertain the suit, the subject matter of which was the alleged breach by the*

*Appellant of his Oath of Allegiance and Oath of Office, and the outcome of which had been overtaken by events. (Distilled from Grounds and 7)*

*(iv) Whether Exhibits B, C and D, being uncertified photocopies of public documents were admissible in evidence, having regard to Sections 97, 109, 111 and 112 of the Evidence Act (Distilled from Ground 6)*

*(v) Whether the learned Justices of the Court of Appeal were right in affirming the order of the trial Court awarding exemplary damages in the sum of N50 million against the defendants/appellant and 2nd respondent contrary to the legal principles and factors governing award of damages/Distilled from Ground 8).*

Learned Senior Counsel, Uwemedimo Nwoko adopted the brief



of argument, filed on 1/8/2018 and deemed filed on 27/5/2019. He equally adopted the issues crafted by the appellant.

I shall utilize the said issues formulated by the appellant for ease of reference and convenience.

ISSUES 1, 2 & 3

***(1) Whether the learned Justices of the Court of Appeal were right to hold that the Appellant was granted fair hearing and thereby affirming the judgment of the trial Court, when the entire proceedings of trial Court was tainted and vitiated by the non-service of the originating summons and subsequent hearing notices on the appellant. (Distilled from Grounds 1 and 2)***

***(2) Whether the learned Justices of the Court of Appeal were right to affirm the trial Court's order granting reliefs not claimed by the Plaintiff/1st Respondent against the Appellant (Distilled from Ground 3 and 9)***

***(3) Whether the Court below was right to hold that the trial Court had jurisdiction to entertain the suit, the subject matter of which was the alleged breach by the Appellant of his Oath of allegiance and Oath of Office, and the outcome of which had been overtaken by events, (Distilled from Grounds 4,5 and 7).***



Learned Senior Advocate for the appellant submitted that the Court below was in error to affirm the judgment of the trial Court when the entire proceedings of the trial Court was a nullity by reason of the fact that the Originating Summons was not served on the appellant, who was sued as the 2nd defendant in his individual and personal capacity. He cited **Sken Consult v Ukey** **(1981) 1 SC 6** etc.

For the appellant, it was contended that the Court below erred in dismissing the appellant's appeal when the reliefs granted by the trial Court were not claimed by the plaintiff. He referred to **Ekpenyong v Nyong (1975) 2 SC 71 at 81-82** etc.

For the appellant, it was submitted that the proper forum for challenging any conduct of a public officer on a complaint that a person has breached the code of conduct under the Constitution is the Code of Conduct Tribunal and not the Federal High Court.

In response, learned Senior Advocate for the respondent submitted that the record of appeal bears out the facts of service and prosecution most eloquently and appellant entered appearance through counsel in his office. That even though service of process is



fundamental to jurisdiction of Court, non-service or improper service can be waived by a defendant who may voluntarily submit to the jurisdiction of the Court and take part in the proceedings until judgment as happened in this instance. He cited **Ogbuanyinya v Okudo (1990) 4 NWLR (pt. 146) 551 at 576** etc. That appellant was at no point-denied fair hearing. Learned counsel for the respondents contended that a consequential order such as made in the instant case at the trial Court is an order

which gives effect and meaning to the judgment where it would otherwise amount to a pyrrhic judicial victory. He cited **Governor Ekiti State v Olubunmo (2017) 3 NWLR (pt. 1551) 1 at 39—40, 42** etc.

That the Federal High Court had jurisdiction to entertain the subject matter. He cited Section. 251 (1) CFRN.

On the issue of non-service of process, it has to be restated that though service of process is fundamental to the jurisdiction of the Court, the absence of it or an improper service can be waived by the defendant who voluntarily, submits to the jurisdiction of the Court and takes part in the proceedings up to judgment. Such a defendant loses the right



to be heard on a later objection on the basis of service of process on him. That is the situation on hand in this instance where the appellant did not raise any issue of service at the earliest opportunity and appeared in Court through counsel and conducted the case up to judgment, only to bring up the matter of non-service at the appeal stage. The legal necessity of service of Court process is to put the other side on notice of the existence of the suit or particular process and not being technical

rule of practice cannot be weaponised for technical mischief to frustrate the course of justice. See **Ogbuanyinya v Okudo (1990) 4 NWLR (pt. 146) 551 at 576; Ezomo v Oyakhire (1985) 2SC 269; (1985) 1 NWLR (pt.2) 195; Job Charles Nig. Ltd v Okonkwo (2002) FWLR (pt. 117) 1007; N.U.B. Ltd. v Samba Pet Co. Ltd; Odua Inv. Co, Ltd. v Talabi (1991) 1 NWLR (pt.170) 761 at 779**.

The law cannot be stretched to such a degree of elasticity upon which it can be founded that since at the material time, the appellant occupying the office of the Attorney-General of the Federation and Minister of Justice should have been served separately thereafter him as Attorney-General had been served to confer

a valid service on him. Therefore, in this case at hand, once he had as Attorney-General been served with the process, the appellant had notice of the process, hence if he had any objection as to that mode of service he ought to have so raised it in protest immediately and not wait after he had participated in the proceedings to use that peculiar service to invalidate the suit.

The situation has been streamlined by the Record of Proceedings which shows that appellant as the 1st defendant and the Attorney-General, of which he was as 2nd defendant were represented by the same counsel in the Federal Ministry of Justice. Also of note is that subsequently when appellant ceased to be Attorney General, the same counsel represented him and the Attorney-General. It follows that being seised with the change if he did not desire that same counsel representing him, he was in a position to do something but he did not change the position of things hence, the counsel remained for him and the 2nd defendant till the end. He cannot thereafter orally change the narrative borne out of the record of appeal which is the compass or guide of the appellate Court which that

Court cannot operate outside of, as it binds all parties. See **Sapo v Sunmonu (2010) 42 NSCQR 910 at 927; Audu v FRN (2013). 5 NWLR (Pt.1348) 397 at 408; Ibikunle v State (2007) 2 NWLR (pt. 1019) 546 at 572; Agwarangbo v Nakande (2000) 9 NWLR (pt. 672) 341 at 360; Abatan v Awudu (2004) 17 NWLR (pt. 902) 430**.

From the record, it is clear that appellant was duly served with the originating processes in this case and even if there was some lapse in the propriety of the service, appellant lost the right to complain having entered appearance and submitted to the jurisdiction of the Court. I rely on **Umeanadu v A.G. Anambra State (2008) 3-4 SC 1-31**.

My learned brother, Amina Augie, JSC captured what is playing out at this point in the case of **HUSSAINI ISA ZAKIRAI V SALISU DAN AZUMI MUHAMMAD (2017) 17 NWLR (PT. 1594) 181 at 230-231 paras H-E**, Augie JSC emphatically held,

*"Any defect amounted to a mere irregularity that can be waived by the parties. Was the said irregularity in this case waived? This Court nailed this issue to the ground in Adegoke Motors Ltd V. Adesanya (Supra), wherein it stated categorically that in similar circumstances like this,*

*the filing of a memorandum of appearance, as was done in this case, constitutes a waiver of any irregularity, and constitutes a submission to the jurisdiction of the Court. In that case, Oputa JSC, observed at p. 271, paras F-H.*

*A writ of summons (valid or invalid is immaterial at this stage) was served on the defendants. The defendants could, if they wanted to either:-*

*i. Enter an appearance on protest; or*

*ii. Enter a conditional appearance;*

*iii. To file a motion asking the Court seised of the matter — to set aside the purported writ and the purported service on the ground of essential invalidity of both writ and service.*

*The defendants did not do this. Rather they entered an appearance through their solicitors … this implies that they wanted and intended to contest the case of all the plaintiffs.*

*In this case, the appellant entered a conditional appearance and also filed a counter-affidavit, which means he waived the irregularity that he complained of, and had submitted to the jurisdiction of the Court."*

*See also* ***NBC v. Ubani*** ***(2014) NWLR (Pt. 1398) 421 at 459-461***

The appellant had insisted

that he was not served with the originating summons and turns around to argue about the non-service of hearing notice of the proceedings. That translates to a tacit admission that appellant was served with the originating summons and an admission that he entered appearance and participated in the proceedings. Again to be said is that a party either as plaintiff or defendant who is aware of a pending suit concerning him or her has a duty to check the Registry of Court if nothing has been heard after a reasonable lapse of time for the current status of the case. This is so because a person with a case in Court in whatever capacity cannot afford the luxury of defiant complacency and expect miracles will take place to protect his interest at stake in litigation. In this instance the appellant was represented for 13 months in the trial Court and the legal practitioner did not formally and properly withdraw the appearance thereof, the appellant clearly did not take seriously the matter as weighty as the one under discourse to personally follow up the developments. Clearly he waived his right and opportunity to complain, See **NACB Lt v Ozoemelam (2016) 9 NWLR (pt. 15**

**17) 376 at 407-408 per Ngwuta JSC; Saude v Abdullahi (1989) 4 NWLR (pt. 116) 389 at 405; NBC PLC v Ubani(2014) 4 NWLR (pt. 1398) 421 at 449.**

It is to be noted that the principle of fair hearing is not a magic wand to cure all inadequacies at the trial Court nor can it be applied in the abstract at the comfort and convenience of a party. It is a principle founded and has to be based on the facts of a given case before the Courts, hence only the facts of the case can influence and determine the application or applicability of the principle, from the reliefs sought in the suit. See **Governor of Ekiti State v Olubunmo (2017) 3 NWLR (pt. 1551) 1 at 39-40, 42 & 48.**

In respect to the jurisdiction of the Federal High Court which appellant contends was absent. There is no gainsaying that the Federal High Court had jurisdiction to entertain the subject matter of the suit leading to this appeal pursuant to Section 251 (1) of the Constitution because as at the time of the act of the appellant complained of, he was an officer of the Federal Government.

The contention of the appellant that the Federal High Court is not the proper forum for the

dispute and it ought to have been the Code of Conduct Tribunal falls flat in the face of the facts of this case and the prevailing law.

In fact, the submissions of the appellant go against his case in context with what is available in the record.

Appellant posits that an allegation of abuse or breach of the Code of Conduct for Public Officers, Part 1 of the 5th Schedule to the 1999 Constitution is a matter within the special and exclusive jurisdiction of the Code of Conduct Bureau and the Code of Conduct Tribunal.

Paragraph 1 of Part 1, 5th Schedule to the 1999 Constitution provides:
*"A public Officer shall not put himself in a position where his personal interest conflicts with his duties and responsibilities."*

The allegation in paragraphs 13 and 13 (paragraph 13 is numbered twice) of the 1st Respondent's affidavit at page 8 of the record is as follows:-
*"13. The 2nd Defendant is compromised in the discharge of his duty as the 1st defendant because of his joint interest with the said Elder Bassey Etim in the over N700M interest in the -judgment sum of N415M in the Utan Brama*

*Victims Case in suit No. FHC/CA/8/95. On account of this compromise and undue interest, the 2nd Defendant acted both officially as the 1st Defendant and privately as M.K. Aondoakaa & Co to deal with the said funds as in Exhibit F hereto,*

*13. The 2nd Defendant is blinded by the pursuit of the financial interests he shares with the said Elder bassey Etim in the Utan Brama funds that he is prepared to go to the length in the letters of 8th January, 2008 and 16th February, 2009 to shield the said Elder Bassey Etim."*

These allegations, bordering also on criminality, are allegations of breach of paragraph 1 of the Code of Conduct for Public Officers. By paragraph 12 of part 1 of the said 5th Schedule to the Constitution,

*"Any allegation that a public officer has committed a breach of or has not complied with the provisions of this code shall be made to the Code of Conduct Bureau."*

In paragraph 15(1) of part 1 of the said Schedule, the Code of Conduct Tribunal is established. Paragraph 18 of the said Schedule further provides:

*"1. Where the Code of Conduct Tribunal finds public officer guilty of a contravention of any*

*of the provisions of this code, it shall impose upon that officer any of the punishment specified under sub-paragraph (2) of this paragraph and such other punishment as may be prescribed by the National Assembly.*

*2. The punishment, which the Code of Conduct Tribunal may impose, shall include any of the following:*

*(a) Vacation of Office or seat in any legislative house, as the case may be;*

*(b) Disqualification from membership of a legislative house and from the holding of any public office for a period not exceeding ten years"*

The stance of the appellant that the matter had become spent and academic because in the course of the action, the appellant had ceased to be Attorney-General and occupying the seat of Minister of Special Duties is not supportable because at the time of the act complained of he was Attorney General. Therefore, the case of **Amah v Nwankwo (2007) 12 NWLR (pt. 1049) 552 at 5571-5572** is not applicable as the facts are different from those at hand.

Indeed, the issue of qualification for holding the office of 2nd respondent or any other public office does not arise.

ISSUES 4 & 5

*4. Whether Exhibits B,*

*C and D being uncertified photocopies of public documents were admissible in the evidence, having regard to Sections 97, 109; 111 and 112 of the Evidence Act (Distilled from Ground 6)*

*5 Whether the learned Justice of the Court of Appeal was right in affirming the order of the trial Court awarding Exemplary Damages in the sum of N50 Million against the Defendant/APPELLANT and 2nd Respondent, contrary to the legal principles and factors governing award of damages (Distilled from Ground 8)*

Learned counsel for the appellant contended that the trial Court acted on inadmissible secondary evidence of public documents in coming to the conclusion it did which the Court below erroneously affirmed. He cited Sections 102, 104 and 105 of the Evidence Act, **Fawehinmi v IGP** **(2002) 5 SCNJ 103 at 129 & 132** etc.

That the Court below was wrong in affirming the order of the trial Court which awarded the sum of N50,000,000.00 as exemplary damages in favour of the plaintiff/1st respondent and against the 2nd respondent and the appellant. He stated that exemplary damages are punitive in essence and besides 1st respondent did not seek exemplary damages at the

trial Court. He cited **Odogu v. A.G. Federation (1996) 6 NWLR (pt. 456)508 at 521** etc.

Learned counsel for the respondents stated that Exhibits B, C and D were admissible and rightly relied upon by the Court. That such documents need not be certified true copies where the contents of the documents are not in dispute as in this case because the 2nd appellant did not disown his signature on the documents which the appellant asserted ought to have been certified. He relied on **Onobruchere v Esegine (1986) 1 NWLR (pt. 19)799** etc.

That the primary object of an award of damages is to compensate the plaintiff for the harm done to him and the secondary object is to punish the defendant for his conduct in inflicting that harm.

The appellant had taken exception to the admissibility of Exhibits B, C, D since they were photocopies of public documents. The point has to be made that, copies of public documents attached to an affidavit as exhibits need not be certified true copies because the documents already form part of the evidence adduced, by the deponent before the Court and are available to the Court to use once it is satisfied that they are

credible. Again to be said is that such documents need not be certified true copies where the contents of the documents are not in dispute as in this case because the appellant did not disown his signature on the document he is contending ought to have been certified. I refer to **Onobruchere v. Esegine (1986) 1 NWLR (Pt. 19) 799; Nzekwu v. Nzekwu (1989) 2 NWLR (Pt. 104) 373; Araka v. Egbue (2003) 17 NWLR (Pt. 848) 1; Ogu v. M.T. & M.C.S. Ltd (2011) 8 NWLR Ltd (2011) 8 NWLR (Pt. 1249) 345; Ojuya v. Nzeogwu (1996) 1 NWLR (Pt. 427) 713; Ilorin East L.G. v. Alasinrin (2012) LPELR 8400; B.A.T. (Nig.) Ltd. V. Int'l Tobacco Co. Plc. (2013) 2 NWLR (Pt. 1339) 493**. It is of note that the appellant never denied authoring those documents. It would have been a different thing if the appellant had denied that he did not write and sign the said Exhibits. In any event, the appellant quarreled seriously with the trial Court admission of Exhibits B, C and D and opined that since the documents were not certified, they ought not be admitted. It is the law that any documents attached to an affidavit need not be certified. See **B.A.T. (NIG.) LTD. V. INT'L TOBACCO CO. PLC.**

**(2013) 2 NWLR (PT. 1339) P. 496 at 520-523 PARAS A-E.**

*"...certificate of registration of Dorchester trade mark, certificate of assignment of the trade mark and certificate of renewal of the trade mark, respectively at the state. For the purpose of the application, Exhibits W01, W02 and W03 must certainly true copies, since the applicant was expected to photocopy the originals of those documents given to them by the issuing registry, as exhibited copies for this application. One cannot expect the applicant to have taken the documents (photocopies) to the issuing registry for certification before using the same for this application. Only recently, we had cause to explain, in a well-considered judgment, that public documents, exhibited as secondary copies in affidavit evidence cannot, necessarily, be certified true copies, and that documents exhibited to an affidavit evidence which a Court is entitled to look at, and use. See the unreported decision of this Court in the case of Ilorin East L.G. v. Alh. Woli Alasinrin & Anor — CA/IL/38/2011, delivered on 20/2/2011 wherein we state thus:-*

*"I do not think the issue of*

*certification of a secondary evidence (photocopy) as in exhibit C, can rise in this case, being one sought on affidavit evidence and the respondents not claiming to have obtained it from the appellant, lawfully..."*

I agree with learned counsel for the respondents that relevance is key to admissibility as it is settled law that it is relevance of a document and not the weight to be attached to it that is paramount. Admissibility is not the same thing as the probative value that may be placed on the document or exhibit. Relevance and admissibility of a document are separate matters in contradistinction to the weight to be attached to it. Therefore, in the consideration of the admissibility of any evidence, oral or documentary, the test remains that once it is relevant, it is admissible and the Court is not bothered with how it was obtained or the proper custody of the evidence. The position of the law which I have been trying to articulate is well set out in the judgment of this Court in **Abubakar v. Chuks (2007) LPELR-52 (SC) at 13, paras. C-G, (2007) 18 NWLR (Pt. 1066) 386 at page 403** Tobi, JSC articulated the law and the basis for

it as follows:-

*"Relevancy and weight are in quite distinct compartments in our law of evidence. They convey two separate meanings in our adjectival law and not in any form of dovetail. In the order of human action or activity, in the area of the law of evidence, relevancy comes before weight. Relevancy, which propel admissibility, is invoked by the trial Judge immediately the document is tendered. At that stage, the Judge applies Sections 6, 7, 8 and other relevant provisions of the Evidence Act to determine the relevance or otherwise of the document tendered. If the document is irrelevant, it is rejected with little or no ado. Weight comes in after the document has been admitted. This is the stage of writing the judgment or ruling as the case may be."*

It is of interest that the facts deposed to in the supporting affidavit were not controverted and so are taken as true and deemed admitted with the Court bound to act on them. The documents were further evidence of those facts already deposed and unchallenged and so cannot be disturbed at this stage on admissibility. See **Alagbe v Abimbola (1978) 2 SC 39; Egbuna v. Egbuna (1989) 2 NWLR (Pt.**

**106) 773; Yar'Adua v. Yandoma (2015) All FWLR (pt.770) 1215 at 1259; Long John v. Blakk (1998) 6 NWLR (pt. 555) 524 at 532; Ogoejeofo v Ogoejeofo (2006) 3 NWLR (pt. 966) 205; Owners MV Gongola Hope v. SC (Nig) Ltd (2007) 15 NWLR (pt. 1059) 189 at 215 - 216.**

On whether the Court below was right in affirming the order of the trial Court in the award of exemplary damages in the sum of N50 million naira against respondent, which appellant contends was not claimed by the 1st respondent. That posture is clearly misleading and outside the record. First, the 1st respondent claimed the sum of N100,000,000.00 (One hundred million naira) damages, which is the third relief in the originating summons. The Court even reduced what was claimed and so it is untrue that such monetary award was not claimed.

In justifying the award of N50 million naira exemplary damages Oyewole, JCA in his concurring judgment stated thus:
***"The facts leading to this appeal capture a most sordid law in the administration of justice in this country. It is unthinkable that the occupier of the exalted office of Attorney General would subvert the ends of justice as was crudely done in***

***this case by the appellant.***

***When an Attorney General acts imperiously, placing himself above the Superior Courts of the land, impunity and anarchy are enthroned.***

***Public office is a sacred trust and an Attorney General should epitomize all that is good and noble in the legal profession. That office should never be occupied by individuals of such poor quality as the appellant.***

***It is ironic that the appellant could approach the same temple he brazenly desecrated for succor against the consequences of his appalling conduct.***

***To restore the dignity of the legal profession and reinforce the confidence of the ordinary citizens in, the administration of justice, the Nigerian Bar Association is invited to the facts of this case and the judicial reaction thereto and subject the appellant to its appropriate disciplinary processes." (underlined mine)***

It is not difficult to see the rationale that propelled the decisions in the two Courts below based on concurrent findings which I see nothing perverse leading thereto or a misapplication of the law, procedural or substantive upon which I can support a departure therefrom. Therefore, this appeal

lacks merit and I dismiss it. I abide by the consequential orders made.

Appeal dismissed.

**MOHAMMED LAWAL GARBA, J.S.C.:** I have had the opportunity to read a draft of the lead judgment written by my Learned Brother K. M. O. Kekere-Ekun, JSC in this appeal and it represents, comprehensively, all my views on the issues that call for decision by the Court. I adopt the views expressed and conclusions reached on the issues as well as the conclusion that the appeal is bereft or merit. In particular, I endorse the apt observation by J. O. K. Oyewole, JCA in his concurrent judgment (at pages 300—301 or the Record o Appeal) when he stated that:-

***"The facts leading to this appeal capture a most sordid low in the administration of justice in this country. It is unthinkable that the occupier of the exalted office of Attorney-General would subvert the ends of justice as was crudely done in this case by the appellant.***

***When an Attorney-General acts imperiously, placing himself above the Superior Courts of the land, impunity and anarchy are enthroned.***

***Public office is a sacred trust and any***

***Attorney-General should epitomize all that is good and noble in the legal profession. That office should never again be occupied by individuals of such poor quality as the appellant.***
***It is ironic that the appellant could approach the same temple he so brazenly desecrated for succor against the consequences of his appalling conduct.***
***To restore the dignity of the legal profession and reinforce the confidence of the ordinary citizens in the administration of justice, the Nigeria Bar Association is invited to the facts of this case and the judicial reactions thereto and subject the appellant to its appropriate disciplinary processes."***

This position is weighty enough to serve as a strong lesson to all legal practitioners holding public offices, but particularly, as Attorney-General at the Federal or State levels.
I join in dismissing the appeal in all the terms of the lead judgment.

**IBRAHIM MOHAMMED MUSA SAULAWA, J.S.C.**: I have had a preview of the judgment just delivered by my learned brother, the Hon. Justice K.M.O. Kekere-Ekun, JSC. The reasoning and conclusion therein reached to the effect that the

instant appeal is devoid of merits, are very much in accord with mine.

Hence, I hereby without much ado dismiss the appeal and abide by the consequential orders made in the judgment.

EMMANUEL AKOMAYE AGIM, J.S.C.: I had a preview of the judgment of my learned brother, Lord Justice KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN, JSC. I completely agree with the reasoning, conclusion, decisions, and orders therein.

Following the decision of the Court of Appeal dismissing the appeal by the 1st respondent's opponent against the Akwa Ibom State National Assembly Election Tribunal, and the order of the Court of Appeal that the 1st respondent be issued a certificate of return and sworn in as the member of the House of Representatives representing Uyo Federal Constituency, by virtue of S. 75 of the Electoral Act 2010 and S.287 (2) of the 1999 Constitution, the Independent National Electoral Commission was bound to issue the 1st respondent a certificate of return within 48 hours of its receipt of the Order and the Speaker of the House of Representatives was bound to swear him in as such a member of the House of

Representatives upon receipt of the certificate of return or a certified copy of the said Order.

S. 75 of the Electoral Act 2010 (as Amended) provides that-

"(1). A sealed Certificate of return at an election in a prescribed form shall be issued within 7 days to every candidate who has won an election under this Act: Provided that where the Court of Appeal or the Supreme Court being the final appellate Court in any election petition as the case may be nullifies the Certificate of Return of any candidate, the Commission shall within 48 hours after the receipt of the Order of such Court issue the successful candidate with a valid Certificate of Return.

(2). Where the Commission refuses and/or neglects to issue a certificate of return, a certified true copy of the Order of a Court of Competent Jurisdiction shall, ipso facto, be sufficient for the purpose of swearing — in a candidate declared as the winner by that Court.

S. 287(2) of the Constitution of the Federal Republic of Nigeria 1999 provides that — "the decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities and persons

and by Courts with subordinate Jurisdiction to that of the Court of Appeal."

The appellant as Attorney-General of the Federation of Nigeria on 16-2-2009 wrote a letter to the chairman of Independent Electoral Commission (INEC) (exhibit C) urging the Commission not to obey the judgment of the Court of appeal, describing the judgment as "an obvious desecration of the Institution of the Judiciary." He also wrote a similar letter (exhibit D) to the Speaker of the House of Representatives advising him not to obey the judgment but "to allow the status quo to remain until the last or final word is heard from the Supreme Court." The Independent Electoral Commission (INEC) and the Speaker of the House of Representatives complied with the directives of the appellant in the above mentioned letters to them and refused to obey the decision and the Orders of the Court of Appeal in violation of the proviso to Subsection (1) of S.75 of the Electoral Act 2010 as amended and S. 287(2) of the 1999 Constitution.

The result of this refusal to comply with the decision of the Court of Appeal is that, the respondent's opponent, one Elder Bassey Etim continued to

illegally occupy the seat of Member of the House of Representatives for Uyo Federal Constituency to the exclusion of the 1st respondent who was the candidate adjudged elected and returned as such Member of the House of Representatives. The Attorney General was not a party to the case and did not represent Independent Electoral Commission (INEC) in the case. The parties to that appeal were represented by Legal Practitioners. The Attorney General not being a party in the case and not being a Legal representative of any of the parties had no official or public interest in the case.

It is glaring that the status quo that the appellant used his office as Attorney General of the Federation to preserve was one in disobedience of an Order of Court and frustration of S75 of the Electoral Act and S.287 (2) of the 1999 Constitution. It was clearly an unconstitutional and illegal status quo.

In his desperation to frustrate the enforcement of the Orders of the Court of Appeal, the appellant turned his office into a Court to review the decision of the Court of Appeal and determined that the judgment was "a desecration of the institution of the Judiciary." The

office of the Attorney General is not a Court and has no power to assume that role. By virtue of S. 246(2) and (3) of the 1999 Constitution, the Court of Appeal is the final Court of Appeal on post-election litigations concerning National and House of Assembly elections. No authority or person, not even the Supreme Court of Nigeria can review the decision of the Court of Appeal on such post-election matters concerning National and House of Assembly elections.

It is clear from the foregoing that the appellant committed unlawful acts in his official capacity as Attorney general of the Federation for the purpose of giving an illegal advantage or benefit to one Elder Bassey Etim. This is a clear case of criminal abuse of office to the detriment of the 1st respondent, the adjudged winner of the election. The detriment is that he is prevented from enjoying the fruits of his electoral victory as he has not been allowed to occupy the seat he won in the election. This is a personal injury inflicted on him by the appellant.

The holder of a public office who with malice aforethought uses the public office held by him to commit an unlawful act for the purpose

of depriving a person of his lawful right or interest so as to secure an advantage or benefit for himself or another should be personally liable for the deprivation of a person's lawful right or any injury the person suffers on account of such deprivation. The use of a public office to commit the unlawful act in pursuit of a private or personal interest will not qualify the act as an official one so as to make the public office or authority vicariously liable for such unlawful act.

**Appearances:**

| | |
|---|---|
| OKON N. EFUT, SAN WITH HIM, VICTOR OGBONNA ESQ., JOHN BOSCO BAKONG, ESQ. and JACOB M. JACOB-DUKE ESQ. | **For Appellant(s)** |
| UWEMEDIMO NWOKO, SAN WITH HIM, ITIBE NWOKO ESQ. and P.D. PIUS ESQ. - for 1st Respondent | **For Respondent(s)** |

No appearance for 2nd Respondent.