

IN THE HIGH COURT OF JUSTICE
ONDO STATE OF NIGERIA
IN THE AKURE JUDICIAL DIVISION
HOLDEN AT AKURE

BEFORE HIS LORDSHIP HON. JUSTICE W. A. AKINTOROYE – JUDGE
THIS TUESDAY THE 30TH DAY OF AUGUST, 2022.

SUIT NO: AK/229/2019

BETWEEN:

1. TAJUDEEN ADETONA }CLAIMANTS
2. SUNDAY AYENI }

AND

1. AGRO TRADERS COMPANY LIMITED }
2. MR. RESHEED AYOADE }DEFENDANTS
3. COMMISSIONER OF POLICE }

JUDGMENT

The chequered history of this case dated back to November 12, 2019, when the claimants herein vide a writ of summons, set a legal battle of malicious prosecution in array against the defendants to seek the hereunder reproduced reliefs:

- (i) A declaration of the conduct of the defendants jointly and severally towards that malicious prosecution of the claimants are barbaric, unlawful unconstitutional and an abuse of power.
- (ii) An order of court compelling the defendants individually to publish in the two National Daily and as well in the NTA, to apologize for the wrongful criminal allegations made against the claimants that



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led to their being maliciously prosecuted within 90 days of the Judgment of this Honourable Court.

- (iii) An order of the Honorable court for the sum of Fifty Million Naira (N50,000,000.00) only as punitive damages for the tumour, embarrassment and inconvenient lost of economy means of Two Million Naira (N2,000,000.00) only being the money paid to their Lawyer both at police investigation level and the prosecution of their defence in the courts as a result of the defendants wrongful conducts.
- (iv) An order of court for the sum of Two Hundred and Fifty Thousand Naira (N250,000.00) only being the cost of the litigation.

On 21st November, 2019, the 1st and 2nd defendants squared it up to the claimants by filing their defence to this suit whilst the 3rd defendant did not file any paper.

Tajudeen Adetona opened the claimants' case as Cw 1. He adopted his written statement on oath dated 13th November, 2019, as his evidence in court. Witness averred that he was arrested in connection with the allegations in both the Charge Sheet MAK/0/135^C/2015 and Information Charge No: AK/54^C/2015. He claimed to be arraigned in 2015 and re-arraigned on 17-count charge in 2017. He said that the 1st and 2nd defendants levelled frivolous allegations of conspiracy, stealing and fraud of Ten Million Naira (N10,000,000.00) against him. Witness added that the 1st and 2nd defendants prosecuted him at the Magistrate Court in the first charge and at the High Court for the second charge. According to him, he was prosecuted for the same offence in the two charges respectively without any justification. Cw 1 went further to state that his business suffered a great set back as virtually all his

customers left him while his various farms crops were destroyed by the herdsmen cattle in millions naira. It was his claim that all his business partners and customers deserted him contemptibly. He averred that the defendants maliciously prosecuted him for almost five (5) years but the judgments of the court exonerated him of all the charges. Cw 1 stated that he suffered human degradation and psychological tremor, which were unquantifiable monetarily. Witness added that the criminal allegations levelled against him destroyed his family. An attempt to tender in evidence the Charge Sheets and Information in Magistrate's as well as High Courts respectively was opposed by the learned defendants' counsel. Ruling on the merit or otherwise of the admissibility of the documents shall be considered *anon*. Conversely, the Enrolment of Judgment of the Magistrate's Court in Charge No. MAK/0/135^c/2015-C.O.P. vs. Ayeni Sunday & 2 Ors. was admitted in evidence as Exhibit "A-A4" whilst the Enrolment of Judgment in in Suit No. AK/54^c/2015 – Federal Republic of Nigeria vs. Jimoh Bayo & 3 Ors. – was admitted in evidence, marked Exhibit "B-B10". Witness prayed the Court to grant his claim.

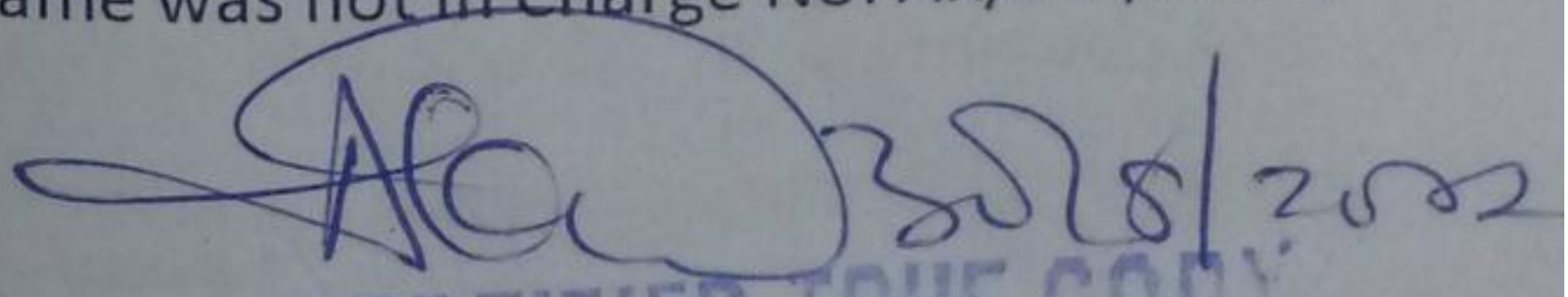
Cross-examined by the learned defendants' counsel, Tajudeen Adetona agreed that he narrated the facts of his case to his counsel in Yoruba Language. He admitted knowing one Taofeek Adetona as his brother and one Alhaji Ismailia Olorungbebe. According to him, he sued the Commissioner of Police and one Taiwo Ayoade to Court in a case. Witness agreed that the court process shown to him was the CTC of Court proceedings in the said case. The CTC of judgment of court in Suit No AK/45^M/2015 between Taofeek Adetona & 2 Ors. vs. C.O.P. & 2 Ors. was admitted in evidence, marked Exhibit "C-C17". Witness maintained that four (4) of them, namely: himself, Ismail Olorungbebe, Adebayo Afeez and Jimoh Bayo, stood trial at the High Court in a criminal case. Cw 1 affirmed that there was a judgment

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delivered by the trial court at the end of the trial albeit he declined knowing if the Court process showed to him was in respect of the criminal trial because he could not read Exhibits "B-B10" and "A-A11" respectively. Witness agreed that the 2nd claimant (Sunday Ayeni) was not charge along with him at the High Court. It was his evidence that there was no dispute between him and the 1st and 2nd defendants before he stood trial in the criminal matter at the High Court. Cw 1 agreed that he did not know the 1st and 2nd defendants before he was arrested and charged to court. He admitted knowing one Sarafa, who was his brother's friend, but he (Sarafa) did not invite him to Igbara-Oke. According to him, he was charged to the Magistrate's Court based on what happened at the Army Check-Point near Igbara-Oke.

Ayeni Sunday, having adopted his written statements on oath dated 13th November and 19th December, 2019 as his evidence, testified as Cw 2. Notably, his former written statement was on fours with Cw1's evidence, which was mindlessly copied. Witness denied paragraphs 1, 2, 4 - 27 of the 1st - 2nd defendants' Statement of Defence. He averred that the 1st - 2nd defendants' criminal complaint to the 3rd defendant led to his arrest. Cw 2 stated that one Mr. Jimoh Bayo never admitted of his complicity in the alleged crime in Suit No: AK/54^C/2015.

Cw 2 was cross-examined. Witness said he could neither read nor write. He claimed to state the facts of what transpired between the parties to his counsel in Yoruba Language. Cw 2 said he neither knew the 1st and 2nd defendants before he was arrested by the police nor had any dispute with them. According to him, he was coming with others to the High Court during trial of that case but he was not charged with them. He affirmed that his name was not in Charge No: AK/54^C/2015, which was shown to him, as a defendant.


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Cw 3 was Mr. Alege Fatai. Witness was sworn on oath but could not adopt his written statement dated 13th November, 2019 because he could not remember deposing to same at the Registry of this Court.

That was the claimants' case.

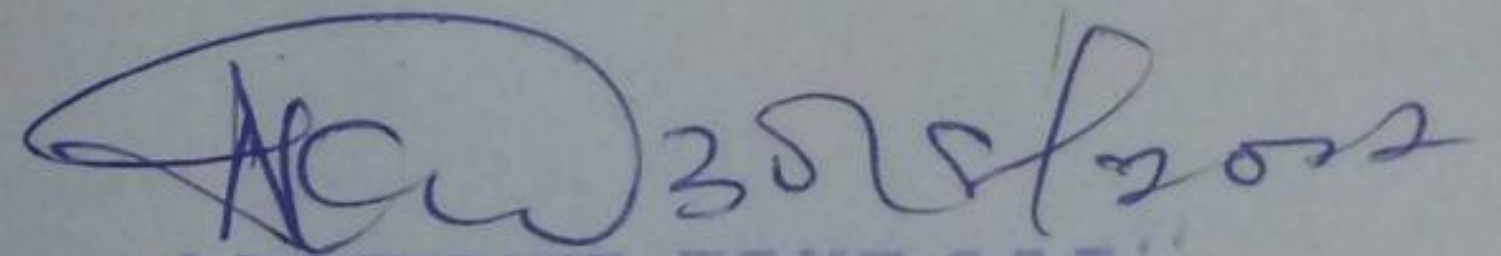
Mr. Aderemi Ajibola, a Superintendent of Police and officer-in-charge of Legal Matters of Kwara State Command, gave evidence as Dw 1. Witness, who elected to affirm, was subpoenaed to testify. The CTC of the subpoena served on him was admitted in evidence, marked Exhibit "1". According to him, he was the O.C. Legal, Ondo State Police Command, between 2013 and 2016, before he was transferred to Kwara State in October 2016. Dw 1 claimed to know about AK/45^M/2015, which was a lawsuit between Taofik Adetona & 2 Ors v. C.O.P Ondo State Command & 2 Ors. Witness said he represented the 1st and 2nd respondents in the case. According to him, a judgment was delivered in the case and he identified Exhibit "C-C17" as the said Judgment. Dw 1 averred that he exhibited with the Counter-Affidavit he filed in the case an extract from the Crime Diary. The photocopy of CTC of extract from Crime Diary was admitted in evidence, marked Exhibit "2". Witness claimed that, as the O. C. Legal then, he was carried along by the case (i.e. AK/45^M/2015) Investigating Police Officer in the course of their investigation. He added that when the AK/45^M/2015 was instituted at the High Court, Akure, he prepared a defence to the suit. Dw 1 identified Exhibit "D2" that he tendered in AK/45^M/2015. The CTC of extra-judicial statement of Jimoh Bayo that was marked Exhibit "D2" in AK/45^M/215 was admitted in evidence, marked Exhibit "3-3A". He went further to say that after the investigation by the Investigating Police Team, Information was prepared at the High Court by him. The CTC of Information filed in Suit No.: AK/54^C/2015 was admitted in evidence, marked Exhibit "4-4a". Similarly,

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the CTC of amended Information as per DW1's evidence was admitted and marked Exhibit "5-5F" whilst the CTC of Charge Sheet in Charge No.: MAK/O/135^C/2015 was admitted in evidence, marked Exhibit "6-6D". Witness claimed to start the prosecution of the case.

Asked questions under cross-examination, S. P. Adeyemi Ajibola re-affirmed that he prosecuted Charge No.: MAK/O/135^C/2015 to a point before he sought transferred from Ondo State. He maintained that the 1st claimant was arrested at Igbara-Oke, when he was fingered as one of the suspects by one Jimoh Bayo – a co-suspect in the crime. According to him, Jimoh Bayo was not however charged to court in the MAK/O/135^C/2015. He denied knowing exactly where the 1st claimant was arrested at Igbara-Oke. Witness added that he could not say where the 2nd claimant was arrested. He agreed that the 1st and 2nd claimants were discharged and acquitted in MAK/O/135^C/2015 and AK/54^C/2015 respectively.

Dw 2 was Mr. Taiwo Ayoade who adopted his written statement on oath dated November 21, 2019 as his evidence in Court. Witness identified Exhibits "2, 5-5d, C-C17 and 3-3a" in line with his depositions in paragraphs 7, 12, 13, 18, 19 and 24 of his written statement respectively. In the same vein, he referred to paragraph 28 of the written statement vis-à-vis a Counter-Affidavit of the 3rd defendant in Suit No.: AK/45^M/2015. The 3rd Respondent's Counter-Affidavit in Suit No.: AK/45^M/2015 – Taofeek Adetona & 2 Ors. vs. C.O.P. & 2 Ors. was admitted in evidence as Exhibit "7-7XXXXVIII". According to him, the 2nd defendant did not make a complaint to the 3rd defendant on behalf of the 1st defendant against the claimants. Dw 2 stated that the claimants were arrested based on the crime committed against the police as contained in Charge Sheet: MAK/O/135^C/2015. He averred that it was one Jimoh Bayo that pointed the 1st claimant to the 3rd


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defendant as the person who used to come and collect money from him on behalf of one Taofeek Adetona.

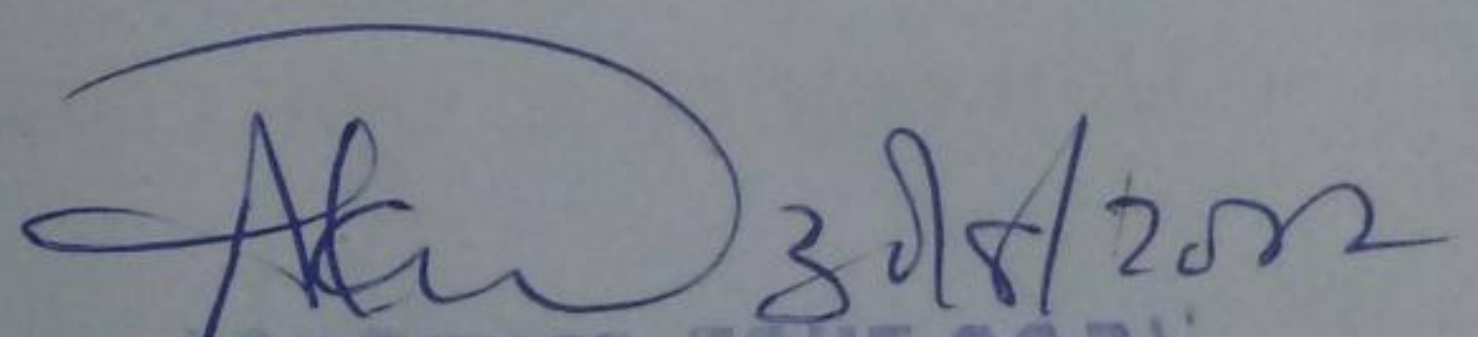
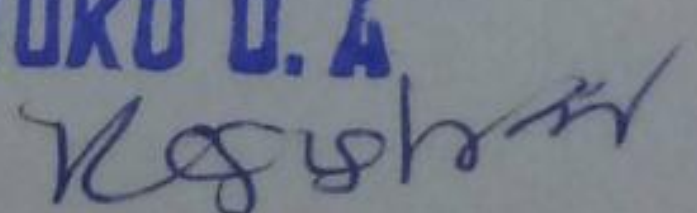
Dw 2 was cross-examined. He affirmed that the current M.D. of the 1st defendant was Mr. Adekunle Rasheed Ayoade. He agreed that the 2nd defendant was the over-all boss of the 1st defendant, who never made any criminal complaint against the claimants. Witness said he was not aware that anyone was arraigned in Court. Dw 2 said he agreed that about eighteen (18) people were arraigned in Court at the beginning of the charge at the High Court. He added that the charge in the High Court case was amended and the number of suspects arraigned in the Court was reduced. Witness admitted knowing one Adeyemi Azeez Olalekan and one Olasunkanmi Fatula, who were staff of the 1st defendant. He agreed that Adeyemi Azeez Olalekan gave evidence in Charge No. MAK/0/135^C/2015 and AK/54^C/2015. Dw 2 said judgments had been given in both cases.

That was the case for defence.

Parties' counsel filed and adopted their written addresses. Besides, the learned counsel for the 1st and 2nd defendants file a Reply on Points of Law.

In his written address, the learned 1st and 2nd defendant's counsel distilled five (5) issues for determination, *videlicet*:

- i. Whether the claimants witness statement on oath should not be discountenanced by this court for failure to comply with the first schedule of the Oaths Act, LFN 2004;
- ii. Whether the depositions adopted by Cw 1 and Cw 2 were the same as those made by the witness;

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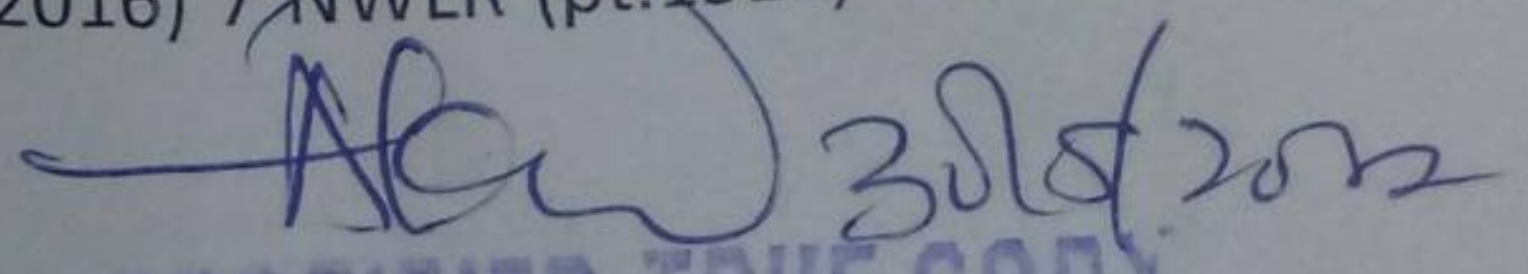
iii. Whether where a party fails to adduce evidence in support of any assertion in his pleading he is deemed to have abandoned his pleading on the fact;

iv. Whether a claim for special damages must be specifically pleaded and strictly proved; and

v. Whether the claimants have been able to establish the case of malicious prosecution against the 1st and 2nd defendant.

In a joint treatment of the issues 1-3 together, he went to town extensively on the authorities of *REBECCA v. A.G. FEDERATION & ORS* (2019) LPELR – 47378 (CA); *OYEKANMI & ANOR v. MTN* (2020) LPELR – 50168 (CA); *GUARANTY TRUST BANK PLC. v. BARRISTER AJIBOYE AYODEJI ABIODUN* (2017) LPELR -42551 (CA) and *ALIYU v. BULAKI* (2019) LPELR – 46513(CA) to contend that the claimants' written statements did not contain an oath as stipulated in the First Schedule of the Oath Act. He submitted that for a written statement to be on oath, it must be in compliance with the First Schedule to section 13 of the Oaths Act, Laws of the Federation of Nigeria 2004. He further submitted that the signature and stamp of the Commissioner of Oath on claimant witnesses' written statements could not remedy the defect therein as it was apparent that they lack the oath clause. He maintained that non-compliance with the provisions of the Oaths Act was a fundamental breach and the consequence was that the entire written statements of the claimant witnesses were left bare.

Arguing against the backdrop of *THE STATE v. ALI SAIDU* (2019) LPELR – 47397 (SC); *TRADER v. ROMO* (2018) LPELR – 46514; *GUNDIRI v. NYAKO* (2012) 11 SCNJ 73 at 103 – 105 and *YAHAYA v. DANKWANBO* (2016) 7 NWLR (pt.1511) 284 at 317, he


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argued in great details that a witness statement on oath constituted the evidence-in-chief of a witness and where that statement was made in the local language before its translation into English Language, the law required of the person to ensure that both statements were tendered. He submitted that the claimants' written statements having not been accompanied by Yoruba versions could not be adopted by the witnesses.

On issue 4, he submitted that the claimants failed to plead and prove the claim for a special damages and therefore not entitled to the reliefs sought. Reference was made to LUKE NWANEWU ONYIORAH v. BENEDICT C. ONYIORAH & ANOR LPELR (2019) SC 254.

On issue 5, counsel highlighted the four essential elements of malicious prosecution as decided by the Supreme Court in the case of BALOGUN v. AMUBIKAHUN (1989) LPELR – 725 (SC) to contend that the 1st defendant merely made a report to the police and left the report to the police to do their duty and nothing more. He submitted that it was not the 1st and 2nd defendants that set the police against the claimants. Marshalling his argument on the authority of MICHELIN TYRE SERVICES LTD. v. AKINWUMI (2010) ALL FWLR (pt. 502) 1113 at 1131, he submitted that the claimants had failed to prove the ingredient of malice with their testimonies before the Court, where it was stated that they had no misunderstanding with the 1st and 2nd defendants before they were charged to Court. It was his further submission that the 1st defendant's complaint to the police was not false but was based on reasonable and probable cause. He therefore urged the court to dismiss the claimants' case with substantial costs.

On his part, the learned claimants' counsel formulated three (3) issues for determination, *to wit*:

- i. Whether the claimants have proved their case to entitle them to the reliefs sought for;
- ii. Whether the claimants disposition were (sic) in line with oath (sic) Law / Act or not warrant the court discountenance with same; and
- iii. In the event the court consider the above 2 issues formulated in favour of the claimants, whether the court should grant their claims. /

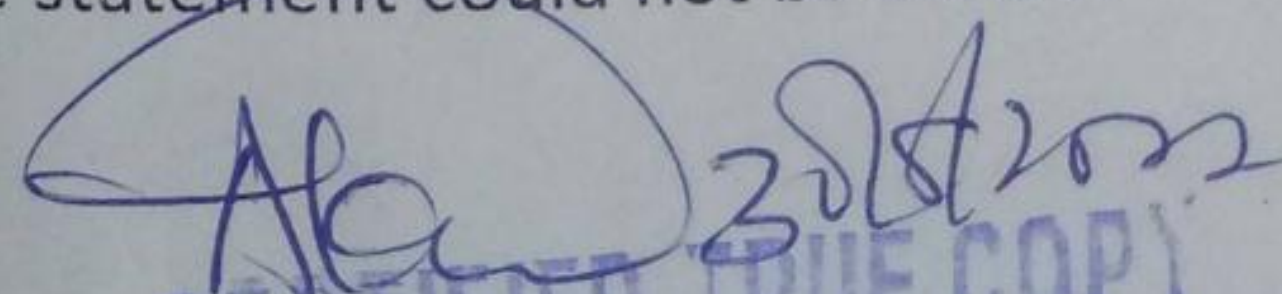
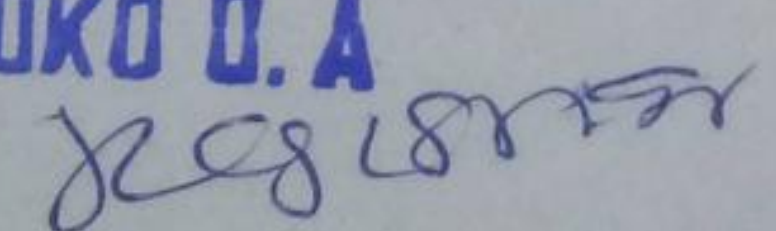
On issue 1, learned counsel anchored his argument on the authorities of *UBGE v. CHUKWUSA* (2014) 44 WRN 130; *JIMJAJA v. COP* (2011) 2 NWLR (Pt. 1231) 375; *IKOU v. OLI* (1962) 1 SCNLR 307; *INNEH v. ARUEGBON* (1952) 14 WACA 13, *BALOGUN v. AMUBIKANHUN* (supra); *PAYIN & ANOR v. ALIUAH* 14 WACA 267 and *BAYOL v. AHEMBA* (1999) 71 LRCN 2347 @ 2371 AG & 2772 AC, to submit that the claimants had proved all the necessary ingredients of malicious prosecution to sustain their claim which remain un-contradicted evidence on record. He maintained that the evidence of the 1st and 2nd defendants were inconsistent and could validly support the case of the claimants. He submitted that the inconsistency in the case of 1st and 2nd defendants tended to show to the Court that their evidence at trial were after-thought and an attempt to mislead the Court so as to escape their desired liability. He cited the case of *ORAAMU v. IDOWO* (1959) 4 FSC 40; *FRAMO NIG. LTD. v. DAODU* (1993) 3 NWLR (Pt. 281) 372 – 375; *OGWUGWU v. ARME TRANSPORT LTD* (1974) NSCC 169 and *MOGAJI v. CADBURY (NIG.) LTD* (1985) 2 NWLR (Pt. 7) 393.

On issue 2, arguing against the backdrop of sections 1, 3 and 4 of the Oaths Act, counsel posited that the argument of the 1st and 2nd defendants on the non-inclusion of declaratory statement in Cw 1's and Cw 2's written statements was of

no moment since oath was administered on the witnesses before they adopted their respective written statements on oath. He submitted that assuming without conceding that the omission was vital to the case of the claimants, the provisions of sections 3 and 4 (2)(b)(c) of the Oaths Act (Cap. 01) LFN 1990 had come to rescue their evidence. Reference was made to BUHARI v. OBASANJO (2005) 130 LRCN 1925 @ 2043 KZ; ANATOGA v. IWEKA II (1995) 8 NWLR (Pt. 415) 547 and SOFOLA v. STATE (2005) 127 LRCN 1091 @ 1115 P.

One issue 3, premising his contention on the authorities of IYERE v. B.F.M LTD (2009) 168 LRCN 143 @ 172 – 173; PAYIN ANOR v. ALIUAH 14 WACA 267 (4); BAYOR v. ABEMBA (2016) 28 WRN 28 @ 41-42; BARAU v. CHOBA (1981) 1 NWLR (Pt. 359) 366; HORST SOMMER & 2 ORS v. FEDERAL HOUSING AUTHORITY (1992) 1 SCNJ 73 @ 80 and ABDULLAHI v. RAJI (1998) 1 NWLR (Pt.534) 481, he submitted that since the position of law was that in case of tortfessor, each of the two or more joint tortfessors was liable for the entire damage resulting from the tort and therefore the 1st and 2nd defendants were liable to the consequence of their wrong action on the claimants.

In his reply on point of law, counsel for 1st and 2nd defendants argued against the backdrop of ALHAJI NUHU v. ALHAJI OGELE (2003) 12 SCNJ 158 that a court could and was entitled to refer to the records before it in the course of its proceedings. He further cited the Court decisions in WEST AFRICA PROVINCAL INSURANCE CO. LTD v. NIGERIA TOBACCO CO LTD. (1987) 2 NWLR (Pt. 56) 299 @ 306. He contended on the authorities of MARK v. ABUBAKAR (2009) 2 NWLR (Pt. 1124) 79 @ 150 and OKEREKE v. YAR'ADUA (2008) 12 NWLR (Pt. 1100) 95 @ 127 E – G that where a witness failed to adopt his written statement, the statement could not be used as


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a material in determining the suit as same would be deemed abandoned when no evidence was led in support.

I shall not set the ball of my judicial evaluation of evidence led in this case rolling without first addressing the issue of propriety or otherwise of admitting in evidence the three documents sought to be tendered during trial by the learned claimants' counsel. In his succinct opposition to the admissibility of the documents, counsel for the 1st and 2nd defendants posited that the documents were public documents, which were admissible only as original copies or CTCs. He placed reliance section 90 of the Evidence Act, 2011.

In a swift opposition thereto, the learned claimants' counsel maintained that the documents were original and not photo-copies. He submitted that the documents did not need certification.

Without much ado, the issue at hand in the arguments canvassed by both counsel find evidential elucidation in section 86 of the Evidence Act, 2011. I shall therefore set out the provisions of the section below :

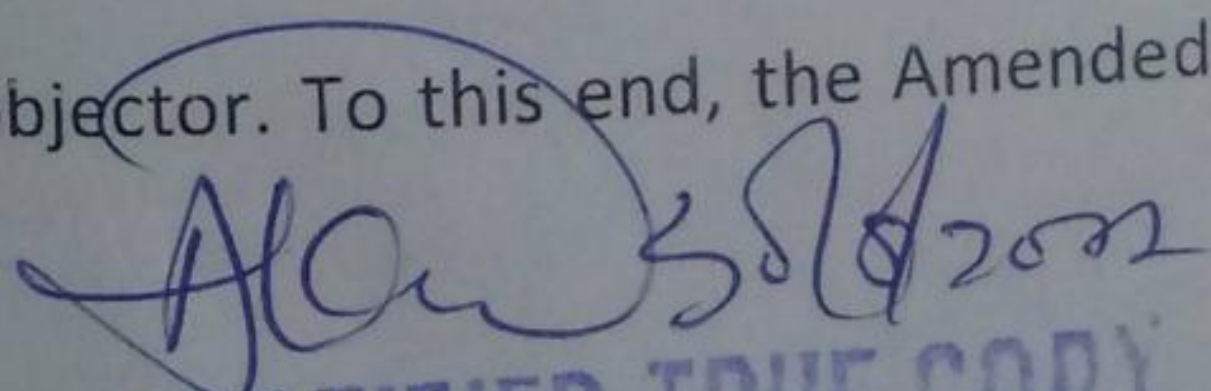
86 (1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document has been executed in several parts each part shall be primary evidence of the document.

(3) Where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it.

(4) Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest; but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.

I am, in view of the afore-quoted section 86 of the Evidence Act, inclined to probe into the originality of the documents sought to be tendered. Two of the documents are the filed "Amended Information" in Charge No.: AK/54^C/2015 between Federal Republic of Nigeria and Jimoh Bayo & Anor. The documents overtly show on their first pages the official stamp of the Registry of this Court with an inscription "official" conspicuously written in red biro on the stamp. The third document is a prepared charge sheet in same suit (i.e. Charge No: AK/54C/2015) which was between Federal Republic of Nigeria and Agunbiade Sileola & Anor. The charge number, date and signature of one Aderemi Ajibola Esq. on the document were written in blue ink albeit it was not filed at the Registry of this court. The foregoing analytical observations, therefore, negate any doubt as to the originality of the documents. Kekere-Ekun JSC in NZODINMA v. IHEDIOHA (2020) 7 (Pt. 2) SCM 64 @ 87 paras. H – I held *inter alia* that where a document has been executed in several parts each part shall be primary evidence of the document and such document required no certification. See also: GAMBO IDI v. THE STATE (2017) 6 SC (pt. iv) 96, (2018) 4 NWLR (Pt. 1610) 359; H.D.P v. INEC (2009) 8 NWLR (Pt. 1143) 297, (2009) 5 SCM, 80 and DAGGASH v. BULAMA (2004) 14 NWLR (Pt. 892) 144. Consequently, I find no merit in the objection raised by the counsel for the 1st and 2nd defendants. I hereby resolve same objection against the objector. To this end, the Amended


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Information in Charge No: AK/54^C/2015 between Federal Republic of Nigeria and Jimoh Bayo & Anor. filed on April 25, 2017, the Amended Information in Charge No: AK/54C/2015 between Federal Republic of Nigeria and Jimoh Bayo & Anor. filed on May 22, 2017, and the Charge Sheet in Charge No AK/54^C/2015 between Federal Republic of Nigeria and Agunbiade Sileola & Anor. are admitted in evidence, marked Exhibits "D – D14", "E – E13" and "F – F16" respectively.

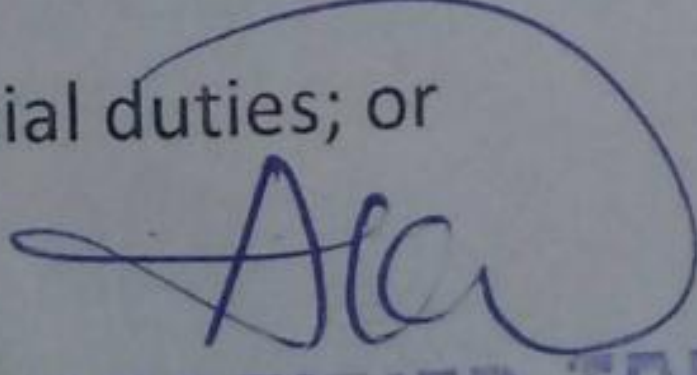
In kick-starting the examination of the evidence before me, it is pertinent to address the issue of the absence of declaratory statement in the adopted written statements of Cw 1 and Cw 2. Counsel for the 1st and 2nd defendants made a heavy weather of this issue in his written address. Without mincing words, the Supreme Court has, in a long line of judicial authorities, the most recent of which was HRM ADEJUDGE v. ADULOJU & ANOR. (2021) 9 SCM 1 @ pp. 21 -23 laid to rest the issue of absence of declaratory statement in written statement thus:

The First Schedule to the Oaths Act prescribe the oath thusly –

"I do solemnly and sincerely declare that I make the solemn declaration conscientiously, believing same to be true and by virtue of the provisions of the Oaths Act" Generally, the law does not allow the form of an oath or affirmation to vitiate the oath or statement made under the said oath or even the absence of oath or affirmation to prevent the admissibility of evidence that should be on oath. Section 4 (2) and (3) of the Oaths Act provide thusly –

4(2) No irregularity in the form in which an oath or affirmation is administered or taken shall:

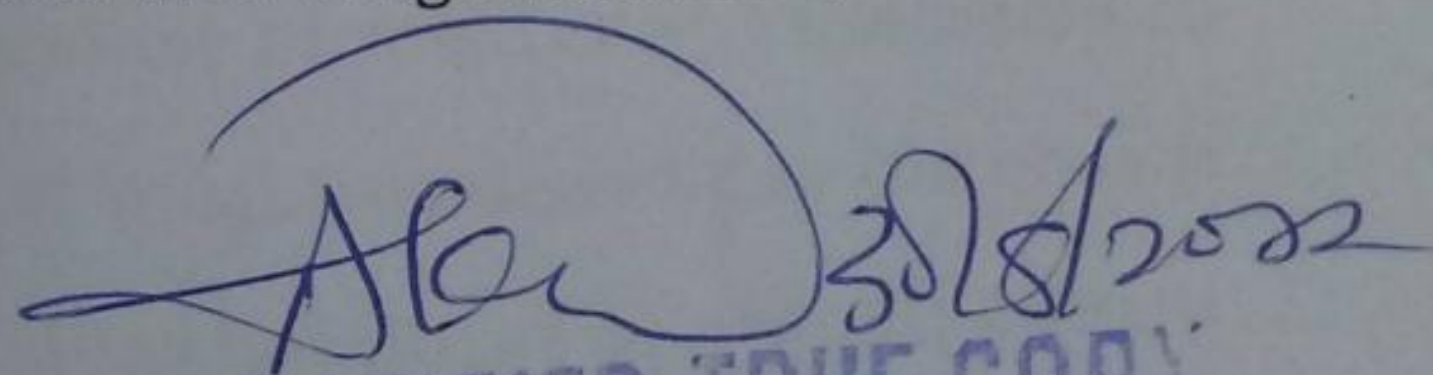
a. Invalidate the performance of official duties; or


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- b. Invalidate proceedings in any court; or
 - c. Render inadmissible evidence in or in respect of which an irregularity took place in any proceedings.
- 3) The failure to take an oath or make an affirmation and any irregularity as to the form of an oath or affirmation shall in no case be construed to affect the liability of a witness to state the truth.

This court in ANATOGU v. IWEKA II (1995) 8 NWLR (Pt. 415) 457 and SOLOLA v. THE STATE (2005) 11 NWLR (Pt. 937) 460 applied the provisions of S. 4(3) of the Oaths Act. In ANATOGU v. IWEKA (supra) this court asked "what then is the consequence of the failure to administer oath or affirmation on a witness before court?" It held that the answer is given by s. 4(3) of the Oaths Act 1963.... It follows from our decision in ANATOGU v. IWEKA and SOLOLA v. THE STATE that even if the written statement was not made on oath or sworn at all, it would still be valid as the witness written statement intended to be given or given as evidence on oath in the proceedings and nothing precludes the witness from adopting it as his testimony when testifying on oath in examination in chief in open court.

Frankly, it is crystal clear from the afore-quoted authorities that the argument of the counsel for the 1st and 2nd defendants in the absence of declaratory statement in the written statements of Cw 1 and Cw 2 pales into insignificance. I, therefore, refuse to be swayed by same.


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The coast, to my mind, is now clear to delve into the evidence led in this case. Braimah Amen Omosun JCA (as he then was) in CO-OPERATIVE & COMMERCE BANK (NIGERIA) LIMITED v. GODWIN ODOGWU (1990) 3 NWLR (Pt. 140) 646 @ 654 followed and applied strictly the decision of West Africa Court of Appeal (WACA) in ALHADI v. ALLILE 13 WACA 323 wherein it was held that in an action for malicious prosecution the claimant must prove that the defendant was the person i.e. he set the law in motion against him, that he was tried in a court of competent jurisdiction of criminal charges and he was found not guilty and discharged, that the report against the claimant and his prosecution was without reasonable and probable cause but was rather actuated by malice. See: BALOGUN v. AMUBIKANHUN (supra) and MOHAMMED AMIN v. BANNERJEE (1947) AC 322, 331. In the same vein, the legal writers Gilbert Kodilinye and Oluwole Aluko in page 26 of their book titled: Nigerian Law of Torts expand on the decision in ALHADI's case and set out five essentials of malicious prosecution thus :

- (1) that the defendant instituted a prosecution against him;
- (2) that the prosecution ended in the claimant's favour;
- (3) that the defendant had no reasonable and probable cause for prosecution;
- (4) that the defendant acted with malice; and
- (5) that he (the claimant) suffered damage to his reputation, person or property.

Noteworthy, however, for a successful prosecution of malicious prosecution to succeed, all the afore-listed elements of the tort must be present and the onus is on the claimant to prove each one of them. See BALOGUN v. AMUBIKANHUN

(supra); USIFO v. EDO UKE & ANOR (1958) SCNLR 109; (1958) 3 FSC 59; OBI v. CHUKWUMA (1964) L.L.R. 105; YEBOAH v. BOATENG (1963) 1 G.L.R. 182 @ 185 and MUSA v. LIMO-WULANA (1975) 2 G.L.R. 290 @ 294.

Now, armed with afore-listed essentials of malicious prosecution, I shall probe into the evidence led by the claimants. The first point of call, in such evaluative enquiry, is to find out whether the 1st and 2nd defendants actually instituted any prosecution against the claimants in MAK/0/135^C/2015 and AK/54^C/2015. In their evidence in-chief, the claimants stated that it was the 1st and 2nd defendants that instituted prosecutions against them in both cases. They claimed to have stood trial for the same offences in the two cases. However, under cross-examination, the 1st claimant agreed that he was charged in the former case (i.e. MAK/0/135^C/2015) based on what happened at the Army Check-Point near Igbara-Oke whilst the 2nd claimant admitted that he was only prosecuted under the former case but not in the latter case. Documentarily, the claimants tendered Exhibits "A-A4", "B - B10", "D - D14", "E - E13" and "F - F16" respectively whilst "C-C17" was tendered by the defence through Cw 1. In Exhibit "A-A4", an enrolment of judgment in MAK/0/135^C/2015, the complainant was the "Commissioner of Police" whilst in Exhibits "B-B10", "D-D14", "E-E13" and "F-F16" the complainant was the "Federal Republic of Nigeria". Conversely, the 1st claimant and two others were the "Applicants" in a fundamental right enforcement suit that resulted in Exhibit "C-C17", a judgment in AK/45^M/2015. In Exhibit "A-A1", the 10-count charge preferred against the claimants and one other was reproduced therein. Count 1 in the exhibit reads thus:

COUNT 1 : That you Ayeni Sunday 'M', Ismaila Olorungbebe Yusuf 'M', Adetona Tajudeen 'M' and others presently at large on the 18th day of

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(supra); USIFO v. EDO UKE & ANOR (1958) SCNLR 109; (1958) 3 FSC 59; OBI v. CHUKWUMA (1964) L.L.R. 105; YEBOAH v. BOATENG (1963) 1 G.L.R. 182 @ 185 and MUSA v. LIMO-WULANA (1975) 2 G.L.R. 290 @ 294.

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COUNT 1 : That you Ayeni Sunday 'M', Ismaila Olorungbebe Yusuf 'M', Adetona Tajudeen 'M' and others presently at large on the 18th day of

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September, 2015 at about 05: 30 pm at Army Checking point in Igbara-Oke in the Akure Magisterial District, did conspire with another to commit felony to wit: serious assault, fraudulent conversion, perverting justice, compounding felony and thereby committed an offence, contrary to and punishable under Section 516 of the Criminal Code Cap 37 Vol. 1 Laws of Ondo State of Nigeria 2006. (*italics mine for emphasis*)

Un-arguably, the afore-quoted charge reinforces the admission of Cw 1 under cross-examination that he was prosecuted in Charge No.: MAK/0/135^C/2015 as a result of what happened at Army Check-Point in Igbara-Oke. A close perusal of the exhibit clearly reveals that none of the ten (10) charges therein borders on offences of conspiracy, stealing and fraud of Ten Million Naira (₦10,000,000.00) the claimants alleged that the 1st and 2nd defendants set in motion against them in the MAK/0/135^C/2015. On the other hand, Exhibit "B – B10" was the Enrolment of Judgment in Suit No.: AK/54^C/2015, wherein the 1st claimant and another were arraigned on Exhibit "E – E13". The 17-count charge in Exhibit "E – E13" centered on conspiracy to obtain money by false pretense, obtaining money by false pretense and stealing of 156 bags of cocoa beans valued Ten Million Naira (₦10,000,000.00) at the 1st defendant. These offences also form the content of Exhibits "D-D14" and "F-F16" respectively. Undoubtedly, these offences touched on what the claimants gave as the crux of their maliciously prosecuted by the 1st and 2nd defendants.

Now, If I may ask a question: what does it mean to prosecute a person maliciously?

To answer this question, I shall again call in aid the decision of the Appeal Court in

COOPERATIVE & COMMERCE BANK (NIGERIA) LIMITED v. GODWIN ODOGWU

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(supra) wherein Omosun JCA (as he then was) quoted *in extensio* CLERK & LINSSELL ON TORTS, 15th Edition, paragraph 1807, page 862 to answer the question thus:

To prosecute in essence is to set in motion the law whereby *an appeal is made to some person with Judicial authority with regard to the matter in question and to be liable for malicious prosecution, a person must be actively instrumental in setting the law in motion.* Merely giving information to the police is not enough; that at best may lead to an action for false imprisonment if the police act on the information and make an arrest and prosecute unsuccessfully. (*Italics mine for emphasis*)

At this juncture, I shall now turn to Exhibit "C – C17", a judgment in fundamental right enforcement Suit No.: AK/45^M/2015, which was instituted by the 1st claimant and two others, to find out if the 1st and 2nd defendants actually instituted prosecution against the claimants in Suit AK/54^C/2015. On pages 6 – 7 of Exhibit "C-C17" some averments of counter – affidavit filed by 1st and 2nd respondents, that is: "Commissioner of Police" and "DSP Kehinde Fabunmi", in that case, were set out thus:

- a. That one *Adeyemi Azeez*, an employee and a field supervisor in Argo Traders Company Ltd. on behalf of the company reported a case of conspiracy stealing/fraud against one Sileola Agunbiade, a ware house assistant manager and others at the "A" Division of the Nigeria Police Force, Akure. An extract from crime Diary attached as Exhibit A.
- b. That *Adeyemi Azeez*, a field supervisor to Agro Traders Limited, who reported the alleged offences on behalf of the company

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made statement to the police and in his statement to the police he alleged the 1st applicant, Mr. Jimoh Bayo, Adebayo Azeez and others of defrauding the company to the tune of ₦10 million naira (Ten Million naira) and that the alleged crime were jointly carried out by Sileola Agunbiade who always manipulate the weight of cocoa supplied to the company being the person in charge of the section and who often at times present the fake way bill to the company in order to defraud the company with the active connivance of the 1st applicant, Afeez Adebayo, Jimoh Bayo and others. Copy of his statement to the police is attached as Exhibit B.

- c. That based on Exhibits A and B, the said Sileola Agunbiade was invited to the Station and he made statement to the police admitting the said offence. Copy of his statement to the police is attached as Exhibit C.
- d. *That Jimoh Bayo who also was alleged of crime was invited by the police and he made statement to the police mentioning the 3rd applicant, Afeez Adebayo and other as the people whom the 1st applicant normally sent to him to collect the proceeds of crim. Copy of his statement to the police is attached as Exhibit D. (italics mine for emphasis)*

Instructively, the Exhibit "3 - 3A" was the extra-judicial statement made on May 6, 2015 at the CIID, Akure, by Jimoh Bayo. This document, in my considered view, was the Exhibit "D" in afore-quoted paragraph d for the same document also formed part of Exhibit "7 - 7xxxxviii", the 3rd Respondent counter-affidavit in Suit No.:

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AK/45M/2015, wherein Exhibit "3-3A" was marked Exhibit "NPF4" in paragraph 40. Notably, the 3rd applicant in Exhibit "C-C17" was the 1st claimant herein. In Exhibit "3-3A", Jimoh Bayo stated *inter alia* thus:

On the information that they have supplied the cocoa beans to the company I went to the company to collect the processed (sic) of the cocoa beans supplied. Thereafter I would (sic) Taofeek Adetona that I have collected the money and they should come and collect the money in my office. Taofeek Adetona, Afeez Alabuja, *Tajudeen Adetona* and one fair in complexion a man which (sic) I don't know his name, but could be recognized if seen do come and collect the money.

In a community reading of Exhibits "C-C17" and "3-3A", two facts hold. Firstly, it was one Adeyemi Azeez, who on behalf the 1st defendant herein, lodged a complaint at the "A" Division, Akure, that one Taofeek Adetona, Jimoh Bayo, Adebayo Azeez and others had allegedly defrauded the 1st defendant a sum of Ten Million Naira (₦10,000,000.00). Secondly, it was one Jimoh Bayo, who stated in his extra-judicial statement, that is: Exhibit "3-3A", at the CIID, Akure, that the 1st claimant herein was one of the persons whom he allegedly gave the proceeds of cocoa beans supplied to the 1st defendant by one Taofeek Adetona, an elder brother of the 1st claimant. If the foregoing facts are uncontrovertibly established vide Exhibits "C-C17" and "3-3A", then, can it be said that the 1st and 2nd defendants really made an appeal to Chief Magistrate Musal Al-Yunus in Charge No.: MAK/0/125^c/2015 and to Hon. Justice W. R. Olamide in AK/54^c/2015 with regard to the criminal matters prosecuted in the two cases? I, without any reservation, answer this question in the negative because from the evidence before me, the 1st and 2nd defendants were not actively instrumental in setting the law

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against the claimants in the two suits. Lewis JSC (as he then was) in MANDILAS & KARABERIS LTD. v. APENA (1969) NMLR 199 @ 203 held that :

In our view, it is clear from DANBY v. BEARDSLEY (1880) 43 L. T. 603 that, to succeed, the plaintiff (i.e. claimant) must show that it was the defendant who was actively instrumental in setting the law in motion against the plaintiff (i.e. the claimant).

Frankly, I cannot but irresistibly conclude on the above analysis and judicial authorities that the foundation of the claimants' case has been utterly destroyed by avalanche of Exhibits "A-A4", "B - B10", "C-C17", "D - D14", "E - E13" and "3-3A" respectively. Thus, the claimants' case against the 1st and 2nd defendants cannot stand. It is, therefore, practically impossible to put the shattered rubbles of their case together to proceed in examining the remaining elements of malicious prosecution. Consequently, the claimants' case ought to be dismissed, it shall be dismissed and it is hereby dismissed.

W. A. Akintoro
HON. JUSTICE W. A. AKINTOROYE
CHIEF JUDGE
30/08/22

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