

SUPREME COURT OF NIGERIA

1ST JULY, 1994. SC. 271/1990

**CORAM:- M. BELLO CJN, M. L. UWAIS, I. L. KUTIGI,
M. E. OGUNDARE, E. O. OGWUEGBU, Y. O. ADIO, A. I. IGUH, JJSC.**

ALHAJI OLOYEDE ISHOLA DEFENDANT/APPELLANT/
(Substituted by Mustapha Oyedokun) CROSS-RESPONDENT

AND

MEMUDU AJIBOYE PLAINTIFF/RESPONDENTS/
CROSS-APPELLANT

APPEALS - *Grounds of appeal - Where issues of fact and mixed law are raised - And leave to appeal was granted by appellate High Court without jurisdiction - Whether the appeal to Court of Appeal was competent.*

CONSTITUTIONAL LAW- *Covering the Field - Use of the words “at least” under s. 238 of the Constitution - Whether that section has covered the field to become self-executing.*

CONSTITUTIONAL LAW- *Constitution of a high court under s. 238 of the 1979 Constitution - Exclusion of a judge of another court - Whether State legislature are empowered to fix number of judges to constitute their high courts.*

CONSTITUTIONAL LAW- *Nullification of a statute - Canons of Construction of Constitutional provisions - Whether s. 238 of the Constitution intends a nullification of s. 63(1) of the High Court Law.*

CONSTITUTIONAL LAW- *Appellate composition of Kwara State High Court - Is by two judges of the high court - Whether s. 63(1) of the High Court Law that so provided is inconsistent with the 1979 Constitution.*

JUDGMENTS - *Null and void decision - Appeals - Where the appeal to Court of Appeal was incompetent - Because no proper leave to appeal was obtained - Whether the Court of Appeal’s decision is null and void.*

PRACTICE & PROCEDURE- *Constitution of a State high court - Under s. 238 of the 1979 Constitution - Whether allowance is made for the court*

being constituted by more than one judge.

PRACTICE & PROCEDURE - Appellate jurisdiction of Kwara State High Court - Application for leave to appeal - Whether one judge can determine the application - Whereas two judges exercised appellate jurisdiction in the case.

WORDS & PHRASES - “At Least” - Used under s. 238 of the Constitution - In respect of composition of high court - Proper meaning thereof.

FACTS

The Plaintiff sued the Defendant before the Area Court Grade 1 claiming title to a parcel of farmland. The case had a chequered history leading to an Upper Area Court giving judgment in favour of the Defendant by dismissing Plaintiffs claim. Plaintiff appealed to the High Court of Kwara State, which being constituted by two Judges in line with applicable High Court Law, allowed the Appeal in favour of the Plaintiff. The Defendant sought leave of the High Court to appeal to the Court of Appeal on grounds of appeal that raised issues of facts, mixed law and facts.

The application for leave was heard by a single Judge. Plaintiffs Counsel raised a preliminary objection contesting that since the appeal was heard by two Judges, a single Judge is not competent to hear and or grant the application. The objection was overruled as the Judge held that he had jurisdiction under S. 238 of the 1979 Constitution, and the application for leave to appeal was granted. Before the Court of Appeal, Plaintiff still raised objection maintaining that the appeal was invalid since no leave of the competent appellate High Court was obtained. The objection was further overruled. The Defendant’s appeal was allowed in part as the Court of Appeal suo motu entered an order of non-suit. Both parties being dissatisfied have now appealed to the Supreme Court which had to determine whether there was any competent grounds of appeal before the Court of Appeal.

HELD (Allowing the plaintiff’s appeal Uwais and Adio, JJSC Dissenting)

Constitution of a State High Court

1. Section 238 provides that the High Court of a State is duly constituted if it “consists of at least one Judge of that Court”. The words “at least” make a great difference in the meaning. Construction of the section is this - for the purpose of exercising any jurisdiction (and this includes appellate jurisdiction

by virtue of section 236(2)) conferred upon it under the constituted or any law, a High Court of a State shall be duly constituted if it consists of a number of judges but not less than one judge of that court. Thus, the section allows the court to be constituted of more than one judge. (P.231 L.29)

Whether s. 238 of the Constitution has covered the field

2. But by the use of the words “at least” in section 238 as it presently stands, the section cannot be said to have covered the field nor that it is self executing. A constitutional provision is self-executing when it lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed or protected without the necessary aid of legislative enactment. (P.232 L.25)

S.238 is an enabling provision

3. Turning now to section 238, the subject with which it deals, that is, the constitution of a court, is a matter of practice and procedure. The section is an enabling provision empowering State legislatures to fix the number of Judges to constitute their respective High Courts but subject to this that the minimum number that may be provided for is one judge of the court, thus excluding a judge(s) of another court sitting in the High Court in exercising any of the jurisdictions conferred on it by the Constitution. (P.233 L.16)

Appellate Composition of Kwara State High Court

4. Section 63(1) is not inconsistent with section 238 of the Constitution; it is valid. As an existing law the High Court of Kwara State is enjoined to observe it. Consequently, in the exercise of its appellate jurisdiction to hear and determine appeals from Upper Area Courts it must be constituted of two Judges of the High Court. (P.236 L.34)

Exercise of appellate jurisdiction of Kwara State High Court

5. An application, as in the case on hand, to the High Court of Kwara State for leave to appeal against its decision sitting in its appellate jurisdiction, to the High Court of Appeal, is made to that Court in its appellate jurisdiction and when considering that application was exercising its appellate jurisdiction and must be constituted by two judges of that Court. It follows that Orilonise, J. sitting alone could not validly exercise the appellate jurisdiction of the High Court. (P.237L.4)

Appeals - Grant of leave without jurisdiction

6. The five grounds of appeal in the defendant's notice of appeal to the Court of Appeal raised issues of mixed law and fact and fact. Under section 221(1) of the constitution, leave to appeal was required. The leave to appeal granted by the High Court of Kwara State was granted by a single judge sitting alone. He had no jurisdiction to grant such leave under section 63(1) of the High Court law. The order granting the leave was invalid and void. And as no valid leave of either the High Court or of the Court of Appeal was obtained before the defendant appealed against the decision of the Ilorin High Court the appeal was incompetent and the decision of the Court of Appeal therein is null and void. (P.237 L. 22)

NOTABLE POINTS OF INTEREST**OGUNDARE JSC*****1. Need for counsel to assist the court and show diligence***

"With respect, this show of lack of scholarship in a matter so crucial to the appeal brought to the Final Court in the land is certainly not helpful to both this Court and parties to the appeals before us nor does it do any credit to both counsel either. It certainly will not be an overstatement to say that counsel appearing in this Court, and indeed in any court, owe it a duty to assist the Court in the development of the law and to ensure that justice is done by showing diligence in the performance of their duty". (P.223 L.32)

2. None-Suit - Need to call for the addresses of counsel

"Suffice to say that a long line of cases had laid it down that before an order of non-suit is made, it is necessary and important that parties' counsel are given opportunity to address the Court as to the desirability or otherwise of such an order. The court below was in breach of this important duty as it did not call on counsel for the parties to address it on the issue before the order of non-suit was made. In effect, it has granted an order which neither party asked for and in respect of which they were not heard." (P.237 L.34)

BELLO CJN***3. Sharia Court of Appeal Kadi can no more be a member of the High Court panel***

It is pertinent to point out that section 63(1) of the High Court Law in so far as it relates to having a Sharia Court of Appeal Kadi as a member of the High

Court for hearing of an appeal from Upper Area Court has been declared inconsistent with section 238 of the Constitution. (P.240 L.23)

4. When to give effect to ordinary meaning of provision of the Constitution

It is cardinal principle of interpreting the provisions of the Constitution that where in their ordinary meaning the provisions are clear and unambiguous, effect should be given to them without resorting to any external aid. (P.243 L.18)

5. Mandatory provision that appellate high court be made up of two Judges - Whether inconsistent

“It is clear that in its ordinary meaning, section 238 of the 1979 Constitution puts a minimum of one Judge to constitute the court and does not restrict the number of Judges that may constitute the court. Accordingly, two or more Judges may within the purview of the section constitute the court, It also appears clear to me that the provision of section 63(1) of the law that “the High court shall be constituted of two judges of the court” in the exercise of its appellate jurisdiction is mandatory and a single judge cannot constitute the court. Since it is permissible to have two judges constituting the court under section 238, section 63(1) cannot be said to be inconsistent with section 238. Accordingly, I hold the remainder of section 63(1) to be a valid existing law”. (P.243 L.34)

UWAIS JSC (Dissenting)

6. Construction of s. 63 of the High Court Law in conformity with the constitution

“Since section 238 allows for a higher number of judges than one and section 274 subsection (1) of the 1979 Constitution provides that an existing law shall have effect in conformity with the provisions of the Constitution, I am of the opinion that the word “shall” in section 63 subsection (1) does not do violence to the Constitution and as such should be construed as directory and not mandatory. In that event the High Court of Kwara State may be constituted, to sit on appeal, by a single judge under section 238 of the Constitution or by two judges under the provision of section 63 subsection (1) of the High Court Law. Consequently, when Orilonise J. sat alone to grant the application for leave to appeal, the High Court was properly constituted. (P.25 L.28)

7. Constitution of s.63 of the High Court Law that will bring conflict

Finally, if the word “shall” in section 63 subsection (1) of the High Court Law

were to be regarded as imperative or mandatory and not directory, then the result would have to be that the High Court of Kwara State could not be constituted, when sitting on appeal with less than two judges. In other words, the number of Judges to sit on appeal would be fixed and static, so that the number “two” would represent both the minimum and the maximum. To borrow a mathematical expression, the number “two”, would be a common factor to both the minimum and maximum number of judges to sit on appeal from Upper Area Courts. With respect, this construction of section 63 subsection (1) would bring the provisions of the section into conflict with section 238 of the Constitution, which, as I earlier held, has prescribed the minimum number to be only one judge. In the event of the conflict, section 63 subsection (4) would have to be declared null and void in accordance with the provisions of section 274 subsection (3) (d) of the Constitution”. (P.257L.16)

8. Construction of statutes - Intra vires meaning is preferred to ultra vires one

It is one of the cardinal rules of construction of a statute (and indeed documents) that where the provision of a statute is capable of two meanings, as in the case of the word “shall” in section 63 subsection (1), if one of the meanings to be given would render the statute intra vires, and the other meanings ultra-vires, then, the former meaning is to be preferred. Therefore, in order to save the provisions of section 63 subsection (1) as intra - vires the Constitution, it is imperative that the word “shall” in the section should be read as directory and not mandatory. (P. 257 L.37)

KUTIGIJSC (Concurring on different reasoning)

9. Whether s. 238 of the Constitution covered the field on composition of the high court

The constitution being the supreme law of the land is superior to any other law. And that being so, section 238 of the Constitution required no “enabling” law by any state before it could be applied. The section is self-executing. It has covered the field of the Constitution or composition of the High Court. In other words section 238 has completely covered the area which section 63(1) made provision. The Constitution is Supreme not only when another law is inconsistent with it but also when another law seeks to compete with it in an area already covered by the Constitution. (P. 273 L.29)

10. Whether s. 63 of the High Court Law is still valid

“It is therefore my view that section 238 of the Constitution has covered the

field and consequently section 63(1) of the High Court Law is invalid, the issue of constitution of the High Court is clearly now a matter of substantive law, and not a mere matter of practice and procedure”. (P.274 L.29)

11. *A single judge cannot grant leave where two or more judges heard the appeal*

“It is not enough accepting the simplistic treatment of the issue that because section 238 itself provides for “at least one judge”, it is competent therefore for a single judge to grant leave where two or more judges had heard an appeal or for two or more judges to grant leave where only one judge heard an appeal. To me that kind of attitude would be tantamount to an abuse of the Constitutional provision itself. In the administration of justice, you need certainty and consistency”. (P.277 L.4)

OGWUEGBUJSC

12. *S.63(1) of the High Court Law is not inconsistent with s. 238 of the Constitution*

“Against this background, I am satisfied that section 63(1) of the High Court Law of Kwara State is not inconsistent with section 238 of the 1979 Constitution. In my opinion, section 238 of the Constitution permits a State High Court to be constituted by more than one judge”. (P.289 L.29)

ADIO JSC (Dissenting)

13. *Construction of State Law that would make constitutional provision absurd”*

Therefore, if the provision of section 63(1) of the High Court Law, as it is, is given its plain and grammatical meaning then the expression “the High Court shall be constituted of two judges of the High Court” therein would, as was being contended by some learned counsel in this case, make it illegal for a single Judge of the court to sit alone when exercising the appellate jurisdiction of the court. In short, the sitting of a single Judge of the High Court alone when exercising the appellate jurisdiction of the High Court which is possible and perfectly constitutional under the provision of section 238 of the Constitution is made impossible and illegal by section 63(1) of the High Court Law. That certainly is absurd”. (P.296 L.24)

14. *Constitutionally backed order of court compared with inconsistent ordinary statute*

If an order by a court has the backing of the provision of the Constitution it does not matter if it contravenes an ordinary statute like the Electoral Act or

the High Court Law. In any case, the legal consequence of section 63(1) of the High Court Law derogating from and being inconsistent with section 238 of the Constitution is that it is to the extent of the inconsistency void as the constitutional position in the law of this country is that if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void. That is the constitutional position whether in a military or a civilian regime. (P.298 L.26)

15. Whether s. 63(1) of the High Court Law is void

The provision of section 63(1) of the Law is, therefore, void. The provision of the section is rigid. It is two judges that have to sit in exercise of the appellate jurisdiction of the High Court; no more no less. One Judge can't lawfully do so and three or more Judges can also not lawfully do so under the provision of the section whereas one Judge, two and more Judges can lawfully do so under the provision of section 238 of the Constitution. (P.302 L.28)

IGUHJSC

16. Need to ensure that the constitution is not breached

Where a constitutional issue, as in the present case, is raised, the court must examine the issue closely to ensure that it is not lightly treated. A constitutional issue, like the question of jurisdiction, is not only fundamental but must be disposed of as soon as it is raised to ensure that the Constitution which is the supreme law of the land is not breached or disregarded. (P. 306 L.9)

17. Whether s. 238 of the Constitution is self executing

"A constitutional provision is said to be self-executing when it is complete in itself and does not need the aid of a supplemental legislation to become fully operative. On the other hand a provision is not self-executing if it appears, upon a proper construction, that it may not become completely operative without supplemental or enabling legislation. It is my view that section 238 of the 1979 Constitution not being self-executing, the various High Court Laws and Rules which regulate the practice and procedure of such High Courts would appear to be the supplemental legislation contemplated by the said sections 238 and 239 of the 1979 Constitution. (P.317 L. 14)

18. Panel of judges that heard appeal - Whether bound to hear motion for leave to appeal

It has to be emphasized that it does not necessarily mean that the same Judges who heard the appeal must in Law be the ones to give leave to appeal. Any competent High Court of appellate jurisdiction of a State duly constituted under the law has jurisdiction to entertain an application for leave to appeal against the judgment of another High Court of the same State sitting in its appellate jurisdiction. It does not matter and it will make no difference that the panel of Judges that heard the application for leave to appeal is different from the panel that heard the appeal. (P.318 L.26)

REPRESENTATION

O. Olajide for plaintiff
S. A. Bello for Defendant

AMICICURIAE

Murtala A. Sani, Esq., Attorney-General, Kwara State
with Olawumi State Counsel.
B. I. Hom, Esq., Attorney-General, Benue State
J. B. Majiyagbe, SAN. with C. A. Candide-Johnson
J. A. T. Ajala, SAN, with Mrs. I. Kasali
A. B. Mahmoud, Esq.

CASES REFERRED TO

- Abidogun v. Sambo (1975-78) K.W.L.R. 29
- Momoh v. Aderibigbe suit No. KWS/48A/83
- Erisi v. Idika (1987) NWLR 503; 11-12 SCNJ 27, 33-34
- Olawoyin v. C.O.P. (1961) ALL NLR 203, 205, 213
- Akerele v. Alapata (1973) NNLR 138
- Willis v. St. Paul Sanitation Co. (1892) 48 Minn. 140, 50 NW 1110, 1111-2
- Higgins v. Cardinal MFg. Co. (1961) 188 Kan 11, 360 P2D 456, 462
- Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 10 SC, 132-134
- Rabiu v. The State (1980) 8 -11 SC. 130
- Nwobodo v. Onoh (1984) 1 SC. 1 (1984) ALL NLR 1
- Osayi v. Izozo (1969) 1 ALL NLR 155
- Olayioye v. Oso (1969) 1 ALL NLR 281
- Oduola v. Coker (1981) 5SC. 197
- Ikoro v. Safrap Ltd (1977) 2 SC 123

<u>Ishola</u>	<u>v.</u>	<u>Ajiboye</u>	<u>(1994)</u>	<u>11</u>	<u>KLR</u>	<u>217</u>
Aigbe v. Edokpolor (1877) 2SC. 1						
Omoregbe v. Lawani (1980) 3 - 4 SC. 108						
Afolabi v. Adekunk (1983) 2 SCNLR 141						
Anyaduba v. N.R.T.C. Ltd (1992) 5 NWLR 535						
South Dakota v. North Carolina (1904) 192 U.S. 286						
Adesanya v. President of the Federal Republic of Nigeria (1981) 2 N.C.L.R. 358						5
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AT pp. 348 - 349						
Dike v. Nzeke (1986) 4 N.W.L.R. (Part 14) 144						
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Omoboriowo v. Ajasin (1984) ALL N.L.R. 105 at p. 126						
Abubakar v. The State (1981) 2 N.C.R. 297 at p. 298						
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A. G. of Lagos v. Dosunmu (1989) 3 N.W.L.R. (Part 111) 552						
Okhae v. Governor of Bendel State (1990) 4 N.W.L.R. (Part 144) 327 at p. 367						
Mohammed v. Olawunmi (1990) 2 N.W.L.R. (Part 133) 458 at p. 484						
Surakatu v. Nigerian Housing Development Society Ltd. (1981) 4 S.C. 26						20
Oduola v. Nabhan (1981) 5 S.C. 197						
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Elufisoye v. Alabetutu (1968) N.M.L.R. 298 at p. 301						
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Thomas O' Sullivan v. Noarlunga Meat Ltd (1957) A.C.I, at 24						
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Adigun v. Attorney-General, Oyo State (1987) 1 N.W.L.R. (Pt. 53) 678						

- Skenconsult (Nig.) v. Godwin Secondy Ukey (1981) 1 S.C. 6 at 26
Timitimi v. Amabebe 14 W.A.C.A. 379
Tukur v. Government of Gongola State (1987) 4 N.W.L.R. (Part 117) 517 at 545
Agbaje v. Adelekan (1990) 7 N.W.L.R. (Part 164) 595 at 614
5 Onyema v. Oputa (1987) 2 N.S.C.C. 900
Attorney-General of the Federation v. Sade (1990) 1 N.S.C.C. 271
Management Enterprises Ltd. v. Otusanya (1987) 2 N.W.L.R. (Part 55) 179
Hewitson and Miller v. Fabre (1888) 21 Q.B.D. 6
Obimomire v. U.A.C. Ltd (1966) 1 All N.L.R. 250
10 Macfoy v. U.A.C. Ltd (1961) 3 All E.R. 1169 at 1172
Akerele v. Alapata (1973) 6. S.C. 147

STATUTES & RULES REFERRED TO

- Court of Appeal Rules 0 . 3 r. 15
15 Constitution of the Federal Republic of Nigeria 1979, ss. 221(1), 238, 239, 236, 275(1), 274(1), 214, 237, 111
High Court Law of Northern Nigeria Cap. 49 1963, ss. 62, 63(1), 116, 80, 40(1), 38
Constitution of Northern Nigeria 1963 (Cap. 1 laws of Northern Nigeria, 20 1963) ss. 50(1), 51(3), 53(4) (b)
20 Electoral Act, 1982 s. 119(3)
Nigeria (Constitution) Order in Council 1960, s.3(2)
Area Courts Edict No. 2 of 1967, Laws of Kwara State, s. 2(2)

BOOKS REFERRED TO

- 25 Federalism in Nigeria under the Presidential Constitution Prof. Nwabueze SAN, pp. 159 - 160
C.J.S. (Corpus Juris Secundum) Constitutional Law s. 48

LEAD JUDGMENT BY OGUNDARE JSC

- 30 The main issue that calls for determination in this appeal relates to the constitution of the High Court of Kwara State when sitting to determine an application by a losing party for leave to appeal to the Court of Appeal against a decision of the said High Court sitting in its appellate jurisdiction.
The plaintiff, Memudu Ajiboye had sued the original defendant, Alhaji
35 Oloyede Ishola, Bale of Amoyo before the Area Court grade 1, Ajase-Ipo claiming title to a piece or parcel of farmland situate at Oke-Maró in Amoyo

village. The case had a chequered history. The Area Court Grade 1 Ajase-Ipo tried the case and came to a decision. An appeal against that decision went to the Upper Area Court No. 1 Ilorin from where a further appeal went to the High Court of Kwara State sitting at Ilorin. The High Court ordered a retrial before the Upper Area Court No.2 Ilorin. Following an application by one of the parties, the High Court varied the order of retrial and ordered that the retrial be before the Upper Area Court, Omu-Aran. 5

The Upper Area Court, Omu-Aran took evidence in support of each party's case and, after an inspection of the farmland in dispute, found for the defendant and dismissed plaintiff's claim. Being dissatisfied with this judgment, the plaintiff appealed to the High Court of Kwara State sitting at Omu-Aran. The appeal was heard by two Judges of that court, namely J.F. Gbadeyan and B. Orilonise. At the conclusion of the hearing of the appeal and in a reserved judgment, the High Court allowed the appeal, set aside the judgment of the trial Upper Area Court and entered judgment for the plaintiff awarding title to the farmland in dispute to him. 15

The defendant was unhappy with the High Court's judgment and sought leave of the court to appeal to the Court of Appeal. His application for leave to appeal was heard by a single Judge- Orilonise, J. At the hearing of the application, Mr. Olajide, plaintiff's counsel raised an objection to the competence of one Judge sitting to consider the application for leave to appeal. In raising his objection Mr. Olajide had submitted: 20

"I have a preliminary objection to the motion. That since the appeal was heard by two Judges of this court the application for leave to appeal cannot be heard and granted by a single Judge on the authority of Oladunni Akerele v. Jimolt Alapata (1973) NNLR 138 where it was decided that where 3 Judges sat to hear the appeal an application for leave to appeal granted by only one Judge was no leave. It is only where one single Judge heard the substantive appeal that the same Judge can grant leave to appeal. 25

I submit that the application is not a preliminary (sic) matter in this court as to vest one Judge with powers to hear the application for leave to appeal." 30

Mr. Bello, learned counsel for the defendant, in reply, argued thus:

"I urge the court to ignore the objections raised by my learned friend as they are misconceived. I submit that a single Judge cannot (sic) hear a motion of leave to appeal against the decision of the High Court given by two Judges. The reason given by my learned friend as well as the case of Oladunni Akerele v. Jimoh Alapata (supra) cited by him are based on 35

the old 1963 constitution of the Federal Republic of Nigeria which has been repealed. The current law is section 238 of the constitution of the Federal Republic of Nigeria, 1979. I therefore submit that the authority cited by my learned friend can no longer be the law, and I urge the court to rule that it is
 5 competent to hear this application.”

The Judge, in his ruling, observed-

“Immediately Mr S.A. Bello learned counsel for the applicant rose to move this motion for leave to appeal to the Court of Appeal against the decision of this court delivered on 9th July, 87, Mr. Olajide learned counsel
 10 for the respondent raised two preliminary objections to the application and urged the court to strike it out The first objection touches on the competence of the court constituted by a single Judge to hear the application for leave to appeal against the decision of the High Court constituted by two Judges in the exercise of its appellate jurisdiction. Counsel cited in aid of this submis-
 15 sion the Supreme Court case of Oladunni Akerele v. Jimoh Alapata (1973) NNLR 138 where at pp. 139’97141 His Lordship Honourable Justice Fatayi Williams J.S.C. (as he then was) considered the provision of section 117 subsection 4(c) of the Constitution of the Federation 1963 read with sections 62 and 63(1) of the High Court Law cap 49 Laws of Northern Nigeria
 20 1963 as amended by S.69 of the Area Court Edict 1967 of Kwara State and held quite rightly in my humble view, that a High Court in its appellate jurisdiction then must be constituted of three members, two of whom shall be High Court Judges and one of whom shall be a Judge of the Sharia Court of appeal, and that therefore in the exercise of its appellate jurisdiction the
 25 High Court constituted of a single Judge to hear an application for leave to appeal was improperly constituted.

As far as the 1963 Federal Constitution now repealed was concerned that was good law but since the coming into effect of the Constitution
 30 of the Federal Republic of Nigeria 1979 on 1st October, 1979 see the provisions of S.117(4)(c) of the Constitution of the Federation, 1963 read with sections 236(2), 238 of the Constitution of the Federal Republic of Nigeria 1979 which reads:

“238. for the purpose of exercising any jurisdiction conferred upon
 35 it under this constitution or any law a High Court of a state shall be duly constituted if it consists of at least one Judge of that court.

236(2) The reference to civil or criminal proceedings in this section includes a reference to proceedings which originate in the High Court of a state and those which are brought before the High Court to be dealt with

by the court in the exercise of its appellate or supervisory jurisdiction.”

The combined effect of these two sections of the 1979 Constitution of the Federal Republic of Nigeria is that a single Judge of the High Court can sit on appeal to determine any criminal or civil appeal from the appropriate subordinate courts within the state. 5

Having overruled the plaintiff’s objection with costs, the learned Judge heard arguments on the defendant’s application for leave to appeal to the Court of Appeal and granted same.

At the Court of Appeal (Kaduna Division) the plaintiff’s counsel once again raised a preliminary objection under Order 3 rule 15 of the Court of Appeal Rules, to the effect that “the Appellant’s Appeal and Grounds of Appeal before this Honourable Court are invalid and incompetent on the ground that no leave of the competent High Court was sought for and obtained before the Appellant’s Appeal and Grounds of Appeal were filed. The High Court sitting as a single Judge in its original jurisdiction which granted the appellant’s purported leave to appeal has no jurisdiction to so do under Section 221(1) of the Constitution of the Federal Republic of Nigeria, 1979. Both the preliminary objection and the appeal were taken together and, in its judgment, the preliminary objection was overruled and the defendant’s appeal was allowed in part in that the judgment for the plaintiff by the High Court was set aside and an order of non-suit entered instead. In overruling the preliminary objection the court, per Ogundere JCA. said: 10 15 20

“The respondent filed a preliminary objection on the ground that the appeal is incompetent as leave to appeal required under Section 221(1) of the 1979 Constitution was granted by a single Judge. The appellant’s reply was that under (sic) sections 222()/236, 238 of the 1979 Constitution and the decision of this court in Suit No. FCK/K/69/81 Malam Ado & Anor. v. Hajiya Dije, leave to appeal granted by a single Judge of the High Court is good in law. This submission is unassailable as section 238 of the constitution provides that for the purpose of exercising any jurisdiction conferred upon it under this constitution, or any law, a High Court of a state shall be duly constituted if it consists of at least one Judge of that Court. The submission of the appellant is upheld and the preliminary objection of the respondent is dismissed. See Madukolu & ors. v. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 All NLR 587 at 395, CA/K/123/87 Agaka v. Balogun of 11.1.88.” 25 30 35

Both parties being dissatisfied with the judgment of the Court of Appeal have appealed to this court. The defendant with leave of this court appealed against the Court of Appeal’s order of non-suit, maintaining that the proper order to make was an order of dismissal of plaintiff’s claim. The plaintiff

also appealed both against the dismissal of his preliminary objection to the competence of the appeal and the order of non-suit of plaintiff's claim, maintaining that the judgment of the High Court granting plaintiffs' claim ought to have been affirmed. Briefs of arguments were filed and exchanged by the parties.

During the pendency of the appeals in this court the defendant, Alhaji Oloyede Ishola (Bale of Amoyo) died and by an order made by us on 10th January, 1994, Mustapha Oyedokun was substituted in his place.

In his brief on the main appeal, the defendant (who is the appellant in the main appeal and cross-respondent in the cross-appeal) sets out one issue as calling for determination, that is to say:

"Whether the Court of Appeal, Kaduna was not wrong in law in making an order of non-suit instead of restoring in toto the decision of the trial court which dismissed the suit of the plaintiff/respondent when:

- (i) the suit was given a full and complete hearing;*
- (ii) the Court of Appeal did not uphold the complaints of the plaintiff/respondent against the judgment of the trial courts; and it (Court of Appeal) did not reverse any of the findings, and conclusions of the trial court, but rather it confirmed them;*
- (iii) the Court of Appeal did not invite the parties counsels (sic) to address it before making an order of non-suit;*
- (iv) the reasons given for making the order of non-suit instead of dismissal are not suitable in law."*

He adopts the issue set out by the plaintiff in his brief on the cross-appeal.

The plaintiff - he is respondent in the main appeal and cross appellant in the cross-appeal sets out two issues in his Brief as calling for determination in the appeals before this court. The two issues are:

"1. Whether there was any valid and competent Appeal and Grounds of Appeal before the Court of Appeal, Kaduna on which the Court of Appeal's judgment could be based and,

2. Whether the Court of Appeal's order of non-suit is reasonable, warranted and can be supported by the weight of evidence before the court if parties' counsel had been duly invited to address the Court of Appeal on the propriety of ordering a non-suit."

I propose to deal first with the issue of the competence of the appeal to the Court of Appeal. This is so for unless that appeal was competent, the question of the propriety or otherwise of the order of non-suit made by it would not arise.

Mr. Olajide, learned counsel for the plaintiff/respondent, in his Brief of Argument which he adopted at the oral hearing of the appeal on 10th

January, 1994 submitted that there was no valid and competent appeal before the court on which the judgment of that court could be based. He referred to various sections of the 1979 Constitution, particularly sections 238 and 239 and the practice in the High Courts of the Northern states for two Judges to sit 5 when exercising the appellate jurisdiction of the High Court and submitted that a single Judge would have no jurisdiction to entertain any matter relating to an appeal before that court. He commended to the court two decisions of the High Court of Kwara State on the issue, that is, Haruna Abidogun v. Alhaji Sambo (1975-78) KWL.R. 29 and Alhaji Saka Momoh v. Fatai Aderibigbe, Suit No. KWS/48A/83 delivered by Obayan, J. on 9/2/84 (unreported) where in 10 both cases it was held that a single Judge of the High Court of Kwara State could not entertain any interlocutory application arising from the decision of the court sitting in its appellate jurisdiction. Relying on the decision of this court in Udekwe Erisi & ors. v. Uzor Idika & ors (1987) NWLR (Pt.66) 503; 11-12 SCNJ 27,33-34 learned counsel submitted that as the plaintiff did not obtain a valid leave of court to appeal in a matter where leave was required under the 1979 Constitution his appeal to the Court of Appeal was incompetent and the court below lacked jurisdiction to entertain it. 15

Mr. Bello, for the defendant/appellant, in the appellant's cross-respondent's Brief in the Cross-Appeal submitted that a single Judge of the High Court of a state was competent to grant leave to appeal under sections 236 and 238 of the 1979 Constitution. 20

When questioned by the court each counsel was unable to tell us the authority under which it is the practice for two Judges to sit where the High Court is exercising its appellate jurisdiction. This, to say the least, is rather startling. Both counsel evinced complete ignorance of the existence of sections 62 and 63(1) of the High Court Law of Northern Nigeria that govern the exercise by the High Court of Kwara State of the appellate jurisdiction conferred on it by the 1979 Constitution and other Laws applicable in the State to hear and determine appeals from decisions of the Upper Area Court. With respect, this show of lack of scholarship in a matter so crucial to the appeal brought to the Final Court in the land is certainly not helpful to both this court and parties to the appeals before us nor does it do any credit to both counsel either. It certainly will not be an overstatement to say that counsel appearing 25 in this court, and indeed in any court, owe it a duty to assist the court in the development of the law and to ensure that justice is done by showing diligence in the performance of their duty. 30 35

Because of the far reaching effect our decision on the point in issue

would have on the practice in many states of the Federation (particularly the Northern State) where the High Court Law Cap. 49 Laws of Northern Nigeria, 1963 is still applicable, it became necessary to reopen the hearing of that part of the cross appeal and to invite a number of learned counsel, as amici curiae to address us on the following question:

5 *“What is the constitution of the High Court of Kwara State when sitting to determine an application by a losing party for leave to appeal to the Court of Appeal against the decision of the said court sitting in its appellate jurisdiction having regard to Section 238 of the 1979 Constitution and Section 63 of the High Court Law of Kwara State.”*

10 In consequence of the invitation of the Chief Justice of Nigerian, Mutala A. Sanni Esqr., learned A.-G., of Kwara State, B. I Horn Esqr., learned Attorney-General, of Benue State, J.B. Majiyagbe. S.A.N., Chief J.A.T. Ajala, S.A.N. and A.B. Mahmoud Esqr. filed Briefs of argument and proffered oral arguments at the rehearing on 19th April 1994. We are indeed very grateful for the immense
15 assistance rendered by these gentlemen of the Bar - both official and unofficial. Their submissions have helped in no small measure in resolving the knotty problem posed by the construction of section 238 of the constitution.

I may mention that Mr. Bello, learned counsel for the defendant also filed an additional Brief on the question of the construction of section 238 and
20 proffered oral arguments at the hearing. Both the brief and his oral arguments are a great improvement on his earlier performance. Mr. Olajide, learned counsel for the plaintiff was reported to be involved in a motor accident shortly after the first hearing and was still in hospital at the time of the rehearing; he was thus unable to file an additional Brief or to be present at the second
25 hearing. The plaintiff, however, was present and, when questioned by the court whether he wanted an adjournment, expressed the desire that the hearing should proceed.

All counsel that appeared before us at the rehearing gave, in their respective Briefs, a short history of the law relating to the Constitution of the
30 High Court of Northern Nigeria and the circumstances leading to the enactment of section 63(1) of the High Court Law. They all submitted that as a result of the coming into force of the Constitution of the Federal Republic of Nigeria, 1979, the Constitution of Northern Nigeria, 1963 hitherto applicable to all the Northern States ceased to have effect and as a result of the decision of the
35 Court of Appeal in *Ado & anor v. Hajiya Dije* (1984) 5 NCLR 260 and of this court in *Oloriegbe v. Omotoso* (1993) 1 NWLR (Pt.270) 386, that part of section 63(1) that provided for inclusion of a Judge of the Sharia Court of Appeal in the constitution of the High Court when sitting in its appellate jurisdiction on appeals from Upper Area Court, is no longer applicable being inconsistent

with section 238 of the 1979 Constitution.

As regards what is left of section 63(1), that is, that a High Court in the exercise of its appellate jurisdiction in appeals from Upper Area Court, it shall be constituted of two Judges of the High Court, it is the submission of Messrs Sanni, Hom. Majiyagbe, Chief Ajala and Mr. Bello that that part too is inconsistent with section 238 and is therefore void. Mr. Horn, however, concedes it that section 238 is only an enabling provision requiring further legislation of the state legislature to provide for the constitution of the High Court of the states.

Mr. Mahmoud submits to the contrary. He argues thus in his Briefs:-
 “4.2 Construing Section 238

What is the intent of the framers of our Constitution as embodied in Section 238 of the 1979 constitution? Is the intention of the makers of the Constitution to provide for same Constitution for the High Court for its appellate and original jurisdiction? Is it to accommodate, as the respondent (that is defendant) argues the varying practice in the Northern and Southern States?

The salient words in section 238 of the Constitution are in my view those underlined:

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

There is no doubt that any jurisdiction above refers to both original, appellate and supervisory jurisdiction of the High Court. The question must however be asked in what sense is the word shall be used? Is shall there used in mandatory sense or directory or merely implying a permission? I submit that the use of two words at least subsequently in the section signifies that the word shall could not be construed as mandatory in the context. If the view is taken that shall is used in the mandatory sense, the result is a logical absurdity. Surely, it was not possible to have a court constituted by less than one Judge.

The Key to the construction of the clause therefore lies in the meaning of the words at least used in the section. It is submitted that the words at least are not superfluous. A cardinal principle of the interpretation of the constitution is:-

The words of a Constitution may not be ignored as meaningless. In construing a Constitution some meaning or effect should be given to all the words or language used therein if it is possible to do so in conformity with the intention of the framers. If the language used is clear and unambiguous

its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written. Unless the context suggests otherwise, words are to be given their natural obvious or ordinary meaning.

5 *What then is the significance of the words at least used in that section? It is submitted that since it is logically impossible to have a court constituted by less than one Judge, in which case the section would have been construed as providing the smallest number the logical construction of section 238 is, it is permissive of a High Court of a State being constituted by*
 10 *a number higher than one. But who then is to provide for that number higher than one?*

Again is (sic) this background, it is submitted, section 238 of the constitution is to be construed as not being self executing.

15 *A constitutional provision is self executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. A provision is not self executing if its duly construed indicate that it is not to become operative without supplemental or enabling legisla-*
tion.

20 *It is submitted that some legislation is contemplated in aid of section 238 to make provision fully operational the constitution of the High Court. It is submitted that the same is envisaged albeit, more clearly stated in section 239 in relation to the practice of the High Courts of the state. The respective High Court Laws of the states, the civil and criminal procedure laws of the states are in our view the laws contemplated by sections 238 and*
 25 *239 of the Constitution.*

It is submitted that this interpretation is in consonance with our federal system, by which the states as the federating units have vested in them legislative, executive and judicial powers. Indeed if the entire scheme of the Judicature in the country as provided in the constitution, is taken into
 30 *account it is clear that what the constitution has sought to provide is a broad, uniform framework for the country. Many matters are expected to be spelt out in legislation of the States. These include matters dealing with the Sharia Court of Appeal, the Customary Court of Appeal [both superior courts of record] as well as other matters of detail. Appointment, removal, discipli-*
 35 *pline, Judicial Service Commissions, etc. are all within the ambit of the control of the respective states.” (Brackets mine)*

I have given deep consideration to the submissions of learned counsel. Section 50(1) of the Constitution of Northern Nigeria, 1963 (Cap. 1 of the Laws of Northern Nigeria, 1963) (which Constitution, on the creation of Kwara

State, among other states, in 1967 became the constitution of that state as well as of other states carved out of the former Northern Region of Nigeria until 1st October 1979 when the 1979 Constitution came into force) established a High Court of Kwara State. Section S 3(1) of that Constitution conferred appellate jurisdiction on the High Court in respect of appeals from subordinate courts. 5 The High Court Law, Cap.49 together with rules of court made pursuant to section 116 thereof governed the practice and procedure applicable in the court. Section 80 of the Law provide.

“80. Every proceeding in the High Court in the exercise of its original jurisdiction and all business arising there out shall, so far as is practicable and convenient and subject to the provisions of any written law, be heard and disposed of by a single Judge, and all proceedings in an action subsequent to the hearing of trial, down to and including the final judgment or order, shall, so far as is practicable and convenient, be taken before the Judge before whom the trial or hearing took place. 15

Thus, in the exercise of the original jurisdiction conferred on the court, it would be duly constituted if it consisted of a single Judge of the court. In the exercise of its appellate jurisdiction however, the law provided for a different constitution. This was provided for in section 40(1) which reads-

“40(1) The High Court in the exercise of its appellate jurisdiction shall, subject to the provisions of part v, be constituted of not less than two Judges, and the Chief Justice or the Senior Presiding Judge shall where applicable preside at each sitting of a court so constituted.” 20

Thus, 2 or more Judges of the court would constitute the court when sitting to hear and determine an appeal. When, however, the appeal (other than an appeal in respect of matters which were the subject of the jurisdiction of the Sharia Court of Appeal) was from Upper Area Court. Section 63(1) provided for a Judge of the Sharia Court of Appeal to sit along with the Judges of the high Court. Section 63(1) provided:

“63(1) In the exercise of its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal.” 25

The inclusion of a Judge of the Sharia Court of Appeal was in compliance with section 51(3) of the Constitution of Northern Nigeria which reads:

“51(3) When the High Court is exercising jurisdiction on appeals from a decision of a native court a member of the Sharia Court of Appeal may sit as an additional member of the High Court in such manner and under such conditions as may be prescribed by any law enacted by the Legislature of the Region.” 30

That subsection was inserted in the 1963 Constitution following the decision of the Federal Supreme Court in *Olawoyin v. C.O.P* (1961) 1 SCNLR 210: (1961) All NLR 203, 205, 213.

This was the state of the law when in *Oladunni Akerele v. Jimoh Alapata* (1973) NNLR 138 this court decided that when hearing an application
 5 for leave to appeal to the Supreme Court, the High Court was exercising appellate jurisdiction and was not properly constituted by a single Judge. In that case, the appellant had appealed to the Supreme Court from a decision of the High Court of Kwara State sitting as a Court of Appeal from an Area Court. At the hearing of the appeal before the Supreme Court, counsel for the respon-
 10 dent objected that the appeal was not properly before the court because leave of the court below was required for such an appeal and leave had been given by a single Judge but the High Court sitting as Court of Appeal from Area Courts was properly constituted only by two High Court Judges and one Sharia Court of Appeal Judge. This court upheld the objection. *Fatayi- Will-*
 15 *iams. J.S.C.* (as he then was) delivering the judgment of the court observed at pages 140-142 of the report:

"We are also of the view that there is merit in the objection. As we have pointed out earlier, section 117(4Hc) of the Constitution of the Federa-
tion provides that an appeal lies to this court from a decision of the High
 20 *Court in any civil proceedings in which an appeal has been brought to that High Court from some other court only with the leave of such High Court or of this court. Order VII rule 3 of the Supreme Court Rules also provides that where an appeal lies only by leave of this court or of the court below, any application to the court for such leave shall be made ex parte by notice of*
 25 *motion. It is further provided in rule 37 of the same Order that whenever an application could be made either to the court below or to this court, it shall be made in the first instance to the court below it, if the court below refuses the application, the applicant shall be entitled to have the application de-*
 30 *termined by this court. The defendant/appellant pursuant to the above provisions, duly applied to the Ilorin High Court for leave to appeal against the dismissal of his appeal. The application was heard by Adesiyun, J. alone and was granted. In hearing the application, the learned Judge would ap-*
pear to have overlooked the provisions of section 62 and 63(1) of the High Court Law of the Northern States as amended by section 69 of the Area
 35 *Courts Edict of Kwara State (Edict No.2 of 1967). The sections, as amended, read -*

'62. The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from Upper Area Court.

63(1). *In the exercise of its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal.*

An application to the High Court of Kwara State for leave to appeal 5 against the decision of that Court in the exercise of its appellate jurisdiction is, without doubt, made to that High Court in its appellate jurisdiction. In dealing with such an application, therefore, the High Court must be duly constituted in the manner provided for in section 63 of the High Court Law. The court is not properly constituted with only one Judge. Compared with those of section 63, the provisions of section 80 of the High Court Law bring out the point 10 we are making more clearly. The section reads-

“Every proceeding in the High Court in the exercise of its original Jurisdiction and all business arising thereout shall, so far as is practicable and convenient and subject to the provisions of any written law, be heard and disposed of by a single Judge, and all proceedings in an action subsequent to the hearing or trial, down to and including the final judgment or order, shall, so far as is practicable and convenient, be taken before the Judge before whom the trial or hearing took place.” 15

(Underlinings are mine)

20

From the above provisions, it seems to us that a single Judge can preside over the proceedings in the High Court in the exercise of its original jurisdiction; in the exercise of its appellate jurisdiction, however, the court must be constituted of three members, two of whom must be Judges of the 25 High Court and the third a Judge of the Sharia Court of Appeal.

As the order granting the defendant/appellant leave to appeal was made without jurisdiction, it is null and void. The consequence of this is that no leave either of the court below, or of this court has been obtained before appealing against the decision of the Ilorin High Court given in Suit No. KWS/ 30 45A/69 on 19th February, 1971. That being the case, the appeal is not properly before this court.”

The High Court of Kwara State followed this decision in Haruna Abidogun v. Alhaji Samho (1975) KWLR 29.

The contention of learned counsel for the parties and all the amici 35 curiae is that the 1979 Constitution has altered the position under the 1963 Constitution of Northern Nigeria. To what extent is this submission correct? With the coming into force of the 1979 Constitution on 1st October 1979, the 1963 Constitution of Northern Nigeria (as well as the 1963 Constitutions of the

Federal and of Eastern and Western Regions) ceased to have effect. Sections 238 and 239 of that constitution provide:

“238. *For the purpose of exercising any jurisdiction conferred upon this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.*

5 239. *The High Court of a state shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time prescribed by the House of Assembly of the state.”*

10 (Italics is mine)

Section 275(1) of the Constitution preserves the High Court of Kwara State established under the 1963 Constitution of Northern Nigeria. It reads:

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

By virtue of sections 274(1) which reads:

“274(1). *Subject to the provisions of this constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed*
25 *to be-*

(a) *an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and*

(b) *a Law made by a House of Assembly to the extent that it is a law*
30 *with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws.”*

And the definition of the expression “existing law” in subsection 4(b) thereof, the High Court Law of Northern Nigeria is an existing law which has effect with such. modifications as may be necessary to bring it into con-
35 formity with the provisions of the 1979 Constitution. One of such modifications affects section 63(1) of the High Court Law and effectively removes the Judges of the Sharia Court of Appeal from the bench of the High Court when sitting in its appellate jurisdiction. Section 63(1) to the extent that it provides for a Judge of the Sharia Court of Appeal to sit with Judges of the High Court

to hear and determine appeals is inconsistent with section 38 of the Constitution -see: Mallam Ado & anor. v. Hajiya Dije (1984) 5 NCLR 260 C.A. where the High Court of Kano State was constituted of two High Court Judges and a Judge of the Sharia Court of Appeal in determining an appeal from the Area Court. Coker J.C.A. (as he then was) delivering the lead judgment of the Court of Appeal said at page 267 of the report:

“The 1979 Constitution of Nigeria prescribes in sections 234 and 235 for the establishment of the High Court of a State and the mode of appointment of its Judges and of their qualification. Similarly sections 240 and 241 of the same Constitution provides for the establishment and jurisdiction of a Sharia Court of Appeal of a State and the qualification for appointment of its members. The two courts are separate and distinct, with different jurisdiction and membership. A Judge of the one is different from that of the other and its membership cannot be interchanged. It is only the Constitution of the country which established both courts and prescribed the qualification of their members and jurisdiction, that could make a Judge of one court sit in another; but regretfully, no such provision exist (sic) in the present Constitution. For the reasons aforesaid, therefore I hold that ground 4 of the appeal succeeds and the judgment of the Kano State High Court as constituted at the hearing of the appeal is incompetent and a nullity.”

This decision was approved by this court in Oloriegbe v. Omotosho (supra). Section 63(1) is effectively modified by section 238 of the Constitution.

But is that part of section 63(1) of the High Court Law which provides for the High Court to be constituted by two Judges of that court when sitting in its appellate jurisdiction inconsistent with section 238? The answer to this question lies in the construction of the section.

Section 238 provides that the High Court of a state is duly constituted if it “consists of at least one Judge of that court.” The words “at least” make a great difference in the meaning. My construction of the section is this- for the purpose of exercising any jurisdiction (and this includes appellate jurisdiction by virtue of section 236(2)) conferred upon it under the Constitution or any law, a High Court of a state shall be duly constituted if it consists of a number of Judges but not less than one Judge of that court. Thus, the section allows the court to be constituted of more than one Judge.

I am reinforced in this view by the wording of section 214 of the 1979 Constitution. The section provides:

“214. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, the Supreme Court shall be duly consti-

tuted if it consists of not less than five Justices of the Supreme Court. Provided that where the Supreme Court is sitting to consider an appeal brought under section 213(2)(b) or (c) of this Constitution, or to exercise its original jurisdiction in accordance with section 212 of this Constitution, the court shall be constituted by seven Justices.”

Whereas the main body of the section allows for five or more Justices of the Supreme Court to exercise any jurisdiction conferred on the court, the proviso thereto makes it mandatory that in exercising appellate jurisdiction on questions as to the interpretation or application of the Constitution or questions as to whether any of the provisions of Chapter IV of the Constitution (relating to fundamental human rights) has been, is being or is likely to be, contravened in relation to any person or in exercising its original jurisdiction (where this exists), the Supreme Court shall be constituted by seven Justices. The proviso unlike the main body of the section does not allow for any laxity in the number of Justices to constitute the court when dealing with matters covered by it. I hold the view that the word “shall” as used in the section is directory only but the same word as used in the proviso to the section is mandatory.

For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a state shall be duly constituted if it consists of one Judge of that court.

In that latter case, there would be no argument that the section has covered the field in so far as the subject of the constitution of a State High Court is concerned. But by the use of the words “at least” in section 238 as it presently stands, the section cannot be said to have covered the field nor that it is self executing. A constitutional provision is self-executing when it lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoined or protected without the necessary aid of legislative enactment. In *Willis v. St. Paul Sanitation Co.* (1982)-1.8 Minn, 140, 50 NW 1110, 1111-2, the Minnesota court in the U.S. stated

“If the nature and extent of the right conferred and of the liability imposed is fixed by the provision itself, so that they can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the legislature for action, then the provision should be construed as self-executing:’

See also *Higgins v. Cardinal Mfg Co.* (1961) 188 Kan 11,360 P 2D456, 462 where the Kansas court also stated:

“It is a settled rule of constitutional construction that prohibitive and restrictive constitutional provisions are self-executing and may be enforced by the courts independent of any legislative action unless it appears from the language of the provision that the enactment of legislation is contemplated as a requisite to giving it effect.” 5

The Arkansas court in *Rockefeller v. Hogue* 244 Ark 1029, 429 S.W. 2d. 85, 88 the test applied: It said:

“One of the principal tests as to whether constitutional provision is self-executing is the determination, from the language, its nature and its objects, whether it is addressed to the legislative branch or to the judicial branch.” 10

To this I may add that where the provision merely announced general principles, or where the framers expressly or by necessary implication indicated legislative action which was to follow to give effect to the principle, the provision is non self-executing. 15

Turning now to section 238, the subject with which it deals, that is, the constitution of a court, is a matter of practice and procedure. In my respectful view, the section is an enabling provision empowering state legislatures to fix the number of Judges to constitute their respective High Courts but subject to this that the minimum number that may be provided for is one Judge of the court, thus excluding a Judge(s) of another court sitting in the High Court in exercising any of the jurisdiction conferred on it by the Constitution. I have support for the view that the constitution of a court is a procedural matter in the observation of this court in *Olawayin v. Commissioner of Police* (1961) 1 SCNLR 210; (1961) All NLR 213, 225 (Reprint) where, per Brett, 25 FJ, this court stated:

“As regards submission (iii). I do not consider that the right to have an appeal determined by a court composed in a particular way is a right of the kind which is preserved by section 38 of the Interpretation Act, 1889. It seems to me to be a procedural matter, and it has been held that no one has a vested right in any particular form of procedure: Wright v. Hale (1860) 30 L.J., Ex.40.42. 30

Submission (iv) also seem to me to deal with a procedural point, and, with respect, I do not consider that a question affecting the composition of the court is a question of jurisdiction in the sense in which that word is used in Swith v. Brown (1871) L.R. 6 F.B. 729, 733 and the other cases to which the Attorney-General referred us” 35

Submissions (iii) and (iv) referred to in the above passage are:

“(iii) Section 38 of the Interpretation Act, 1889, which applies to

the Constitution Orders as it does to an Act of the parliament of the United Kingdom, provides that the revocation of the 1954 Constitution Order shall not affect any rights acquired under the Order. This would preserve the right of persons in Northern Nigeria to have their appeals determined by a court composed in a particular way.

5 (iv) *The jurisdiction of the High Court of the Northern Region to sit with an additional member is not to be taken away except by express words."*

In my respectful view, therefore, I think that Mr. Mahmoud is right to say that section 238 is non self- executing.

10 The principles to be applied in the construction of the provisions of our constitution have been laid down in a number of cases. In Nafiu Rabiu v. State (1980) 8-11 Sc. 130, Sir Udoma, J.S.C. stated the general rule when he said at pages 148-149:

15 ".... *the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the constitution*".

20 And in Attorney-General of Bendel State v. Attorney -General of the Federation (1981) 10 S.C. 132-134, Obaseki J.S.C. listed 12 canons of construction, some of which are:

25 1. The Constitution of the Federal Republic of Nigeria is an organic scheme of government to be dealt with as an entirety; a particular provision cannot be dissevered from the rest of the Constitution.

2. The principle upon which the Construction was established rather than the direct operation or literal meaning of the words used, measure the purpose, and scope of its provisions.

30 3. Words of the Constitution are therefore not to be read with stultifying narrowness.

To the 12 canons listed by the learned Justice of the Supreme Court I venture to add:

1. Constitutional language is to be given a reasonable construction and absurd consequences are to be avoided.

35 2. Constitutional provisions dealing with the same subject matter are to be construed together.

3. Seemingly conflicting parts are to be harmonized, if possible, so that effect can be given to all parts of the Constitution.

4. The position of an article or clause in a constitution influences its

construction.

Bearing in mind the canons of construction discussed above, it is my view that in interpreting section 238, section 239 must be considered along. The two sections deal with the same subject matter in that they are both enabling provisions relating to practice and procedure. Section 239 confers 5 power on the House of Assembly of state to prescribe from time to time practice and procedure of the state High Court in the exercise of the jurisdiction vested in the court by the Constitution. If the view is accepted that section 238 is non self-executing in that it envisages a situation where a State High Court only may be constituted by more than one Judge, it follows logically 10 that the body to prescribe that number can be the House of Assembly of the state (or the Military Administrator under the present dispensation). To suggest otherwise will, in my respectful view, occasion absurd consequences. To suggest, for instance that State High Court may be constituted by one Judge or more as the State Chief Judge may decide amounts, with profound respect, 15 to reading section 238 with “stultifying narrowness” and not according to it liberal interpretation that is required of constitutional provisions. Surely, if the framers of our constitution intended to give such power to the State Chief Judge, they would have clearly stated so. Section 239 gives the power to prescribe practice and procedure of the State High Court to the legislative 20 branch and not to the judicial branch as in sections 216 and 227 of the constitution. It is, in my respectful view, reasonable to presume that it is to the legislative branch rather than the Judicial branch, that the power is given in section 238 to prescribe the number of Judges to constitute the High Court.

The High Court Law, Cap. 49 Laws of Northern Nigeria, 1963, is appli- 25 cable in Kwara State and it is deemed to be a Law made by the Kwara State House of Assembly pursuant to sections 238 and 239 of the Constitution. It is, therefore, an existing law by virtue of section 274 of the constitution. Is what remains of section 63(1) after the modification to it by *Olorieghe v. Omofoso* and *Ado v. Dije* (*supra*) valid? Messrs Olajide, learned counsel for the plaintiff, 30 in his Brief, and Mr. Mahmoud learned amicus curiae answered this question in the affirmative. But the learned Attorney-General and learned Senior Advocates who appeared as amici curiae and Mr. Bello, learned counsel for the defendant answered the question in the negative. With profound respect to 35 all the latter learned gentlemen, I would answer the question in the affirmative. From all I have said about the canons of construction of constitutional provisions, I cannot read section 238 to require, by its context, that a nullification of section 63(1) is intended. In my humble view, in its modified form, (after the application of the “blue pencil” rule by the cases earlier referred to by me), the

then was) in *Ado v. Dijie* (supra) to the effect that section 63(1) is no longer in force. The pronouncement was, at best, an *Obiter dictum*; it went beyond the issue for determination before the Court of Appeal in that case.

As was rightly held by this court in *Akerele v. Alapata* (supra), an application, as in the case on hand, to the High Court of Kwara State for leave to appeal against its decision sitting in its appellate jurisdiction, to the Court of Appeal, is made to that court in its appellate jurisdiction. The High Court when considering that application was exercising its appellate jurisdiction and must be constituted by two Judges of that court. It follows that Orilonise, J. sitting alone could not validly exercise the appellate jurisdiction of the High Court. 5 10

We have been invited to overrule *Akerele v. Alapata* on the ground that the basis for that judgment- the Constitution of Northern Nigeria, 1963, was no longer in force. With respect to learned counsel who so submitted, I think the submission is misconceived. *Akerele v. Alapata* was correctly decided at the time it was decided. Even if there has been, since then, a change in the law, that is no reason to overrule it; it would only be declared no longer applicable. In view, however, of the conclusion I have arrived at on the question of the validity of section 63(1) of the High Court Law, Cap.49 Laws of Northern Nigeria, 1963, the principles enunciated in the case still hold good. 15 20

I have examined the five grounds of appeal in the defendant's notice of appeal to the Court of Appeal; the grounds raised issues of mixed law and fact and fact. Under section 221(1) of the Constitution, leave to appeal was required. The leave to appeal granted by the High Court of Kwara State was granted by a single Judge sitting alone. He had no jurisdiction to grant such leave under section 63(1) of the High Court Law. The order granting the leave was invalid and void. And as no valid leave of either the High Court or of the Court of Appeal was obtained before the defendant appealed against the decision of the Ilorin High Court given in Suit No. KWS/OM/1986 on 9th July 1987, the appeal was incompetent and the decision of the Court of Appeal therein is null and void. 25 30

In view of the conclusion just reached I do not consider it necessary to go into other issues raised in the Briefs of the parties. Suffice to say that a long line of cases has laid it down that before an order of non-suit is made, it is necessary and important that parties' counsel are given opportunity to address the court as to desirability or otherwise of such an order. See *Osayi v. Izozo* (1969) 1 All NLR 155; *Olayiwole v. Oso* (1969) 1 All NLR 281; *Oduola v. Coker* (1981) 5 S.C. 197; *Ikoro v. Safrap Ltd* (1977) 2 S.C. 123; *Aigbe v. Edokpolor*

(1977) 2 S.C. 1; Omoregbe v. Lawani (1980) 3-4 S.C. 108; Afolabi v. Adekunle (1983) 2 SCNLR 141; Anyaduba v. NRTC Ltd (1992) 5 NWLR 535. The court below was in breach of this important duty as it did not call on counsel for the parties to address it on the issue before the order of non-suit was made. In effect, it has granted an order which neither party asked for and in respect of which they were not heard. As the proceedings before that court are otherwise a nullity; I will not go into the question raised in both the appeal and the cross-appeal, of the correctness of the order.

The main appeal of the defendant fails and it is dismissed by me. The cross-appeal of the plaintiff succeeds and it is allowed by me. The judgment of the Court of Appeal is declared null and void.

I set aside the award of N35.00 costs to the defendant made by Orilonise, J. on 31st July, 1987 and make no order as to the costs of this appeal.

15

BELLO CJN

I have had a preview of the lead judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree with the reasoning and conclusion therein. However, I consider it necessary to state a few words on the constitutional issue for which the court invited the amici curiae to assist in its determination. The Issue is:

“What is the constitution of the High Court of Kwara State when sitting to determine an application by a losing party for leave to appeal to the Court of Appeal against the decision of the said court sitting in the appellate jurisdiction having regard to section 238 of the 1979 constitution and section 63 of the High Court Law of Kwara State.”

The facts and the law relevant to the issue may be stated. The Respondent in this appeal was the plaintiff in the Upper Area Court wherein he claimed a piece of land against the defendant, now the appellant, and the claim was dismissed. The plaintiff appealed to the High Court of Kwara State which allowed the appeal and awarded the land to him. The defendant sought the leave of the High Court to appeal to the Court of Appeal against the decision in accordance with the provision of section 221(1) of the 1979 Constitution. A single Judge of the High Court sitting alone granted the leave to appeal in spite of the objection of counsel for the plaintiff that a single Judge had no power to do so.

The same issue was raised by the plaintiff on appeal to the Court of Appeal and that court held that a Judge of the High Court sitting alone can, in

the exercise of the appellate jurisdiction of the High Court, grant leave to appeal to the Court of Appeal against the decision of the High Court. It holds on this court to determine the issue.

Before 1st October 1979, when the 1979 Constitution came into force, sections 62 and 63 of the High Court Law of Northern Nigeria, now the High Court Law of Kwara State, provided for the constitution of the High Court for the exercise of its jurisdiction for the hearing of appeal from the Native Courts, now the Area Court, in accordance with the provisions of the 1963 Constitution of Northern Nigeria. The said sections read:

“62. *The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from Upper Area Courts.* 10

63 (1) *In the exercise of its jurisdiction under sections 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge at the Sharia Court.* 15

In *Oladunni Akerele v. Jimoh Alapata* (1973) NNLR 138, this court decided that when hearing an application for leave to appeal to the Supreme Court, the High Court was exercising appellate jurisdiction and was not properly constituted by a single Judge. 20

Now sections 238 and 239 of the 1979 Constitution provide, as modified by the Constitution (Suspension and Modification) Decree 1984:

“238 *For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.* 25

239 *The High Court of a state shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time to prescribe by the House of Assembly of the state or a Decree.* 30

Sections 274(1) of the Constitution preserves existing law in these terms:-

“274(1) *Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution.* 35

(2) x x x x x x x x

(3) *Nothing in this Constitution shall be construed as affecting the*

power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law."

Furthermore, sections 274(4)(b) defines "existing law" thus:

5 “(b) “existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force which having been passed or made before that date comes into force after that date.”

10 It follows from the foregoing that the 1979 Constitution preserved sections 62 and 63 of the High Court Law as existing law but in giving effect to the sections the court must ensure that they are in conformity and not inconsistent with section 238 of the Constitution. The existence of section 63 of the High Court Law will cease if it is inconsistent with section 238 of the Constitu-
15 tion. It will be invalid. Validity of section 63 is the fulcrum upon which the main issue in the appeal rested.

At the conclusion of oral addresses of the learned amici curiae, I expressed the appreciation and gratitude of the court for their invaluable assistance. Though the issue may appear to be simple, its resolution had indeed
20 been a difficult one as can be seen from our divergent views in reaching the majority decision of the court. We thank the learned amici curiae for their industry and commendable submissions on the constitutional issue.

It is pertinent to point out that section 63(1) of the High Court Law in so far as it relates to having a Sharia Court of Appeal Kadi as a member of the
25 High Court for hearing of an appeal from Upper Area Court has been declared inconsistent with sections 238 of the Constitution: *Ado & Anor v. Hajiya Dije* (1984) 5 NCLR 250 and *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 270) 386. Thereafter, two Judges of the High Court constitute the court in the exercise of its jurisdiction.

30 Before us, learned counsel for the plaintiff, who is the appellant in the issue, submitted that the provision of the remainder of section 63 requiring two Judges for the hearing of an appeal is mandatory and is consistent with s.238 of the Constitution and consequently the Court of Appeal had erred in law in affirming the decision of Orilonise, J. of the High Court that a single
35 Judge could grant leave to appeal. That being the case, he further contended that there was no proper appeal before the Court of Appeal and its decision cannot therefore stand. Responding, counsel for the respondent on the issue argued that in accordance with the provision of s.238 of the Constitution a single Judge of the High Court can validly constitute the court and grant leave

to appeal.

The learned Attorney-General of Kwara State, Mr. Sani, submitted that since the 1963 Constitution of Northern Nigeria ceased to have effect and the decisions in *Malam Ado & Anor. v. Hajiya Dije*, (supra) and *Oloriegbe v. Omotesho* (supra) the remainder of s.63 requiring two High Court Judges to sit on appeal became permissive and not mandatory having regard to s.238 of the 1979 Constitution. Referring to the decisions of this court in *Nwobodo v. Onoh* (1984) 1 SCNLR 1; (1984) All NLR 1, he argued that a single Judge can validly constitute the High Court for the purpose of exercising appellate jurisdiction.

In what appears to be submission in the alternative, the learned Attorney-General contended that an application for leave to appeal from a decision of the High Court was merely supervisory. It was an appeal and did not come within the provision of section 63; that the decision of this court in *Oladunni Akerele v. Jimoh Alapata* (supra) was decided per incuriam and should not be affirmed. In conclusion, he stated that the single Judge had the power to grant the leave and the appeal to the Court of Appeal was competent. Mr. Majiyagbe, S.A.N., after having stated the history of section 63 of the High Court Law in its constitutional and statutory perspective and the several relevant decisions of this court particularly, *In re IS. Olawoyin v. Commissioner of Police*, (1961) 1 SCNLR 210; (1961) All NLR 203; *Malam Ado & Anor. v. Hajiya Dije*, (supra), *South Dakota v. North Carolina*, (1904) 192 U.S. 286 L. Ed. 448 at p.465; *Prout v. Starr* (1903) 188 U.S. 537 L. Ed. 584 at 587; *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria & anor* (1981) 2 NCLR 358 at pp.374; *Archbishop Okogie v. A.-G of Lagos State* (1981) 2 NCLR 337, at pp.348-349, contended that although from the historical point of view it was desirable to have two Judges of the High Court for the purpose of exercising appellate jurisdiction, section 63 was inconsistent with section 238 of the Constitution and invalid. He stated that section 238 was the sole guide to the composition of the High Court, whether in its original or appellate jurisdiction and it was duly constituted if it consisted of at least one Judge. He submitted that a single Judge of the High Court could validly grant leave to appeal. Referring to *Oladunni v. Jimoh Alapata*, he stated that though that decision was right at the time it was made, it ought now be considered overruled.

The learned Senior Advocate further contended that section 63(1) was not an existing law because section 53(4) of the 1963 Constitution on

which it had been founded had not been re-enacted in the 1979 Constitution.

Chief Ajala, S.A.N., reviewed in his brief several authorities and relevant provisions to the issue and submitted that section 63 was an existing law within the meaning of section 274(1)(b) and (4)(b) of the 1979 Constitution but was inconsistent with section 238 and therefore invalid. He submitted that a single Judge of the High Court could grant leave to appeal. He relied on *Ikenyi Dike v. Obi Nzeke* (1986) 4 NWLR (Pt. 34) 144 and *Nwobodo v. Onoh* (supra). He urged the court to depart and over-rule the earlier decision in *Akerele v. Alapata* (supra).

The learned Attorney-General of Benue State, Mr. Horn, after having reviewed the relevant provisions of the constitution also contended that s.63 was an existing law and must be read with sections 238 and 274 of the Constitution. Citing *Ado v. Dije* (supra), he submitted that section 63 was not invalid vis-a-vis section 238. He contended that section 238 was a deliberate innovation aimed at harmonizing the minimum composition of the High Courts throughout the Federation; that by the provision of section 238 a single Judge of the High Court could exercise, section 63 notwithstanding, the original and appellate jurisdiction of the court; that the words "at least one Judge" in section 238 prescribed the minimum number of one Judge but the section did not prevent the High Court from being constituted by more than one Judge. He concluded that the requirement of "two Judges" by section 63 did not offend section 238 but was consistent with it. He buttressed his submission with *Nwobodo v. Onoh* (supra),

In his brief, Mahmoud, amicus curiae, after having examined the historical background of section 63 prior to the 1979 Constitution and the decision in *Olawoyin v. Commissioner of Police* (1961) 1 SCNLR 210; (1961) NSCC 90 and *Akerele v. Alapata* (supra), he submitted that the only crucial departure from the pre-1979 position of the law was the introduction of s.238 of the 1979 Constitution and part of section 63 relating to Kadi had already been declared void: *Ado v. Dije* (supra) and *Olorieghe v. Omotesho* (supra). He stated that the answer to the issue on appeal lay on the interpretation of section 63(1) of the High Court Law and section 238 of the Constitution. Referring to the rules and canons of interpretation stated in *Nafiu Rabiu v. State* (1980) 8-11 S.C. 130 and *The Attorney-General of Bendel State v. The Attorney-General of the Federation* (1981) 10 S.C.1, he contended that in construing s.238, the word "shall" could not be construed as being mandatory in the context of the section in view of the words "at least" therein. He stated that the logical construction to be put to section 238 was that it was permissible for a High Court of a State to be constituted by more Judges than one. Accordingly,

section 238 was not self executing. It permitted the State to make Law providing for the composition of its High Court. He concluded that s.63 was not inconsistent with section 238. He referred to *Billiri v. Billiri* (1991) 4 NWLR (Pt. 186) 473; and *Nwobodo v. Onoh* (supra).

With the exception of the submission in the alternative advocated by Majiyagbe. SAN., to the contrary, there is a consensus of learned counsel and the amicus curiae that section 63 is an existing law. I share the same view. The contention of Majiyagbe, SAN, that because the 1963 Constitution of Northern Nigeria, upon which section 63 was enacted, had ceased to have effect on 30th September, 1979 when the 1979 Constitution came into force, the section also died with its progenitor was misconceived. Section 274 of the 1979 Constitution not only preserved the continuous existence of the High Court Law with its section 63 but the Law was also preserved by sections 6(1)(b) and 6(2) of the Interpretation Act which, by virtue of section 277(4) of the 1979 Constitution, applies to interpreting the provisions of the Constitution.

I am very much impressed by the submission of Mr. Horn and Alhaji Mahmoud on their approach to the interpretation of section 238 of the 1979 Constitution and section 63 of the Law. It is a cardinal principle of interpreting the provisions of the Constitution that where in their ordinary meaning the provisions are clear and unambiguous, effect should be given to them without resorting to any external aid: *Attorney-General of Bendel State v. Attorney-General of the Federation* (supra).

Now, section 238 of the 1979 Constitution provides that for the purpose of exercising any of its jurisdiction, the High Court shall be duly constituted if it consists of "at least one judge" of that court. The words "at least one Judge" are the operative words for the determination of the composition of the court under the Constitution. In its ordinary meaning, the word "least", inter alia, means "a minimum" and the phrase "at least" means "qualifying an expression of an amount or number, (so much or many) at any rate, if not more": The shorter Oxford English Dictionary, Third Edition.

It is clear that its ordinary meaning section 238 of the 1979 Constitution puts a minimum of one Judge to constitute the court and does not restrict the member of Judges that may constitute the court. Accordingly, two or more Judges may within the purview of the section constitute the court. It also appears clear to me that the provision of section 63(1) of the Law that "the High Court shall be constituted of two Judges of the court" in the exercise of

its appellate jurisdiction is mandatory and a single Judge cannot constitute the court. Since it is permissible to have two Judges constituting the court under section 238, section 63(1) cannot be said to be inconsistent with section 238. Accordingly, I hold the remainder of section 63(1) to be a valid existing
5 law.

However, as I have shown that more than two Judges may constitute the court under section 238, the issue of inconsistency between the section and section 63, which limits the two Judges, may arise in a case where more than two Judges constitute the court. I would reserve such issue for consid-
10 eration in a proper case. For the time being, it is an academic question which I refrain myself from determination. A court ought to make pronouncement upon question, of constitutionality unless it is absolutely necessary and essential to do so for the determination of the issue before it: *Spector Motor Service v. McLaughlin* (1951) 232 U.S. 105; *Silver v. N.R.R.* (1990) 213 U.S. 175 and *Peters*
15 *v. Hobby* (1955) 349 U.S. 331.

For the foregoing reason and the fuller reasons in the judgment of my learned brother, Ogundare, J.S.C, the appeal and cross-appeal are hereby allowed. The judgment of the Court of Appeal is set aside and the decision of
20 the High Court stands. I make no order as to costs.

If the time for determination of the defendant's application for leave to appeal had not expired, I would have remitted the case to the High Court for its hearing and determination by properly constituted court. Regrettably the time has expired.

25 _____

UWAIS JSC

This case has had its vicissitudes. It was first instituted in Area Court Grade 1, Ajase- Ipo, Kwara State. There was an appeal from that court to Upper Area Court No.1, Ilorin, and then to the High Court of Kwara State,
30 holden at Ilorin. A retrial of the case, was at first ordered by the High Court, in Upper Area Court no.2, Ilorin, but this was later altered by the High Court, on application, to a retrial at the Upper Area Court. Omu-Aran. After the decision by the Upper Area court, Omu-Aran, there was an appeal to the High Court, Ilorin, and a further appeal to the Court of Appeal, Kaduna. The appeal before
35 us is from the decision of that court.

At the Upper Area Court, Omu-Aran, the Respondent herein was the plaintiff and the Appellant was the Defendant. Both parties, that is the plaintiff and the defendant, claimed ownership of a piece of land in Oke-Maró area of

Amayo village in Kwara State. Each side relied on history, traditional evidence and acts of possession. The parties called witnesses and the Upper Area Court visited the land in dispute to conduct a view before delivering its judgment. It dismissed the plaintiff's claim by stating thus:-

"We have carefully considered the veracity of the evidence of both parties, the demeanour of the plaintiff before this court, and what we saw at the locus in quo. We feel, the evidence of the defendant is more automatic (sic). The plaintiff fails to discharge the onus on him, and hence we dismiss the claim of the plaintiff."

In the High Court, the plaintiff's appeal was heard by Gbadeyan and Orilonise JJ., who, in allowing it, held as follows:-

"Now, therefore, can we not say that the trial court has either properly exercised its judicial discretion to believe or disbelieve the witnesses of the parties or properly handled the facts in this case? In the circumstance, we have come to the firm conclusion that the interest of justice demands that we disturb the findings of the trial court. We say on the available facts that the respondent has not established any case superior to or even equal to that of the appellant. That scale should have tilted in favour of the appellant. The omnibus ground of appeal succeeds. We shall allow the appeal and set aside the decision of the trial court dismissing the appellant's claim and awarding the land to the respondent."

Consequently, we invoke section 59 of the Area Courts Edict, 1967, to substitute a verdict awarding judgment over Oke-Marofarm land, Amoyo to the appellant."

The Defendant felt aggrieved and applied to the High Court for leave to appeal pursuant to section 221 subsection (1) of the Constitution of the Federal Republic of Nigeria, 1979. The application was heard by a single Judge (Orilonise J.) and leave was accordingly granted.

In the Court of Appeal, the learned Justices (Mohammed, J.C.A., as he then was, Ogundere and Achike J.C.A.) allowed the appeal by the defendant, in part, by entering an order of non-suit against the plaintiff. In the lead judgment of the court delivered by Ogundere, J.C.A., the following observations were made:-

"I have examined most critically the record of proceedings of the trial court, including its findings and conclusions, the re-findings of the High Court, Omu-Aran, Kwara State, in its appellate jurisdiction, and the briefs of arguments (sic) filed by both parties in this appeal. It is trite law that an appellant who found his appeal on an attack of the findings of fact of the lower court has an uphill task to perform especially when it is based on

the credibility of witnesses as in this case. A Court of Appeal cannot, and must not, substitute its own findings on the credibility of witnesses for that made by the trial Judge, except where the trial Judge has been shown to be obviously perverse, and it must go beyond a mere entertainment of doubts as to whether the decision of the trial court based on the credibility of witnesses was right, the Court of Appeal must be convinced beyond doubt that the lower court was in fact wrong.....

Now let us apply these principles to the appeal in hand, but first to the trial Upper Area Court. At pA2 of the Record, it sets out the issues; First, who was the first settler, to determine ownership of land by first occupation. Secondly which of the contending families ruled Amoyo during the course of its history? Thirdly, who is in effective possession of the land or who has title to it. As to first settlement, the trial court found that plaintiff's family in its evidence installed seven out of eleven Bales in history. On accepting the evidence of D.W.2 head of the Kingmakers that the land and rulership in Amoyo belong to defendant's family, and that, Ijabo Oye the defendant's founder and his descendants ruled over Amoyo in succession, without any break, since the village was founded, awarded the defendant's family the first settler status. The trial court found defendant's evidence superior to plaintiff's in that regard. Is that perverse? Certainly, the High Court did not prove in its judgment that that finding was wrong beyond the shadow of doubt. So, it could not constitute its own, nor can it draw any other logical conclusion than that drawn by the trial court.....

At the end, the trial court found the evidence of the defendant "more automatic" (sic) meaning, I venture to suggest, more convincing. Since it is the duty of the plaintiff to prove its case by a preponderance of evidence, which it failed to do, but only proved a probable case."

The learned Justice then considered whether the defendant had adduced preponderant evidence in proof of his case for judgment to be given in his favour. He came to the following conclusion:-

"In view of the various grants of land to other families in Amoyo including the plaintiff, and the fact that both parties proved control of some part of the disputed land by grants it made on it, the defendant's evidence of acts of ownership are not preponderant To dismiss the plaintiff's claim is to suggest that this court awarded the land in dispute to the defendants.

In the circumstances, the appeal succeeds partially, for an order of dismissal of plaintiff's claim in the trial court below, an order of non-suit is

hereby substituted.”

Both parties were unhappy with the decisions of the Court of Appeal. The defendant was the first to file a notice of appeal to this court and the plaintiff later, by leave of this court, filed a notice of cross-appeal.

The only issue for determination presented in the defendant’s brief of argument is:-

“Whether the Court of Appeal, Kaduna was not wrong in law in making an order of non-suit instead of restoring in toto the decision of the trial court which dismissed the suit of the plaintiff/respondent when:

- (i) *the suit was given a full and complete hearing;*
- (ii) *the Court of Appeal did not uphold the complaints of the plaintiff/respondent against the judgment of the trial court; and it (Court of Appeal) did not reverse any of the findings, and conclusions of the trial court, but rather it confirmed them;*
- (iii) *the Court of Appeal did not invite the parties counsels (sic) to address it before making an order of non-suit;*
- (iv) *the reasons given for making the order of non-suit instead of dismissal are not sustainable in law.”*

For his part the plaintiff framed two issues for determination in his brief of argument. The issues thus:-

“1. Whether there was any valid and competent appeal and grounds of appeal before the Court of Appeal, Kaduna, on which the Court of Appeal’s judgment could be based, and

2. Whether the Court’s order of non-suit is reasonably warranted and can be supported by the weight of evidence before the court even if parties’ counsel had been duly invited to address the Court of Appeal on the propriety of ordering a non-suit.”

The first issue, issue No. 1, raises a constitutional issue for determination by a full court in accordance with the provisions of section 214 of the Constitution of the Federal Republic of Nigeria, 1979. Hence the court as presently constituted.

After hearing arguments by counsel on the case, on the 10th day of January, 1994 we adjourned the case for judgment to be delivered on the 25th day of March, 1994. However, we discovered later that to resolve the first issue the provisions of sections 63 of the High Court Law, Cap.49 of the Laws of Northern Nigeria, 1963, applicable to Kwara State, will have to be interpreted vis-a-vis the provisions of section 238 of the 1979 Constitution. Since counsel for the parties in the appeal did not in the course of their address or in their briefs of argument make any reference to section 63, it was decided to

invite other counsel as amici curiae to assist the court with addresses on the interpretation of the section in question. In the letter inviting both counsel to the parties and the amici curiae the following question was posed for their addresses-

5 *“What is the constitution of the High Court of Kwara when sitting to determine an application by a losing party for leave to appeal to the Court of Appeal against the decision of the said court sitting in the appellate jurisdiction having regard to section 238 of the 1979 Constitution and section 63 of the High Court Law of Kwara State.”*

10 All learned amici curiae filed briefs of argument and so also learned counsel for the defendant, but not so learned counsel for the plaintiff who, we have been told by the plaintiff, to have been on admission in a hospital at Ogbomosho following a car accident in which he was involved soon after the hearing of the appeal on the 10th day of January, 1994.

15 At this stage, it is pertinent to point out that the issue of jurisdiction of the High Court of Kwara State High Court was first raised in that court, as a preliminary objection, by the plaintiff, when one of the two Judges that heard the appeal in the High Court(Orilonise,J.)sat to hear the application brought by the defendant for leave to appeal to the Court of Appeal against the decision of the High Court.In overruling the objection,Orilonise,J.held as follows:-

20 *“The first objection touches on the competence of the court constituted by a single Judge to hear the application for leave to appeal against the decision of the High Court constituted by two Judges in the exercise of its appellate jurisdiction. Counsel cited in aid of this submission the Supreme Court case of Oladunni Akerele v. Jimoh Alapata,(1973) NNLR.138 where at pages 139-141 (1973)6SC 147. His Lordship Honourable Justice Fatayi-Williams J.S.C. (as he then was) considered the provision of section 117 subsection 4(c) of the Constitution of the Federation, 1963 read with sections 62 and 63(1) of the High Court Law, Cap.49 of the Laws of Northern Nigeria, 1963 as amended by section 69 of Area Court Edict, 1987 of Kwara State and held quite rightly in my humble view, that a High Court in its appellate jurisdiction then must be constituted of three members two of whom shall be High Court Judges and one of whom shall be a Judge of the Sharia Court of Appeal, and that therefore in the exercise of its appellate jurisdiction the High Court constituted of a single Judge to hear an application for*

35 *leave to appeal was improperly constituted.*

As far as the 1963 Federal Constitution, now repealed, was concerned that was good law; but since the coming into effect of the Constitution of the Federal Republic of Nigeria, 1979 on 1st October, 1979 see the

provisions of S. 117(4)(c) of the Constitution of the Federation, 1963 read with s.63 of the High Court Law is no longer good law by virtue of sections 236(2) (and) 238 of the Constitution of the Federal Republic of Nigeria, 1979 which reads:

..... 5
“The combined effect of these two sections of the 1979 Constitution of the Federal Republic of Nigeria is that a single Judge of the High Court can sit on appeal to determine any criminal or civil appeal from the appropriate subordinate courts within the state.”

On the appeal reaching the Court of Appeal, the defendant filed another notice of preliminary objection on the ground that the appeal before the Court of Appeal was incompetent. Dealing with the objection, the Court of Appeal stated as follows:- 10

“The parties herein filed and exchanged briefs. The respondent filed a preliminary objection (sic) on the ground that the appeal is incompetent as leave to appeal required under section 221(1) of the 1979 Constitution was granted by a single Judge. The appellant’s reply was that under sections 222(1), 236, 238 of the 1979 Constitution and the decision of this court Suit No. FCA/K/69/81 Mallam Ado v. Hajiya Dije, leave to appeal granted by a single Judge of the High Court is good in law. This submission is unassailable as section 238 of the Constitution provides that for its purpose of exercising any jurisdiction conferred upon it under this Constitution, or any law, a High Court of a state shall be duly constituted if it consists of at least one Judge of that court. The submissions of the appellant is upheld and the preliminary objection of the respondent is dismissed. See Madukolu v. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 All NLR, 587 at pp.594 CA/K/123/87 Agaka v. Balogun of 11/1/88.” 15 20 25

In his brief of argument in this court Mr. Bello, learned counsel for the defendant argued that section 63 of the High Court Law, has ceased to exist as from the date the 1979 Constitution came into force. He submitted that although s.274 of the 1979 Constitution has saved every legislation as an “existing law” by 1st October, 1979 section 63 of the High Court Law has not satisfied the conditions laid down under section 274 for it (section 63) to be considered as an “existing law”. Furthermore, he contended that section 63 is in conflict with section 238 of the 1979 Constitution and as such section 63 is not an “existing law.” He submitted that a single Judge can validly constitute the court to grant leave to appeal to the Court of Appeal by virtue of the provisions of sections 238 of the 1979 Constitution. He cited in support of the submission the following cases- Omoboriowo & anor. v. Ajasin, (1984) All 30 35

NLR 105 at pp. 126; (1984) 1 SCNLR 108; Nwobodo v. Onoh & 2 Ors., (1984) All NLR 1 at pp. 10 (1984) 1 SCNLR 8; Nwobodo v. Onoh & 2 Ors. (1984) All NLR 1 at pp. 10 (1984) 1 SCNLR 1 and Gulma, Dikko and Abubakar v. State (1980) 2 ncr 271 AT PP. 298.

Mr. Sani, learned Attorney-General of Kwara State, as amicus curiae, submitted that with the promulgation of the 1979 Constitution the provisions of section 63 of the High Court Law, became permissive and ceased to be mandatory by virtue of section 238 of the Constitution. He contended that a single Judge can validly constitute a High Court in Kwara State for the purpose of exercising appellate jurisdiction in view of the provisions of section 238 of the Constitution which embrace section 62 and 63 of the High Court Law. He cited the case of Nwobodo (supra) (1984) N.S.C.C. 1 at pp.12. He argued that it is a matter of choice or practice whether the High Court of Kwara State is constituted by one or more Judges as envisaged by section 63 of the High Court Law. He stated that the jurisdiction of the High Court when dealing with applications for leave to appeal is merely supervisory, since the purpose of the application is to pave the way for an intended appellant to appeal to the Court of Appeal.

Mr. Hom, learned Attorney-General of Benue State, stated as amicus curiae, that the 1979 Constitution is the supreme law of the land and that all other existing laws saved by the constitution, with the exception of Decrees, have effect only with such necessary modification as to bring them into conformity with the provisions of the Constitution, as provided by section 274 of the 1979 Constitution. He submitted that section 63 of the High Court Law of Kwara State, which is an existing law, must be read and tested against the provisions of sections 274 and 238 of the 1979 Constitution. He contended that section 238 is a deliberate innovation aimed at harmonising and unifying the minimum composition of the High Courts throughout the country. Therefore, by the provision of section 238 a single Judge of the High Court can exercise the jurisdiction of the High Court notwithstanding the provisions of any State High Court Law or other law to the contrary. He argued further that section 63 of the High Court Law is not invalid vis-a-vis the provisions of section 238 of the Constitution and cited the case of Ado v. Dije (supra) in support. He canvassed that the words “at least” in section 238 are contained therein deliberately. He said that there is a difference between the words “at least one Judge” in section 238 and the words “if it consists of two Judges” in section 63 of the High Court Law. The words “at least” he said, prescribe the minimum number of one Judge but nothing stops the High Court from being constituted by more than one Judge. He submitted that the provisions of section 63 had become directory instead of mandatory since the promulgation

of the 1979 Constitution. If a High Court is constituted by two Judges that does not make it inconsistent with the provisions of the Constitution, since it has met the minimum number of at least one Judge prescribed by the Constitution. He relied on the case of *Nwobodo v. Onoh* (1984) 1 SCNLR 1; (1984) 1 S.C.1; (1984) NSCC. 1 at p.28-29 and pp.12 respectively per Bello, J.S.C., (as he then was) pp.122-124 and pp.523 'respectively per Obaseki, J.S.C.; pp.137 -142 and pp.58-59 respectively per Eso, J.S.C. and pp. 193-194 and p.73 respectively per Uwais, J.S.C. He submitted that by the provisions of section 63(1) of the High Court Law, the least number to constitute the High Court in its appellate jurisdiction is two Judges and the number cannot exceed that. He, however conceded that the provisions of section 238 of the constitution are enabling provisions, so that a State House of Assembly can legislate for more than one Judge to constitute the High Court.

Mr. Majiyagbe, learned Senior Advocate and *amicus curiae* traced the history of the constitution of the High Court in Northern States under pre-1960 legislation; post 1960 legislations and the 1979 Constitution. He cited the following cases. In re *J.S Olawoyin v. Commissioner of Police* (1961) 1 SCNLR 210; (1961) All NLR; *Mallam Ado v. Hajiya Rabi.* (supra), *South Dakota v. North Carolina*, (1904) 192 U.S 286 L.Ed. 448 atp.465; *Prout v. Starr* (1903) 188 US 537 L.Ed. 584 at 587; *Senator Abraham Adesanya v. President of the Federal Republic of Nigeria, anor.*, (1981) 2 NCLR, 358 at pp.374; *Archhishop Okogie v. A.-G. of Lagos State*, (1981) 2 NCLR. 337 at pp.348-349, before submitting that all the statutory provisions relating to the constitution of the High Court of Kwara State (and indeed all the High Courts of Northern States) for the hearing of appeals from any other lower court, and for that matter, for the hearing of any cause or matter, which are inconsistent with the provisions as contained in section 238 must be held to be null and void to the extent of such inconsistency. Learned Senior Advocate stressed that a single Judge of Kwara State High Court can grant leave to appeal to the Court of Appeal for the following four reasons-

1. Because section 63(1) of the High Court Law of Kwara State is in conflict and inconsistent with section 238 of the 1979 Constitution.

2. Because section 63(1) of the High Court Law of Northern Nigeria is not an existing law because section 53(4) of the 1963 Constitution on which it was founded has not been re-enacted in the 1979 Constitution; it can only be an existing law within the meaning of section 274(4) (b) if it is a law in respect of which either the National Assembly or House of Assembly of the State has power to make law.

3. Because the sole guide to the source of the composition of the

High Court in its original and appellate jurisdiction is section 238 of the 1979 Constitution of Nigeria which provides that a High Court of a state shall be duly constituted if it consists of at least one Judge of that court.

4. Because a single Judge of Kwara State High Court can validly
5 grant leave to appeal to the Court of Appeal.

Other cases cited learned Senior Advocate are- Billiri v. Billiri, (1991) 4 NWLR. (pt. 186) 473 Nwobodo's case (supra) Madukolu & ors. case (supra) Mallo v. Buwace (1988) 4 NWLR (Pt. 89) 422; Achineku v. Ishagba, (1988) 4 NWLR (Pt.89) 411. He finally submitted that the decision of this court in
10 Akerele v. Alapata (supra) must be considered as overruled in view of the fact that the case had been decided prior to the coming into force of the 1979 Constitution and in the light of the later decision of this court in the case of Oloriegbe v. Omotesho, (1993) 1 NWLR (Pt. 270) 386.

15 The next amicus curiae to address the court was Chief Ajala, learned Senior Advocate. The argument in the brief, which he filed, has been based on three premises, namely-

1. The provisions of sections 63 of the High Court Law are inconsistent with the provisions of section 238 of the 1979 Constitution and, therefore,
20 are unconstitutional and void.

2. The ratio decidendi in the case of Oladunni Akerele v. Jimoh Alapata, (1973) NNLR 138, (1973) 6 SC 147 which he describes as the cause celebre, ought not be followed and should be re-examined by us with a view to overruling it because, in his view, its application to future cases will perpetuate sub-
25 stantial miscarriage of justice.

3. That the High Court and the Court of Appeal were right in holding, in the present case, that the preliminary objection raised in the application for leave to appeal to the Court of Appeal should be dismissed since in the context of section 238 of the Constitution a single Judge can sit in the appellate
30 jurisdiction of the High Court of Kwara State.

In elaboration of these premises, learned Senior Advocate stated that in exercising any appellate or supervisory jurisdiction which has been vested in the High Court of the state by the 1979 constitution, the High Court is duly constituted if it consists of at least one Judge. In the face of clear and
35 unambiguous language of section 238 of the 1979 Constitution a broad rather than narrow interpretation should be given to the section. He submitted that the High Court law of Kwara State is an existing law by virtue of the provisions of section 274(1)(b) and (4)(b) of the Constitution. He cited the case of the A-G of Lagos State v. Dosunmu (1989) 3 NWLR (Pt.111) 552 and submitted that

that notwithstanding s.63 is inconsistent with section 238 of the Constitution. Therefore, he urged that this court should exercise its power under section 274 subsection (3) of the Constitution to declare section 63 of the High Court Law invalid. He submitted that by the reasonings and conclusion in the case of Ikenyi Dike & ors. v. Nzeke & Ors. (1986) 4 NWLR (Pt. 34) 144 and Nwobodo v. Onoh (1984) 1 S.C 1at pp. 28-29, a single Judge of the High Court can grant leave to appeal contrary to the provisions of sections 63 of the High Court Law and the decision in Oladunni Akerele's case (supra).

Finally, Alhaji Mamoud, as amicus curiae, traced the historical background of the point in issue both before and after the 1979 Constitution came into force. He referred to the cases of Olawoyin v. Commissioner of Police, (1961) NSCC. 90; (1961) 1 SCNLR 210; Oladunni Akerele v. Jimoh Alapata, (1973) 6 S.C. 147; Ado v. Dije, (supra) and Olorieghe v. Omotesho, (supra). He submitted that on the authority of the last two cases, section 63 subsection (1) of the High Court Law is partly void since a Sharia Judge cannot sit with two High Court Judges to hear any appeal to the High Court from subordinate courts. He contended that, however, the question remains, in the wording of sections 238, whether the High Court sitting as appellate court is properly constituted by two Judges as is presently the practice in Kwara State and indeed in most, if not all, the Northern States. He sought to put the question differently asking: could the Kwara State High Court exercise appellate jurisdiction when constituted by a single Judge? In seeking to answer the questions he referred to the principles of interpreting the Constitution as stated in Nafiu Rabiu v. State, (1980) 8-11 S.C. 130 (1982) 2 NCLR 117 per Udoma, J.S.C. and A.-G of Bendel State v A.G. of the Federation, (1981) 10 S.C.1 (1982) 3 NCLR 1 per Obaseki, J.S.C. who propounded ten commandments for the interpretation of the Constitution. Learned counsel submitted that the prime effort or fundamental purpose in construing a constitutional provision, is to ascertain and give effect to the intent of the framers of it and the people who adopted it. He made reference to section 16 of 16 C.J.S. (i.e. Corpus Juris Secundum) Constitutional Law. In construing the provisions of section 238 of the Constitution, he placed emphasis on the words "any jurisdiction," "shall" and "at least" and then submitted that the use of the words "at least" subsequently in the section signifies that the word "shall" could not be construed as being mandatory in the context of the section. He argued that if the word "shall" is taken to be mandatory, the result will lead to absurdity since it is not possible to have a court constituted by less than one Judge. He, therefore, concluded that the logical construction to be given to section 238 is that it is

permissive for a High Court of a state to be constituted by more Judges than one. He then submitted that section 238 of the Constitution should not be construed as not being self-executing and called in support section 48 of 16 CJS. (Corpus Juris Secumdum) Constitutional Law which states;

5 *“A constitutional provision is self executing when it is complete in itself and becomes operative without the aid of a supplemental or enabling legislation. A provision is not self executing if its duly, construed (sic) indicate (sic) that it is not to become operative without supplemental or enabling legislation.”*

10 Learned counsel submitted further that some supplemental legislation is required in aid of section 238, in order to make the provisions of the section fully operational in constitution of the High Court. He canvassed that the High Court Law of Kwara State is an existing law under the Constitution by virtue of the provisions of s.274 thereof. He, therefore, submitted that there
15 is no conflict between section 63 of the High Court Law and section 238 in so far as the former provides for a number that is higher than single Judge for the constitution of the High Court sitting in its appellate capacity. Based on this submission, he urged that the decision in *Akerele v. Alapata* (supra) is the true position of the law and, therefore, should be upheld. In other words he said
20 any application for leave to appeal against any decision of the High Court of Kwara State, sitting on appeal, must be constituted by two Judges and not one. He made reference to two decisions of the Court of Appeal, to wit *Patrick Okhae v. Governor of Bendel State*, (1990) 4. NWLR (Pt. 144) 327 at pp.327 and *Billiri v. Billiri*, (1991) 4 NWLR (Pt. 186) 473 at pp.485.

25 Permit me, at this stage to express the debt of gratitude which we owe all the counsel who have addressed us as *amici curiae* at the further hearing of this appeal. They not only readily accepted the invitation to appear as *amici curiae* but also presented well prepared briefs and articulated arguments which
30 I find stimulating and, indeed, very helpful.

Now, it is very obvious to me that the issue to be determined with regard to the constitution of the High Court of Kwara State sitting on appeal concerns the construction of section 63 of the High Court Law vis-a-vis section 238 of the 1979 Constitution. It is also very clear that in answering the ques-
35 tion posed by this case, it is the provisions of section 63 subsection (1) of the High Court Law, more than the provisions of section 238, that call for interpretation because the provisions of section 238 are clear and unambiguous.

The High Court Law, Cap. 49, which was, in the main, enacted on the 1st day of December, 1955, had been in existence long before the promulgation

of the 1979 Constitution which came into force on the 1st day of October, 1979. Therefore, by the provisions of section 274 subsection (4)(b) of the Constitution, the High Court Law is an “existing Law” as defined by the Constitution. Section 274 subsection (4)(b) provides as follows:-

“(b) “existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date;”

Now, section 238 of the 1979 Constitution provides as follows:-

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a state shall be duly constituted if it consists of at least one Judge of that court.”

As the provisions of the section stand, there is no doubt whatsoever that whatever jurisdiction the High Court of Kwara State exercises whether appellate or original, there should be a minimum of one Judge sitting. In ordinary language the words “at least” mean the lowest computation or the lowest number.

It is settled principle of interpretation that where the language of the constitution is clear and unambiguous, it must be given its ordinary meaning, -see A.-G. of Bendel State v. A.-G. of the Federation (supra). The fact that section 238 prescribes the lowest or minimum number of Judges that can constitute the High Court, whether sitting on appeal or otherwise, suggests that there can be a higher or maximum number than one. In other words, there can be a number higher than the lowest computation which is one Judge. That makes section 238 not self executing. I think this is what sections 62 (as amended) and 63 subsection (1) of the High Court Law of Kwara State attempt to achieve, when the High Court Law provides as follows:-

“62. The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from Upper Area Court.

63(1) In the exercise of its jurisdiction under section 62, the High Court shall be constituted of two members who shall be Judges of the High Court.

The words of section 62 are clear and need no elaboration. However, section 63 appears to be in a different category. Therefore, in interpreting the provisions of section 63 subsection (1) vis-a-vis section 238 of the Constitution, I think the question to be asked is; has section 63 subsection (I) prescribed the minimum number of Judges that will constitutes the High Court of Kwara State, whilst sitting on appeal, to hear cases from Upper Area Courts? The answer to the question rests with the interpretation given to the keyword

“shall” which comes immediately before the words “be constituted” in the subsection. In the construction of statute, the word “shall” may be regarded as mandatory or directory depending on the sense in which the word is used. In some cases, the conditions or forms prescribed by the statute have been regarded as essential to the act or thing regulated by it, and their omission has been held fatal to its validity. However, it is impossible to lay down any general rule for determining whether a provision is imperative or directory. In *Liverpool Borough Bank v. Turner*, (1860) De G.F. & J 502 Lord Campbell L.c. stated as follows on pp.507-508:-

10

“No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.”

Further guidance had been given in *Howard v. Bodington* (1877) 2 P.D. 203 at pp.211 where Lord Penzance said-

“I believe, as far as any rule is concerned, you can not safely go further than that in each case you must look to the subject matter; consider the importance of the provision that has been disregarded, and the relation of the provision to the general object intended to be secured by the Act and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.”

Now, in the light of the provisions of sections 238 of the 1979 Constitution which prescribe the minimum number of Judges to sit on appeal, is section 63 subsection (1) to be interpreted as also prescribing the minimum number to be two Judges? Since section 238 allows for a higher number of Judges than one and section 274 subsection (1) of the 1979 Constitution provides that an existing law shall have effect in conformity with the provisions of the constitution, I am of the opinion that the word “shall” in section 63 subsection (1) does not do violence to the Constitution and as such should be construed as directory and not mandatory. In that event the High Court of Kwara State may be constituted, to sit on appeal, by a single Judge under section 238 of the Constitution or by two Judges under the provision of section 63 subsection (1) of the High Court Law. Consequently, when Orilonise J. sat alone to grant the application for leave to appeal, the High Court was properly constituted.

To further support the view which I hold that section 238 of the Constitution prescribes the minimum or lowest or microscopic number that

can constitute the High Court, one needs to look at similar provisions in the 1979 Constitution which prescribe the number of Judges that will constitute the Superior Courts of Record created by the Constitution. In other words, one needs to look at the general scheme of the Constitution as a guide to its interpretation. In respect of the Supreme Court, the phrase “not less than”, 5 instead of the words “at least” in section 238, have been employed in section 214 of the Constitution. Similarly, in respect of the Court of Appeal, the phrase used in section 226 of the Constitution is “not less than”. With regard to Federal High Court and Sharia Courts of Appeal, the expression used in section 232 and 243 of the Constitution, respectively, is “at least”. Both the words 10 “at least” and “not less than” represent in ordinary parlance, the minimum computation or least number required - See Associated Dominions Assurance Property Ltd v. Balmford, (1950) A.L.R. 672 and Shearer v. Hamilton, 9 Macph. 456, 3 S.C.L.R. 339.

Finally, if the word “shall” in section 63 subsection (1) of the High 15 Court Law were to be regarded as imperative or mandatory and not directory, then the result would have to be that the High Court of Kwara State could not be constituted, when sitting on appeal with less than two Judges. In other words, the number of Judges to sit on appeal would be fixed and static, so that the number “two” would represent both the minimum and the maximum. To 20 borrow a mathematical expression, the number “two”, would be a common factor to both the minimum and maximum number of Judges to sit on appeal from Upper Area Courts. With respect, this construction of section 63 subsection (1) would bring the provisions of the section into conflict with section 238 25 of the Constitution, which, as I earlier hold, has prescribed the minimum number to be only one Judge. In the event of the conflict, section 63 subsection (1) would have to be declared null and void in accordance with the provisions of section 274 subsection (3) (d) of the Constitution, which provides:-

“274. (3) *Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency of any other law, that is to say -*

.....
(d) *any provision of the Constitution”*

35

It is one of the cardinal rules of construction of a statute (and indeed documents) that where the provisions of a statute is capable of two meanings, as in the case of the word “shall” in section 63 subsection (1), if one of the meanings to be given would render the statute intra vires and the other mean-

ing ultra vires then, the former meaning is to be preferred -see R. v. O' Brien, (1985) I All E.R. 971 at pp.975h, and A.-G. v. Great Eastern Railway, (1880) 5 App. Case. 473 at pA78 where the House of Lords laid down the principle that

5 *"Whatever may be fairly regarded as incidental to, or consequent upon, those things which the legislature (i.e. the 1979 Constitution) has authorised, ought not (unless expressly prohibited) to be held by judicial construction, to be ultra-vires,"* (Parenthesis mine).

Therefore, in order to save the provisions of sections 63 subsections
10 (1) as intra-vires the Constitution, it is imperative that the word "shall" in the section should be read as directory and not mandatory.

Alhaji Mahmoud in his interpretation of the words "at least" in section 238 placed emphasis on the significance of the words and argued that a court cannot be constituted by less than one Judge. With respect, the approach leads to absurdity, what is required in the construction of a statute is
15 the interpretation of the words of the statute, and not an examination of the significance of the words of the statute. Unless of course, the words of the statute are ambiguous and not clear. In interpreting the words, once they are clear and unambiguous, the ordinary meaning in the day to day usage of the words is to be given to them. That is the principle on which statutes are
20 interpreted. Therefore, since the words "at least" are not ambiguous and simply mean "not less than", section 238 cannot be said to be absurd in stating the obvious. The import of the phrase, and, therefore, its meaning, is not lost, if by logic a court cannot be constituted by less than one Judge. In *Chatenay v. The Brazilian Submarine Telegraph Company, Ltd*, (1891) 1 Q.B. 79 the following observation was made by Lord Esher, M.R. at p.85 therefore, about the
25 construction of documents, and I daresay, it is applicable to the construction of statutes as well-

"The expression "construction", as applied to a document, at all events as used by English lawyers, include two things; first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. The meaning of the words I take to be the question of fact in all cases, whether we are dealing with poem or a legal document. The effect of words is a question of law."

35 It ought, indeed, to be remembered that the principle of interpreting the 1979 Constitution has now been settled, and it is that the provisions of the Constitution are to be given liberal and not narrow meaning -see *Nafiu Rabiu v. Kano State*. (1980) 8-11 S.C. 130 per Udoma, J.S.C.; *A.-G. of the Federation v. A.-G. of Bendel State*, (1982) 3 NCLR 1 at pp.43 and 45 and *Mohammed & anon.*

Olawunmi & ors., (1990) 2 NWLR (Pt.133) 458 at pp.484. Therefore, to regard the words “at least” in section 238 of the Constitution as meaningless since no court can be properly constituted without a Judge is, in my opinion, to give the words a narrow meaning when the context in which they are used does not call for such meaning. From the foregoing the conclusion which I arrive at, is that both the High Court (Orilonise, J.) and the Court of Appeal (Mohammed J.C.A., as he then was; Ogundere and Achike, J.C.A.) were right when they held that a single Judge of Kwara State has the jurisdiction to hear an application for leave to appeal from the decision of the High Court to the Court of Appeal.

This, however, is not the last word on the capacity of a single Judge of Kwara State to sit on appeal. Our attention has been drawn to the decision of this court in *Akinrele v. Alapata* (supra). In that case, the High Court of Kwara State heard an appeal from an Upper Area Court with three Judges forming the Coram in accordance with section 63 subsection (1) of the High Court Law. An application was made to the High Court for leave to appeal to the Supreme Court, as the Court of Appeal had not come into existence then. The application was heard by a single Judge of the High Court and it was granted. When the appeal came before the Supreme Court, a preliminary objection was raised against the hearing of the application by a single Judge since that contravened the provisions of section 63 subsection(1). In upholding the preliminary objection, the Supreme Court stated as follows (per Fatayi-Williams, J.S.C. as he then was):-

“An application to the High Court of Kwara State for leave against the decision of that court in the exercise of its appellate jurisdiction is, without doubt, made to that High Court in its appellate jurisdiction. In dealing with such an application, therefore, the High Court must be duly constituted in the manner provided for in section 63 of the High Court Law. The court is not properly constituted with only one Judge. Compared with those of section 63, the provisions of sections 80 of the High Court Law bring out the point we are making more clearly. The section reads-

‘80. Every proceeding in the High Court in the exercise’ of its Original Jurisdiction and all business arising thereon shall, so far as is practicable and convenient and subject to the provisions of any written law, be heard and disposed of by a single Judge, and all proceedings in an action subsequent to the hearing or trial, down to and including the final Judgment or order, shall, so far as is practicable and convenient, be taken before the Judge before whom the trial or hearing took place’. (The underlining is ours).

From the above provisions, it seems to us that a single Judge can preside over the proceedings in the High Court in the exercise of its original jurisdiction, in the exercise of its appellate jurisdiction, however, the court must be constituted of three members, two of whom must be Judges of the High Court and the third a Judge of the Sharia Court of Appeal. As the order
5 *granting the defendant/appellant leave to appeal was made without jurisdiction, it is null and void. The consequence of this is that no leave either of the court below or this court has been obtained before appealing against the decision of the Ilorin High Court given in suit No. KWS/45A/69 of 19th February, 1971. That being the case, the appeal is not properly before this*
10 *court."*

This decision was delivered by the Supreme Court on the 16th day of June, 1973. Mr. Majiyagbe has submitted in his oral argument, that the decision is in order being in accordance with the law at the time it was given. He
15 said that though the decision is no longer applicable now, it should not be overruled. Chief Ajala argued that the correctness of the decision has to be viewed in the light of section 238 of the 1979 Constitution. He said that the decision is wrong and that the application of it to future cases will perpetuate injustice. He did not elaborate on this. He, therefore, urged us to overrule it.
20 Alhaji Mahmoud argued that not only is the decision valid, it is also the position of the law presently. He, therefore, urged that we should follow it.

Now, a lot of water had passed under the bridge since the decisions in Akinrele's case was given. With the creation of the Court of Appeal in 1976 appeals from the High Court of Kwara State had ceased to come direct to the
25 Supreme Court. Instead, they go to the Court of Appeal first before coming to the Supreme Court. The Constitutions in force at the time the decision was given were the 1963 Constitution of the Federal Republic of Nigeria and the Constitution of Northern Nigeria, 1963, Cap. 1 of the Laws of Northern Nigeria, 1963. Both these Constitutions were jointly replaced and superseded by the
30 1979 Constitution of the Federal Republic of Nigeria, which contains the provisions of sections 238. Neither the 1963 Constitution of the Federal Republic of Nigeria nor the Constitution of Northern Nigeria, 1963 Cap. 1 contained any provision which was similar to section 238 of the 1979 Constitution.

35 Furthermore, in interpreting the provisions of section 63 subsection (1) of the 1979 Constitution, in the case of Oloriegbe v. Omotosho, (1993) 1 NWLR (Pt. 270) 386, where two High Court Judges and a Sharia Court Judge sat to hear an appeal from an Upper Area Court, my learned brother Ogundare, J.S.C made the following observation in his concurring judgment on page 409 thereof-

“It is clear from the record before us that the High Court of Kwara State was not properly constituted having regard to section 238 of the Constitution and its proceedings in the hearing and determination of the defendant’s appeal to it are, therefore, a nullity.

I am not unaware of section 63(1) of the High Court Law, Cap.49 Laws of Northern Nigeria, 1963 (applicable in Kwara State) which provides:-

.....
and that the High Court Law is an existing law within the meaning assigned to that expression in section 274 of the Constitution. But section 63(1) is not in conformity with section 238 of the Constitution, it is of no avail in saving the proceedings of the High Court of Kwara State here concerned. It is invalid as it stands. See Olawoyin v. Commissioner of Police. (1961) N.S.C.C. 90 at pp. 9697.” (1961) 1 SCNLR 210.

And Mohammed J.S.C. in his concurring judgment following the decision of the Court of Appeal in Mallam Ado & anor v. Hajiya Dije. (supra) 15 stated on pp.412-413 thereof, thus:-

“In allowing the appeal and remitting the case to the High Court of Kwara State to be determined on its merit, there is the issue which this court raised suo motu in the course of hearing the appeal as to whether the High Court, Kwara State was properly constituted when it heard and set aside the appeal from the decision of the Lokoja Upper Area Court. In other words, having regard to the provision of section 238 of the 1979 Constitution, and in view of the fact that the coram of the High Court that heard the appeal from Lokoja Upper Area Court included a person other than a Judge of the High Court, was that court properly constituted? If it was not, would its judgment not be a nullity? The Court of Appeal had had to decide the same issue in Mallam Ado & anor v. Hajiya Dije. (1984) NCLR. Vol 5, 260 where Karibi-Whyte, J.C.A., (as he then was) said on p.277 as follows

“It is important in the construction of s.238 to bear in mind the use of the word ‘that’, in referring to the court. The Court so referred to is the High Court, and not any other or in association with any other court. The provision of s.238 of the Constitution is to be found in Part IIA, and should be construed by reference to the other sections associated with it. To construe section 238 to include other Judges outside that part, suggests, and can only assume a reference to section C of Part II with respect to Judges of the Customary Court of Appeal, who are referred to in s.245(1)(b) as Judges’. This is because s.240(2)(b) which refers to Kadis of the Sharia Court of Appeal cannot be so construed. It will therefore be absurd to construe s.238

to include a Kadi, and Judges other than those of the High Court. In my view, although s.238 enables more than One Judge of the High Court to sit and hear appeals in the High Court; it does not enable any Judge of any other
5 court, or any other person to sit as a member of the High Court. This, in my view, is consistent with the scheme of the Constitution in relation to the spheres of operation and exercise of jurisdiction of the courts, and accords with the ordinary meaning of the section, in relation to other sections of the Constitution -See Canada Sugar Refining Co. v. R. (1898) AC 735; A.-G. v.
10 Brown (1920) 1 KB 773 at p.791.”

And His Lordship went on page 281 of the report thus:-

“I have held earlier in this Judgment that the scheme of the Constitution and the express provision of s.238 thereof, do not contemplate any other, than a Judge of the High Court sitting in that court. Hence, the High
15 Court constituted as it was, in this appeal by two High Court Judges, and a Khadi of the Sharia Court of Appeal, was incompetent to hear the appeal, and therefore heard the appeal without jurisdiction.”

I was also a member of the panel in that case. I indicated, in my judgment on page 400 thereof, that I was in agreement with the concurring
20 judgment of Ogundare, J.S.C. The above was the view of the majority of the panel on the case.

What has transpired from the foregoing is that section 63 subsection (1) of the High Court Law, Cap.49 has been interpreted, of recent, by the Supreme Court, to be invalid, in so far as the membership of a Khadi of the
25 Sharia Court of Appeal in the composition of the High Court is concerned, when hearing the appeal from Upper Area Court, in view of the provisions of section 238 of the 1979 Constitution. Therefore, the dictum in Akinrele v. Alapata (supra) that the composition of the High Court sitting on appeal, must include a Khadi of the Sharia Court of Appeal, as a member, has been departed
30 from, for to hold so now would be per incuriam. However, suppose we are to go by the decision in Akinrele’s case, that only the Judges of the High Court who sat on appeal could grant leave to appeal to the High Court, that is where two of them sat to hear an appeal from Upper Area Court. I am afraid, in view of the reasons, which I have given earlier in this judgment, that dictum in
35 Akinrele’s case, cannot, in my opinion, also stand. So that there is very little or nothing that is now left of the decision in Akinrele v. Alapata. This notwithstanding, I am reluctant to overrule it because the principles upon which we overrule our previous decisions have not been shown to have been satisfied. See Johnson v. Lawanson, (1971) 1 All NLR 56 Bucknor-Maclean & anor v

Inlak Ltd, (1980) 8-11 S.C.1; Surakatu v. Nigeria housing Development Society Ltd., (1981) 4 S.C. 26; Oduola & ors v. Nahham & ors (1981) 5 S.C. 197; Ifezue v. Mbadugha & anor., (1984) 5 SCNLR 427 (1984) 5 S.C. 79; Odi v. Osafile (1987) 2 NWLR (Pt.57) 510; Akinsanya v. U.B.A., (1986) 4 NWLR (Pt.35) 273 and Rossek v. A.C.B. Ltd., (1993) 8 NWLR (Pt.312) 382.

It remains now to consider the issue of non-suit entered by the Court of Appeal, which is the reason for the appeal by the defendant. In concluding its judgment, the Court of Appeal (per Ogundere, J.C.A.) stated as follows, after virtually finding in favour of the defendant, by holding that the High Court was wrong to have interfered with the findings of fact made by the trial Upper Area Court:

"To dismiss the plaintiff's claims is to suggest that this court awarded the land in dispute to the defendant."

In the circumstances, this appeal succeeds partially, for an order of dismissal of the plaintiff's claim in the trial court below, an order of non suit is hereby substituted. The appellant is awarded N250.00 costs against the plaintiff/respondent."

It is quite clear from the face of the record of appeal that the Court of Appeal did not call on counsel to the parties to address it before it peremptorily entered an order of non-suit in the case. This is manifestly a wrong exercise of its discretion, because there is a long line of authorities which laid down that before a non-suit order is made, the court should invite address by counsel on the desirability of such order. If by now any authority is still needed for the proposition, then see Craig v. Craig, (1967) NMLR 52, (1966) 1 All NLR 173 Osayi v. Isozo (1969) 1 All NLR 155 at 157; Elufisoye v. Alahetutu, (1968) NMLR 298 at pp.301 and Olayioye v. Oso, (1969) 1 All 281 at pp.284-285.

An order of non-suit implies giving to an unsuccessful plaintiff another opportunity of proceeding again in the same cause against a defendant, who in any case, was not entitled to the judgment of the court - see Onwunalu v. Osademe, (1971) 1 All NLR 14 at pp.17 and Anyakwo v. A.C.B. (1976) 2 S.C.41 at pp.62.(1976) 1 All NLR (Vol.1) 144. Now, could this be said of the defendant in the present case?

Learned counsel for the defendant has argued that the order of non-suit made by the lower court will prejudice the defendant's case whose version of traditional history was accepted by the trial court, on the basis of which judgment was entered by the trial court in his favour. Learned counsel argued further that the order of non-suit is inappropriate in this case since the case was tried on its merits in the Upper Area Court and the plaintiff failed in toto to prove his claim to the land in dispute. He said that the plaintiff failed at

the trial to prove either that he owned the land in dispute; or he controlled it; or made grant of any part of the land to any person. Counsel, therefore, urged that we should substitute an order of dismissal of the plaintiff's case, as done by the Upper Area Court, instead of the order of non-suit entered by the Court of Appeal.

5 Mr Olajide, learned counsel for the plaintiff, submitted in the plaintiff's brief of argument that the Court of Appeal acted wrongly in exercising its discretion to enter the order of non-suit without first giving the parties the opportunity of being heard since none of the parties asked for the order. He cited the case of *Ikoro v. Safrap (Nig.) Ltd.*, (1977) 2 S.C. 123 at p.127 and
10 contended that judgment should have been entered for the plaintiff by the Court of Appeal because the plaintiff had discharged the onus of proving his case in the trial court. He cited *Aigbe v. Edokpolor*, (1977) 2 S.C. 1 at p.15 in support of the submission. Learned counsel argued that though the plaintiff was obliged to succeed on the strength of his case and not on the weakness
15 of the defence case, there were material contradictions in the case for the defendant which strengthened the plaintiff's case and, therefore, judgment should have been given to the plaintiff. He relied on *Akpakpuna & ors. v. Nzeka II*, (1983) 2 SCNLR 1; (1983) 7 S.C. 1 at pp.60-62. Learned counsel submitted that because the trial court misdirected itself on the evidence adduced
20 by the defendant and thereby arrived at the wrong decision, the High Court was right to reverse the decision as was done in *Onajohi v. Olanipekun*, (1985) 4 S.C. (Pt.2) 156 at pp.162-163.

It must be made clear that neither the appeal nor the cross-appeal before us challenges the correctness of the decision of the Court of Appeal
25 that the High Court was wrong in interfering with the findings of fact made by the trial Upper Area Court. The finding of the Court of Appeal in that respect stands unchallenged. The issues before us, if I must reiterate, are whether the case was properly before the Court of Appeal since leave to appeal was granted by a single Judge in the High Court and whether the court of appeal was right
30 to have entered an order of non-suit after allowing the appeal before it.

It is common ground that the Court of Appeal was wrong in making the order of non-suit. The questions are: What follows next? Was any miscarriage of justice occasioned as a result of the order? There is no doubt that the defendant who was the successful party in the trial court and the Court of
35 Appeal would be prejudiced if the plaintiff were to be given another chance to relitigate the case. The trial court clearly found for the defendant by dismissing the plaintiff's claim. The decision of the High Court came to nought. Therefore, the Court of Appeal had no choice but to restore the judgment of the Upper Area Court. Consequently, I hold that the Court of Appeal did not

exercise its discretion judicially in making the order of non-suit. I allow the appeal by the defendant and set aside the order of non-suit which was entered by the Court of Appeal.

In the result, the appeal by the defendant succeeds and the cross-appeal by the plaintiff fails. The decision of the Upper Area Court dismissing the plaintiff's claim is hereby restored. The defendant is entitled to costs of N1.000.00 which I award against the plaintiff in favour of the defendant. 5

It is for the aforementioned reasons that I regret that I am unable to agree with the judgment read by my learned brother Ogundare, J.S.C. the draft of which I have had the opportunity of reading in advance.

KUTIGI JSC (Concurring on different reasoning) 10

This case which is about a claim for a piece of land was tried at the Upper Area Court, Omu-Aran in Kwara State. The plaintiff lost and his claim was dismissed. He then appealed to the High Court. The appeal was heard by two Judges of the court, namely Gbadeyan and Orilonise, JJ. They allowed the appeal and awarded the land to the plaintiff. Not satisfied with the judgment of the High Court, the defendant appealed to the Court of Appeal, Kaduna Division. The proposed grounds of appeal are contained on pages 71-81 and 84-88 of the record. They are all clearly grounds of facts or mixed law and facts. Leave of appeal was therefore required by virtue of the provision of section 221(1) of the 1979 Constitution. Counsel for the defendant, Mr. S.A. Bello applied by motion for leave to appeal before Orilonise J. At the hearing of the motion, Mr. Olajide learned counsel for the plaintiff quite rightly in my view raised a preliminary objection that since the appeal was heard by two Judges of the High Court, the application for leave could not be heard and granted by a single Judge relying on the authority of *Oladunni Akerele v. Iimoh Alapata* (1973) NNLR 138. He said it was only where a single Judge heard the substantive appeal that one Judge can grant leave to appeal. The preliminary objection was vigorously opposed on the ground that the case of *Akerele v. Alapata* (Supra) was based on the old and repealed 1963 Constitution. That the current provision is contained in section 238 of the 1979 Constitution and it allows a single Judge to hear an appeal and any motion arising therefrom. In his ruling on the preliminary objection, Orilonise J. said on pages 92-93 thus: 20 25 30

“As far as the 1963 Federal Constitution now repealed was concerned that was good law but since the coming into effect of the Constitution of the Federal Republic of Nigeria 1979 on 1st October 1979 see the provisions of section 117(4)(c), of the Constitution of the Federation 1963 read 35

with section 63(1) of the High Court Law is no longer good law by virtue of sections 236(2) and 238 of the Constitution of the Federal Republic of Nigeria 1979 which read:

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law a High Court of a state shall be duly constituted if it consists of at least one Judge of that court.”

“236 (2). The reference to Civil or Criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a state and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction.” The combined effect of these two sections of the 1979 Constitution of the Federal Republic of Nigeria is that a single Judge of the High Court can sit on appeal to determine any criminal or civil appeal from the appropriate subordinate courts within the state

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I overrule the objections of counsel for the Respondent and hold that this court is competent to hear this application”

Having overruled the preliminary objection, the application for leave to appeal was then moved. Granting the application, the learned Judge ordered on page 95 thus-

“The application is granted as prayed and leave is hereby granted to the applicant to file an appeal to the Court of Appeal Kaduna against the judgment delivered by this court in its appellate jurisdiction on 9th July 1987 in appeal No. KWS/OM/61/86. I award N25.00 costs to the respondent.”

The appeal was now before the Court of Appeal, Kaduna. And once again the plaintiff’s counsel raised the preliminary objection that there was no valid and competent appeal before the Court of Appeal because the High Court sitting as a single Judge granted appellant/defendant’s purported leave to appeal when it had no jurisdiction to do so. Both the preliminary objection and the appeal were heard together. Overruling the preliminary objection, the Court of Appeal per Ogundere J.C.A. observed on pages 158-159 as follows:

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35 “The respondent filed a preliminary objection on the ground that the appeal is incompetent as leave to appeal required under section 221(1) of the 1979 Constitution was granted by a single Judge. The appellant’s reply was that under section 222(1), 236 & 239 of the 1979 Constitution and the decision of this court in Suit No. FCA/K/69/81 Mallam Ado & anor v. Hajiya Diye,

leave to appeal granted by a single Judge of the High Court is good in law. This submission is unassailable as section 238 of the Constitution provides that for the purpose of exercising any jurisdiction conferred upon it under this Constitution, or any law, a High Court of a state shall be duly constituted if it consists of at least one Judge of that court. The submission of the appellant is upheld and the preliminary objection of the respondent is dismissed. See Madukolu & Ors. Nkemdilim (1962) 1 All NLR 587 at 595, CA/K/123/87 Agaka v. Balogun of 1.1.88."

As for the defendant's appeal, the Court of Appeal allowed the appeal and made an order of non-suit against plaintiff's claim. Both sides have now appealed to this Court against the order of non-suit while the plaintiff appealed against the dismissal of his preliminary objection.

I decide to take the appeal on the preliminary objection first because if that succeeds, there will be no need to delve into the merits of the non-suit order.

Plaintiff's counsel Mr. Olajide in his brief submitted that there was no valid and competent appeal before the Court of Appeal on which its judgment could be based. He said the judgment of the Omu-Aran High Court against which the defendant wanted to appeal was delivered by J.F. Gbadeyan and B. Orilonise 11, but that the defendant's leave to appeal was granted by a single Judge. He referred to pages 5874 and 92-95 of the record. He said section 238 of the 1979 Constitution exists to give room to the varying practice and procedure in the Northern and Southern states of Nigeria whereby at least two High Court Judges sit on appellate matters in the Northern states while a single Judge sits on appellate matters in the Southern states. It was submitted that where by practice and procedure, the High Court elects to sit with two Judges in the exercise of its appellate jurisdiction over a given suit, that same High Court cannot turn round to sit with a single Judge in the same suit to grant leave against the decision reached by two Judges of the High Court in its appellate jurisdiction. The High Court Omu-Aran cannot approbate and reprobate at the same time especially as leave to appeal is not automatic. He referred to sections 221(1), 236, and 239 of the 1979 Constitution and said that they should be read together. He said the High Court with the single Judge had no jurisdiction to grant defendant's purported leave to appeal since it was not the High Court contemplated by section 221(1) of the Constitution. He said section 238 of the Constitution provided for the minimum number of High Court Judges to hear appeals and did not provide for the maximum number. We were urged to hold that there was no valid and competent appeal before the Court of Appeal, Kaduna because leave to appeal which was a condition precedent to the filing of the Notice and grounds of Appeal was not validly

granted. He referred to the cases of Ho/man Bros (Nig.) Ltd. Kigo & anor (1980) 8-11 S.C. 43; and Erisi & ors. v. Idika & ors (1987) 4 NWLR (Pt.66) 503; (1987) 9-11 S.C. 170.

Mr. Bello for the defendant in his reply said a single Judge of a state High Court is competent to grant leave to appeal and that leave granted by Orilonise J was valid. He referred to sections 236 & 238 of the 1979 Constitution and to the cases of Ado & Anor v. Dije (1983) 2 FNLR 213 at 231-234; Nwobodo v. Onoh & ors (1984) 1 SCNLR 1; (1984) 1 S.C. 1 at 28-29 and Madukolu & Ors. v Nkemdilim (1962) 1 All NLR 587 at 595 (1962) 2 SCNLR 341. He said section 63 of the High Court Law ceased to exist when the 1979 Constitution came into force because the section did not qualify to be saved as an existing law under section 274 of the 1979 Constitution. That section 63 had its constitutional source in section 53(4) of the 1963 Constitution of Northern Nigeria which was not re-enacted into 1979 Constitution. He said section 63 is inconsistent with section 238 of the 1979 Constitution and is therefore void as provided under section 1(3) of the same constitution. It was also submitted that section 238 manifested the intention of the people not to give power to any state legislature to enact laws such as section 63 of the High Court Law again regarding the establishment and constitution of a state High Court. He said at present a state legislature can only legislate with respect to practice and procedure of a State High Court under section 239 of 1979 Constitution. He said the issue of constitution of a High Court is now a matter of substantive law

and not a matter of practice and procedure and as such no state legislature has power to enact a law on it. It was stressed that by the doctrine of non-interference, a state legislature cannot pass a law that would interfere with a matter already covered by the constitution. He said sections 236 & 238 of 1979 Constitution are plain, clear and unambiguous that a High Court can be validly constituted by a single Judge in the exercise of both its original and appellate jurisdictions. He argued that the decision of this court in Akerele v. Alapata (1973) NNLR 138 based on section 63 of the High Court Law is no longer good law under the present 1979 Constitution. He said the High Court of Kwara State was validly constituted under section 238 of the constitution by a single Judge when it granted leave to the defendant to appeal to the Court of Appeal on 31st July 1987.

I shall now proceed to summarize the submissions of the amici curiae who where invited to address the court on one issue only, to wit:-

“What is the constitution of the High Court of Kwara State when sitting to determine on application by a losing party for leave to appeal to the Court of Appeal against the decision of the said High Court sitting in an

appellate jurisdiction having regard to section 238 of the 1979 Constitution and section 63 of the High Court Law of Kwara State”

Murtala Sanni, Esq., the Hon. Attorney-General of Kwara State, was of the view that an application for leave to appeal from the High Court to the Court of Appeal was not an appeal and did not therefore come within the purview of section 63 of the High Court Law. But that if “leave to appeal” was held to be an appeal, then it did not matter whether or not the court which heard the application was constituted of one or more Judges because under section 238 of the 1979 Constitution the High Court could be constituted with a single Judge.

He said section 63 of the High Court Law which was only permissive and not mandatory, was not in conflict with section 238 of the constitution and that a single Judge of the High Court had powers to assume jurisdiction over an application for leave to appeal to the Court of Appeal in respect of a matter which the High Court decided in its appellate jurisdiction with two Judges.

Mr. Horn, the Hon. Attorney-General for Benue state in his own brief submitted that section 238 of the Constitution was a deliberate innovation aimed at harmonizing and unifying the minimum composition of the High Court throughout the country and that by its provision a single Judge of the High Court can exercise any jurisdiction of that court notwithstanding the provisions of any law to the contrary. Therefore notwithstanding the provision of section 63 of the High Court Law, the Kwara State High Court was duly constituted when on 31/7/87, B. Orilonise J., as a single Judge thereof sat and granted leave to appeal to the Court Appeal against the decision of the High Court sitting in its appellate jurisdiction. He referred to the case of *Nwobodo v. Onoh* (1984) 1 SCNLR 1; (1984) 1 S.C 1.

Mr. Majiyagbe, SAN, also a friend of the court submitted as follows-

1. Section 63(1) of the High Court Law is inconsistent with the provision of section 238 of the 1979 Constitution and it is ipso facto invalid, null and void. And that cases such as *Akerele v. Alapata* (1973) 6 S.C. 147 based on the section must be considered over-ruled having been decided prior to the coming into effect of the 1979 Constitution and in the light of the decision of this court in *Olorieghe v. Omotesho* (1993) 1 NWLR (Pt.270) 386.

2. Section 63(1) of the High Court Law was not an existing law because section 53(4) of the 1963 constitution of Northern Nigeria on which it was founded had not been re-enacted in the 1979 Constitution.

3. Section 63(1) of the High Court Law was not an existing law within the meaning of section 274(4)(b) of the 1979 Constitution as it was not a law in

respect of a matter on which either the National Assembly or a House of Assembly has power to make law.

4. The sole guide to the source of the composition of the High Court in its original and appellate jurisdiction is section 238 of the 1979 Constitution which provides that a High Court shall be duly constituted if it consists of at least one Judge of that court.

Many cases were cited including-

Olawoyin v. C.O.P. (1961) 1 SCNLR 210; (1961) 1 All NLR 203

Ado & anor v. Dije (1984) 5 NCLR 260,

10 Merele v. Alapata (1973) 6 S.C. 147

Nwobodo v. Onoh & ors (1984) 1 SCNLR 1 (1984) NSCC 1,

Oloriegbe v. Omotosho (1 NWLR (Pt.270) 386.

Chief Ajala SAN also in his brief submitted that the composition of the High Court in its appellate jurisdiction as contained in section 63(1) of the High Court Law has been taken away by section 238 of the constitution. He said section 63 of the High Court Law is inconsistent with the provision of section 238 of the 1979 Constitution and is therefore unconstitutional and void. He said a single Judge of the High Court can determine an application for leave to appeal from the decision of the Court High in its appellate jurisdiction to the Court of Appeal by virtue of section 238 of the constitution. He said the decision in Akerele v. Alapata (supra) which was decided before the 1979 Constitution came into force can no longer stand the test of time and ought to be departed from and over-ruled accordingly.

25 Mr. Mohmoud amicus curia in his own contributions submitted thus-

1. Section 63 of the High Court Law of Kwara State is an existing law by virtue of the provision of section 274 of the 1979 Constitution and it is not inconsistent with section 238 of the constitution as already decided in Oloriegbe v. Omorosho (supra) and Ado v. Dije (supra).

30 2. Section 238 of the 1979 Constitution should be construed as not being self-executing and that some legislation is contemplated in aid of the section to make the provision fully operational in the constitution of the High Court.

3. The decision in Akerele v. Alapata (supra) should be upheld and that the constitution of the High Court of Kwara to determine an application for leave to appeal against the decision of the High Court sitting in its appellate capacity should be by two Judges and that the leave granted by a single Judge is void.

I have no difficulty whatsoever in agreeing with the submission of learned counsel Mr. Olajide for the plaintiff that where as in this case the High

Court elected to sit with a single judges in the exercise of its appellate jurisdiction in a suit, the same High Court cannot turn round to sit with a single Judge in the same suit to grant leave to appeal against the decision reached by two Judges of the High Court in its appellate jurisdiction. That was the undoubted decision of this court in the case of *Oladunni Akerele v. Jimoh Alapara* (supra). 5 In that case the High Court sitting as a court of appeal from an Area Court was constituted by two High Court Judges and one Sharia Court of Appeal Judge. When hearing the application for leave to appeal to the Supreme Court, only one Judge sat and granted the application. The Supreme Court held that when hearing the application for leave to appeal to the Supreme Court, the High 10 Court was exercising appellate jurisdiction and was not properly constituted by a single Judge. The leave given by the single Judge was therefore a nullity and the appeal was consequently not properly before the Supreme Court. I think by this judgment the Supreme Court gave effect to the clear and unambiguous provisions of sections 62 & 63(1) of the High Court Law of Northern 15 States. They were the relevant and operative laws then. And more importantly, there was no similar or equivalent provision of the present section 238 of the 1979 Constitution in the then 1963 Constitution. The sections read-

“62. The High Court shall have jurisdiction to hear appeals (other 20 than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of Appeal) from Upper Area Court.

63(1) In the exercise of its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of 25 Appeal.”

These sections were themselves founded on section 53(4)(b) of the 1963 Constitution of Northern Nigeria. It reads

53(4). Any right of appeal from decisions of a subordinate court to the High Court of the Region conferred by this section. 30

(b) Shall be exercised in accordance with any law and rules of court for the time being in force regulating the powers, practice and procedure of the High Court ”

Section 62 & 63(1) were therefore validly made at the time. But sections 53(4)(b) above was not re-enacted in the 1979 Constitution. And this is 35 where I think the problem starts.

We have as at today the provisions of sections 238 & 239 of the 1979 Constitution to be considered along with sections 62 & 63(1) of the High Court Law. Sections 238 & 239 of the Constitution read thus-

“238. *For the purpose of exercising any jurisdiction conferred upon it under this constitution or any law, a High Court of a state shall be duly constituted if it consists of at least one judge of that court.*

239. *The High Court of a state shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time prescribed by the House of Assembly of the state.”*

I agree that section 63(1) above is an existing law being a law which was in force immediately before the date when the 1979 Constitution came into force on 1/10/79. It may therefore be modified as may be necessary to bring it into conformity with the provisions of section 238 of the 1979 Constitution (see sections 274(1) thereof). In Websters New Twentieth Century Dictionary the words “at least” are defined to mean “at the very lowest figure, amount etc, with no less”. So the question now is - Can section 63(1) be modified to bring it in conformity with the provisions of section 238 of the Constitution? My answer is clearly in the negative. I think you will have to re-write the whole of the subsection which in my view is not what is contemplated by section 274(1). Section 63(1) of the High Court Law is therefore in my view clearly inconsistent with section 238 of the 1979 Constitution as follows

(1) Section 63(1) of the High Court Law in so far as it provides for only two Judges (being minimum and maximum) number of the High Court Judges to hear and determine appeals is inconsistent with section 238 which provides for a minimum of one Judge and makes no provision for the maximum.

(2) Section 63(1) of the High Court Law to the extent that it provides for a Sharia Court Judge to sit with Judges of the High Court to hear and determine appeals is inconsistent with section 238 of the Constitution (see the decision of this court in *Oloriegbe v. Omotesho* (1993)1 NWLR (Pt. 270) 386).

(3) There is no equivalent or similar provision of section 53(4)(b) of the repealed 1963 Constitution of Nigeria in the 1979 Constitution in which to plug section 63(1) of the High Court Law. So once section 53(4)(b) is out, so also section 63(1) will be out!

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In the case of *Mallam Ado & anor v. Hajiya Dije* (supra) where an appeal from Upper Area Court Kano was decided by two Judges of the High Court and one Judge of the Sharia Court of Appeal, Kano by virtue of the

provision of section 63(1) above, Coker J.C.A. (as he then was) delivering the lead judgment said on page 267 thus-

“The 1979 Constitution of Nigeria prescribes in section 234 & 235 for the establishment and jurisdiction of a Sharia Court of Appeal of a state and the qualification for appointment of its members.

The two courts are separate and distinct, with different jurisdiction and membership. A Judge of the one is different from that of the other and its membership cannot be interchanged. It is only the constitution of the country which established both courts and prescribed the qualification of their members and jurisdiction that could make a Judge of one court sit in another but regrettably, no such provision exists in the present Constitution.” 10

I endorse the decision.

Karibi- Whyte, J.C.A. (as he then was) also in his own judgment had this to say on page 277 of the report-

*“If..... 15
.....Section 63(1) is deemed to be an existing law within section 274(4)(b), I accept the submission and hold that section 63(1) is inconsistent with section 238 of the 1979 Constitution and therefore contravenes section 1(3) of the Constitution and void to the extent of such inconsistency. This is because section 238 has covered the area in which section 63(1) makes provision.”* 20

I completely agree with the above conclusion too.

It appears to me that since the 1st day of October 1979 when the 1979 Constitution came into force the High Court exercises its original and appellate jurisdiction as to composition or constitution directly under section 238 of the constitution and not under section 63(1) of the High Court Law as was the case previously and when Akerele v. Alapata (supra) was decided. The Constitution being the supreme law of the land is superior to any other law. And that being so, section 238 of the Constitution required no “enabling” law by any state before it could be applied. The section is self-executing. It has covered the field of the Constitution on composition of the High Court. In other words section 238 has completely covered the area which section 63(1) made provision. The Constitution is Supreme not only when another law is inconsistent with it but also when another seeks to compete with it in an area already covered by the constitution. 25 30 35

In the Judgment of this court in a case dealing with the exercise of concurrent legislative powers in circumstances not entirely different from the one now under consideration. Fatayi-Williams C.J.N. in the case of Attorney-General of Ogun State v. Attorney-General of the Federation & ors (1982) 1-2

S.C. 13 at 41 stated thus-

“I would only wish to add that where identical legislations on the same subject matter are validly passed to make laws by the National Assembly and a State House of Assembly, it would be appropriate to invalidate the identical law passed by the State House of Assembly on the ground that the law passed by the National Assembly has covered the whole field of that particular subject matter. To say that law is “inconsistent” in such a situation would not, in my view, sufficiently portray clarity or precision of language.”

I am in full agreement with the observations of the learned Chief Justice. The same principle applies between the Constitution and the state law. It is self evident that section 238 of the Constitution has expressed by its enactment completely and exhaustively what shall be the law governing the constitution of the High Court throughout the Federation. In short, it has covered the whole field of the subject matter when it says “A High Court of a state shall be duly constituted if it consists of at least one Judge of that court.” Thus In Australian case of Ex Parte M’Clean (1930) 43 C.L.R. 472 at 483 the court also dealing with the exercise of concurrent legislation said as follows-

“The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed when a Federal statute discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter.”

The above observation was approved by the Privy council in Thomas O’ Sullivan Noarlvnga Meat Ltd. (1957) A.C. 1 at 24. It is therefore my view that section 238 of the Constitution has covered the field and consequently section 63(1) of the High Court Law is invalid. The issue of constitution of the High Court is clearly now a matter of substantive law, and not a mere matter of practice and procedure the only area left for a State Legislature to legislate in respect of a State High Court as provided for under section 239 of the Constitution itself (see above).

Constitutional provisions similar to section 238 in respect of the Supreme Court, the Court of Appeal, the Federal High Court and the Sharia Court of Appeal can be founded in sections 214, 226, 232 & 243 of the 1979 Constitution respectively as follows-

“214. For the purpose of exercising jurisdiction conferred upon it by this Constitution or any law, the Supreme Court shall be duly constituted if it consists of not less than 5 Justices of the Supreme Court.

Provided that where the Supreme Court is sitting to consider an appeal under section 213(2)(b) or (c) of this constitution, or to exercise its original jurisdiction in accordance with section 212 of this Constitution, the court shall be constituted by 7 Justices. 5

226. For the purpose of exercising jurisdiction conferred upon it by this Constitution or any other law, the Court of Appeal shall be duly constituted if it consists of not less than 3 justices of the Court of Appeal.....

232. The Federal High Court shall be duly constituted if it consists of at least one Judge of that court. 10

243. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Sharia Court of Appeal of a state shall be duly constituted if it consists of at least 2 kadis of the court. But the provision under section 248 of the Constitution of a Customary Court of Appeal of a state is differently worded from any of the sections referred to above as it leaves a State Legislature to enact a law and prescribe for the number of Judges thereof. It reads thus- 15

“248. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of a state shall be duly constituted if it consist of such number of Judges as may be prescribed by law for a sitting of that court.” 20

One can confidently therefore say that sections 238, 214, 226, 232 and 243 (supra) are all self-executing while section 248 (supra) is not self-executing being an enabling provision for a state House of Assembly to make a law on the matter. 25

Having said that I must now say that the principle laid down by the Supreme Court in the case of Akerele v. Alapata (supra) still holds and remains good law. And the principle as I understand it is in the exercise of its appellate jurisdiction to grant leave to appeal the High Court must be constituted as an appeal court. In other words if it is one Judge, or two or more Judges that decide an appeal then leave to appeal from the same judgment can only be granted by one or more Judges as the case may be. 30

My view is reinforced by the fact that even at the time when Akerele v. Alapata (supra) was decided, the High Court of Northern Nigeria did not only exercise appellate jurisdiction in respect of decisions of Native/Area Court as provided under sections 62 & 63(1) (supra), but it also exercised appellate jurisdiction in respect of decisions of District and Magistrates Courts 35

as well as provided in sections 38 & 40(1) of the High Court Law. They read-

“38. *The High Court shall have appellate jurisdiction to hear and determine appeals from the decision of District Courts and Magistrate’ Courts given in the exercise of the original jurisdiction of such courts as well as cases stated or questions of law referred by such courts in accordance with*
5 *the provision of any written law.*”

40(1) *The High Court in the exercise of its appellate jurisdiction shall subject to the provision of part V be constituted of not less than two Judges, and the Chief Justice or the Senior Puisne Judge shall where prac-*
10 *ticable preside at each sitting of a court so constituted.*”

So that while two High Court Judges and one Sharia Court Judge sat for appeals from native courts (see sections 62 & 63(1) above), only two High Court Judges sat in respect of appeals from District and Magistrate courts. (see sections 38 & 40(1) above). It is therefore obvious and quite clear that
15 when the Supreme Court stated in *Akerele v. Alapata* that “in the exercise of its appellate jurisdiction to grant leave the High Court must be constituted as an appeal court”, an “appeal court” could only mean the court as constituted when the appeal was first decided because the “appeal court” which heard
appeals from Native/Area Courts was differently constituted from the “appeal
20 court” which heard appeals from Districts and Magistrate courts. It was therefore the number of Judges who sat over an appeal that decided the number of Judges who would hear an application for leave to appeal in the same case. So as it will continue to be now that section 238 of the Constitution provides that one Judge, or two or more Judges can exercise the appellate jurisdiction
25 . I must say that even in some of the Northern States, appeals are now taken by one Judge of the High Court sitting alone as provided for under section 238 of the Constitution; while in others two Judges still sit. The practice is therefore not limited to the Southern States alone as Mr. Olajide would want us to believe. I think under section 238 of the Constitution it would appear proper
30 for a Chief Judge of a state to assign more than one Judge to hear those appeals which may appear by their nature complicated or which involves serious points of law or procedure. This in my view will be a good and healthy development in the right direction. The High Courts are certainly no exception to the general rule that “two heads are normally better than one”.

35

There is no doubt that under section 221(1) of the 1979 Constitution leave to appeal to the Court of Appeal was necessary in this case. That leave was granted by a single Judge of the High Court instead of two Judges who

heard the appeal in the first place contrary to Akerele v. Alapata (supra). If my interpretation of the principle in Alapata case above is correct and I believe it is, then it must follow that the leave granted by the single Judge must of necessity be null and void. It is not enough accepting the simplistic treatment of the issue that because section 238 itself provides for “at least one Judge”, it is competent therefore for a single Judge to grant leave where two or more Judges had heard an appeal or for two or more to grant leave where only one Judge heard an appeal. To me that kind of attitude would be tantamount to an abuse of the Constitution itself. In the administration of justice, you need certainty and consistency. Litigants are in my view entitled to assume that the same number of Judges who sit over their cases on appeal will sit over their applications for leave to appeal to the Court of Appeal. And once it is shown that only one Judge or two or more Judges sat over a particular appeal, to me it is only proper and reasonable that any application for leave to appeal from that particular case should only be granted by one Judge or two or more Judges as was the case when the appeal was heard in the first place. I completely endorse the stand of this court in Akerele v. Alapata (supra) to the effect that when hearing an application for leave to appeal to the Court of Appeal the High Court is exercising appellate jurisdiction and ought to be constituted as such. That same principle is still valid today under section 238 of the Constitution as explained above. Furthermore, if it is remembered that the same application for leave to appeal if filed in the Court of Appeal itself can only be heard by three Justices of that court, then it is not unreasonable to expect two or more Judges of the High Court to do likewise where two or more of them heard an appeal in the first place.

The leave given by the single Judge in this case was therefore a nullity and the appeal was not properly before the Court of Appeal, Kaduna Division. The plaintiff’s appeal on the preliminary objection therefore succeeds and it is hereby allowed in the result appeal No. CA/156/87 not being properly before the Court of Appeal Kaduna Division is hereby struck out. And this shall be the order of that court.

In view of the conclusion above, there is no need to consider the merit or demerit of the judgment delivered by the Court of Appeal since that judgment is also a nullity being delivered without jurisdiction. It is hereby set aside. The defendant’s appeal therefore fails and it is accordingly dismissed. As Lord Denning once aptly put it in the case of Macfoy v. U.A.C Ltd (1961) 3 WLR 1405; (1962) AC.153 “*You cannot put something on nothing and expect it to stay there. It will collapse*”. So it is in this case.

CONCLUSIONS

1. Section 63(1) of the High Court Law of Kwara State is inconsistent with section 238 of the 1979 Constitution in so far as it provides for only two Judges (being minimum and maximum) to hear and determine appeals while section 238 provides for a minimum of only one judge and makes no provision
5 for maximum. The section is therefore void.

2. Section 63(1) of the High Court Law is invalid when it purports to make provision for the Constitution of the High Court when section 238 of the 1979 Constitution has already made the provision and has covered the field.

10 3. Section 63(1) of the High Court Law is superfluous and therefore invalid when section 238 of the Constitution has expressed by its enactment completely, exhaustively and exclusively what the constitution of the High Court should be.

15 4. The Constitution or composition of state High Court is a matter of substantive law under section 238 of the 1979 Constitution. A State Legislature can only legislate for the court on matters of practice and procedure as provided under section 239 of the Constitution.

20 5. Akerele v. Alapata (supra) still holds and remains good law. An application for leave to appeal may be entertained by one Judge, two or more Judges as the case may be as when the substantive appeal itself was heard.

25 6. It would amount to an abuse of the constitutional provision if any number of Judges were to be randomly assigned to hear applications for leave to appeal irrespective of the number of Judges that decided the appeal in the first place.

30 It is for the above reasons that I agree with the conclusions of the judgment of my learned brother Ogundare J.S.C. which I read before now, that the leave granted by the single Judge, Orilonise J., was a nullity and that the appeal not being properly before the Court of Appeal, Kaduna, its judgment was a nullity.

OGWUEGBU JSC

35 The respondent in this appeal was the plaintiff in the suit tried by the Upper Area Court, Omu-Aran, Kwara State. The appellant was the defendant. The claim was for ownership of a piece of land in Oke-Maró in Amayo Village,

Kwara State. The Upper Area Court, Omu-Aran dismissed the plaintiff/respondent's claim.

Aggrieved by the judgment he appealed to the High Court of Kwara State, Omu-Aran Judicial Division for the exercise of its appellate jurisdiction. Two Judges heard the appeal - Gbadeyan and Orilonise, JJ. They allowed the appeal and the plaintiff was declared owner of the land. 5

Dissatisfied with the decision and in exercise of his right of appeal, the defendant applied to the High Court under section 221(1) of the Constitution of the Federal Republic of Nigeria, (1979) for leave to appeal to the Court of Appeal on grounds of facts and mixed law and facts. As none of the proposed grounds of appeal was on law alone, leave of the High Court sitting in its appellate jurisdiction was therefore required. 10

When the application came for hearing, Mr. Olajide, learned counsel for the plaintiff raised a preliminary objection. He submitted that since the appeal was heard by two Judges of that court, the application for leave to appeal could not be heard and granted by a single Judge on the authority of Oladunni Akerele v. Jimoh Alapara (1973) NNLR 138. The objection was overruled. 15

Orilonise, J. granted the application after holding that it was competent for a single Judge to hear and grant the same. He made the following order:"

The application is granted as prayed and leave is hereby granted to the applicant to file an appeal to the Court of Appeal, Kaduna against the judgment delivered by this court in its appellate jurisdiction on 9th July, 1987 in Appeal No. KWS/OM/6A/86." 20

In the Court of Appeal, the plaintiff's counsel pursuant to Order 3 rule 15 of the Court of Appeal Rules filed a notice of the respondent's intention to rely upon a preliminary objection to the hearing of the appeal in that the defendant's appeal and grounds of appeal were invalid and incompetent; that no leave of the competent High Court was granted before the filing of the appeal and the High Court sitting as a single Judge in its original jurisdiction which granted the purported leave had no jurisdiction to do so under section 221(1) of the Constitution of the Federal Republic of Nigeria, 1979. 25 30

The court below heard the preliminary objection and the appeal together. The objection was overruled again. The court below held that a single Judge could grant the said leave. On the merits, the defendant's appeal partially succeeded. The judgment of the High Court was set aside and in its place, an order of non-suit was made. 35

While overruling the preliminary Objection, the court below per Ogundare, J.C.A. said:-

“The respondent filed a preliminary objection on the ground that the appeal is incompetent as leave to appeal required under section 221(1) of the 1979 Constitution was granted by a single Judge. The appellant’s reply was that under sections 222(1), 236, 238 of the 1979 Constitution and the decision of this Court in *Suit No. FCA/K/69/81 Mallam Ado & Anor v. Hajiya Dije*, leave to appeal granted by a single Judge of the High Court is good in law. This submission is unassailable as section 238 of the Constitution provides that for the purpose of exercising any jurisdiction conferred upon it under this Constitution, or any other law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that Court. The submission of the appellant is upheld and the preliminary objection of the respondent is dismissed. See *Madukolu & Ors. v. Nkemdilim* (1962) 2 SCNLR 341; (1962) 1 All NLR 587 at 595; *CA/K/123/87 Agaka v. Balogun* of 11:1:88.”

Both parties were dissatisfied with the decision of the Court of Appeal and appealed to this court. Briefs of argument were filed and exchanged by the parties.

In the main appeal filed by the defendant, one issue was identified namely:

“Whether the Court of Appeal, Kaduna was not wrong in law in making an order of non-suit instead of restoring in toto the decision of the trial court which dismissed the suit of the Plaintiff/Respondent when:

- (i) the suit was given a full and complete hearing;
- (ii) The Court of Appeal did not uphold the complaints of the Plaintiff/Respondent against judgment of the trial court; and it (Court of appeal) did not reverse any of the findings and conclusions of the trial court, but rather it confirmed them;
- (iii) The Court of appeal did not invite the parties counsel (sic) to address it before making an order of non-suit;
- (iv) the reasons given for making the order of non-suit instead of dismissal are not sustainable in law.”

The plaintiff filed one brief for the cross-appeal and the defendant’s main appeal. He identified two issues for determination:-

- “1. Whether there was any valid and competent appeal and grounds of appeal before the Court of appeal, Kaduna on which the Court of Appeal’s judgment could be based and,
2. Whether the Court of Appeal’s order of non-suit is reasonable, warranted and can be supported by the weight of evidence before the court even if parties’ counsel had been duly invited to address the Court of Appeal on the propriety of ordering a non-suit.”

The defendant adopted the issues formulated by the plaintiff in the cross-appeal.

The plaintiff has continued to raise the issue of the competence of the appeal from the courts below and unless it is first resolved, the consideration of any other issue in the appeal will be futile. If the appeal is not competent any order made by the court below cannot be valid. In the circumstance, I will deal with the issue first. 5

Mr. Olajide, learned counsel for the plaintiff/respondent/cross-appellant on 10:1:94 when this appeal came up for hearing adopted his brief of argument filed on 21:12:90. He submitted in his brief that there was no valid and competent appeal before the Court of Appeal on which the Judgment of that court could be based: that the judgment of the High Court, Omu-Aran was delivered by two Judges, Gbadeyan and Orilonise, JJ: and that the appellant's application for leave to appeal was granted by a single Judge in his original jurisdiction. He contended that sections 221(1), 236 and 238 of the Constitution of the Federal Republic of Nigeria, 1979 should be read together with section 239 of the said Constitution; that section 238 exists to give room to the varying practice and procedure in the Northern and Southern States of Nigeria whereby two Judges sit on appellate matter in the Northern States while one sits to hear appeals in the Southern States. 10 15

It was his further submission that the single Judge who granted the application for leave to appeal is not the High Court that gave the decision appealed against and that section 238 of the Constitution prescribed a minimum number of Judges. We were referred to the cases of *Haruna v. Abidogun v. Alhaji Samho* (1975/78) KWLR 29 at 30 where it was held that a single Judge of the High Court cannot entertain an interlocutory application arising from the decision of the High Court sitting in its appellate jurisdiction and *Erisi & Ors. v. Idika & Ors.* No. 1 (1987) 4 NWLR (Pt.66) 503 where this court held that if the required leave of court has not been obtained pursuant to the 1979 Constitution, no valid appeal is pending. 20 25

We were urged to allow the cross-appeal, affirm the decision of the High Court. Omu-Aran and set aside the Judgment of the court below". 30

Mr. Bello, learned counsel for the defendant/appellant/cross-respondent in reply to issue one in the cross-appeal submitted in his brief that a single Judge of Kwara State High Court is competent to grant leave to appeal under sections 236 and 238 of the 1979 Constitution. He cited and relied on the cases of *Nwobodo v. Onoh & Ors.* (1984) 1 S.C.1; (1984) 1 SCNLR 1 and *Madukolu & Ors. v. Nkemdilim* (1962) 2 SCNLR 341; (1962) 1 All NLR 587 at 595. He urged the court to dismiss the cross-appeal on the ground that it is misconceived and that by virtue of sections 236 and 238 of the Constitution of 35

1979, a single Judge of Kwara State High Court has the power to grant leave to appeal to the Court of Appeal.

After the above arguments the court adjourned for judgment. In view of the fact that section 238 of the 1979 Constitution cannot be interpreted in isolation from section 63 of the High Court Law. Cap. 49 Laws of Northern
5 Nigeria, 1963 applicable in Kwara State and both learned counsel failed to argue section 63 in their briefs of argument, the court decided to invite other counsel as amici curiae for their assistance.

The learned amici curiae filed briefs of argument. The learned counsel for the defendant understandably filed a further brief bearing in mind that
10 his argument on this issue in the respondent's brief to the cross-appeal was very sketchy and did not address the issue.

Counsel for the plaintiff was hospitalised and filed no further brief. The Following learned amici curiae filed briefs of argument and made oral submissions:-

15 Messrs. M.A. Sanni. Attorney-General. Kwara State, B.I. Hom, Attorney-General, Benue State. J.B. Majiyagbe, (S.A.N), Chief J.A.T Ajala. SAN and Mallam A.B. Mahmoud. Mr. Sanni submitted that it is the combined provisions of section 62 of the said High Court Law and section 2(2) of the Area Courts
20 Edict, 1967 that conferred appellate jurisdiction on the High Court, Omu-Aran, Kwara State in respect of its judgment dated 9th February, 1987 which is the subject of this appeal.

He said that by virtue of section 62 of the High Court Law of Kwara
25 State the High Court sitting in its appellate jurisdiction had always been constituted by three Judges made up of two judges of the High Court and one Judge of the Sharia Court of Appeal, Kwara State: that in Appeal No. FCA/K/69/82: Mallam Ado & or. v. Dije the Court of Appeal, Kaduna in its judgment dated 2:6:82 held that since a Judge of the Shari a Court of Appeal is not a
30 Judge appointed in accordance with the provisions of sections 234 and 235 of the 1979 Constitution, he could not validly sit and participate in the said proceedings.

He further submitted that the combined effect of sections 62 and 63 of the High Court Law is to make provisions for appeals from Area Courts in
35 Kwara State and to confer appellate jurisdiction in respect of those appeals on not less than two High Court Judges and with the coming into effect of the 1979 Constitution, section 63 of the High Court Law became permissible and not mandatory.

He contended that the conferment of any jurisdiction by any law stipu-

lated in section 238 of the Constitution includes such conferment as provided in sections 62 and 63 of the High Court Law of Kwara State and therefore a single Judge can validly constitute a High Court of Kwara State for the purpose of exercising appellate or any jurisdiction. He cited the case of *Nwuhodo v. Onoh & Ors.* *supra* among others. He further submitted that section 236(1) of the 1979 Constitution conferred unlimited jurisdiction on the High Court of Kwara State. He finally submitted that section 63 of the High Court Law of Kwara State is not in conflict with section 238 of the Constitution and that a single Judge of the said High Court could grant the application for leave to appeal.

Mr. Hom, the learned Attorney-General, Benue State submitted that notwithstanding section 63 of the High Court Law of Kwara State, the State High Court was duly constituted when on 31:7:87, Orilonise, J. sat and granted leave to appeal to the Court of Appeal.

Mr. Majiyagbe, S.A.N. submitted that the High Court Law of Northern Nigeria, 1963 applicable in Kwara State was a law validly passed under the Constitution as it then stood and by virtue of section 53(4) (b) of the 1963 Constitution of Northern Nigeria, section 63(1) of the High Court Law continued to have validity until 1979. He referred to section 238 of the 1979 Constitution which according to Senior Counsel is relevant to the issue for determination.

He referred to section 239 and submitted that a State House of Assembly is not permitted to legislate on the constitution of the court. For this submission, he relied on the observation of Karibi-Whyte, J.C.A. (as he then was), in *Mallam Ado & or. v. Dije* 5 NCLR 260 at 275. It was his further submission that when section 238 of the 1979 Constitution says that the High Court shall be duly constituted by "at least one Judge of that Court", it could only refer to one Judge of the High Court and section 221(1) of the 1979 Constitution relied upon by the plaintiff has the same effect. He cited the case of *Akerele v. Alapata* (1973) 6 S.C. 147 (1973) NNLR. 138) and submitted that it must be considered overruled having been decided prior to the 1979 Constitution and in the light of the decision in *Olorieghe v. Omotesho* (1993) 1 NWLR (Pt.270) 386. He urged us not to regard section 63(1) of the High Court Law as complementary to section 238 of the 1979 Constitution. The Senior Counsel further submitted that although it is desirable to have more than one Judge of the High Court to sit over an appeal in its appellate jurisdiction, a Judge of the High Court sitting alone does not make the court incompetent and therefore, a single Judge of the Kwara State High Court can validly grant leave to a

losing party to appeal to the Court of Appeal.

In conclusion, he submitted that section 63(1) of the High Court Law is inconsistent with the provision of section 238 of the 1979 Constitution.

Chief Ajala, S.A.N. submitted that a single Judge of the High Court can determine an appeal for leave to appeal from the decision of the High Court in its appellate jurisdiction to the Court of Appeal by virtue of section 238 of the 1979 Constitution; that section 63(1) of the High Court Law of Kwara State Cap. 49, Laws of Northern Nigeria, 1963 as amended is inconsistent with section 238 of the 1979 Constitution as amended and, is, therefore unconstitutional and void. He invited us to overrule the decision of this court in *Oladunni Akerele v. Jimoh Alapata supra*. He referred the court to section 274(1)(b) of the 1979 Constitution and the cases of *Attorney-General Lagos State v. Dosunmu (1989) 3 NWLR (Pt.111) 552* and *Ikenye Dike & ors. v. Ohi Nzeka & ors. (1986) 4 NWLR (Pt. 34) 144*.

Mallam Mahmoud in his brief of argument gave a historical background of the issue under consideration before and after 1979. As to whether section 63 of the High Court Law of Northern Nigeria is in conflict with section 238 of the 1979 Constitution, learned counsel submitted that the resolution of the question hinged on the proper construction of section 238 of the Constitution and the intention of the framers of the Constitution with respect to the requirement for leave to appeal under sections 220 and 221 of the Constitution.

He submitted that the prime effort or fundamental purpose when construing a constitutional provision is to ascertain and give effect to the intention of the framers of and the people who adopted it.

In his view, the salient words in section 238 of the Constitution are those underlined below:-

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.”

He submitted that any jurisdiction refers to original, appellate and supervisory jurisdictions of the High Court. As to whether the word shall is used in mandatory sense, directory or merely implying a permission, he argued that the use of the words at least subsequently in the section signifies that the word “shall” could not be construed as mandatory in the context and that if the word “shall” is used in the mandatory sense, the result would be absurd since it is not possible to have a court constituted by less than one Judge.

He further submitted that the key to the construction of the clause lies in the meaning of the words “at least” used in the section; that since it is

logically impossible to have a court constituted by less than one Judge, the logical construction of section 238 is that it is permissible of a High Court of a State being constituted by a number higher than one.

With the above as a background, it was his submission that section 238 is not self-executing, and that some legislation is contemplated in its aid to make the provision fully operational and that this was envisaged and clearly stated in section 239 of the Constitution. He further stated that the respective High Court Laws of the States, the civil and criminal procedure laws of the States are laws contemplated by sections 238 and 239 of the Constitution.

He submitted that the High Court Law of Kwara State is an existing law under section 274 of the Constitution; that there is no conflict between section 63 of the said Law and section 238 of the Constitution in so far as it provides a number higher than one for the constitution of the Kwara State High Court sitting in its appellate jurisdiction save as decided in *Oloriegbe v. Omotesho* supra and that the decision of this court in *Akerele v. Alapata* supra is still good law. He drew the attention of this court to the cases of *Okhae v. The Governor of Bendel State* (1990) 4 NWLR (Pt. 144) 327 and *Billiri v. Billiri* (1991) 4 NWLR (Pt. 186) -173 decided by the Benin and Jos Divisions respectively of the Court of Appeal bearing on the issue for determination in this appeal.

In conclusion, Mallam Mahmoud submitted thus:

“..... the Supreme Court should affirm the decision in Akerele v. Alapafa, Although that case was decided prior to the 1979 Constitution, the principle in the decision is in keeping with the intent of the framers of our Constitution. Section 63 of the High Court Law of Kwara State is an existing law and conflicts with the Constitution only to the extent already declared in Ado v. Dije supra and Oloriegbe v. Omotesho supra. Thus the constitution of the Kwara State High Court while sitting to determine an application for leave to appeal against its decision given in appellate capacity is two Judges.”

Mr. Bello in his further brief elaborated on his original brief and submitted that the High Court of Kwara State can only be validly constituted in accordance with the provisions of section 238 of the 1979 Constitution when sitting to determine an application for leave to appeal to the Court of Appeal against the decision taken in its appellate jurisdiction and that the High Court. Omu-Aran, Kwara State was validly constituted by a single Judge when that court granted the defendant leave to appeal to the Court of Appeal. Kaduna on 31:7:87 against its decision given in its appellate jurisdiction on 9:7:87.

He also submitted that the decision of this court in *Akerele v. Alapata* supra is

no longer good law.

The only issue on which addresses were invited from the learned amici curiae is this:

“What is the constitution of the High Court of Kwara State when silting to determine an application by a losing party for leave to appeal to the Court of Appeal against the decision of the said High Court sitting in the appellate jurisdiction having regard to section 238 of the 1979 Constitution and section 63 of the High Court Law of Kwara State?”

It is therefore clear that the question which has arisen is the constitution of the High Court of Kwara State in its appellate jurisdiction. This in turn calls for the interpretation of section 63 of the High Court Law and section nil of the 1979 Constitution. After construing the said provisions, the next question will be the application of the answer arrived at to the cardinal issue arising for determination in this appeal namely, whether there was a valid and competent appeal and or grounds of appeal before the Court of Appeal Kaduna on which the judgment of the court below could be based.

The learned amici curiae and both learned counsel for the parties to the appeal have given the court immense assistance in their written and oral arguments. We were given the benefit of the historical origin of section 63 of the High Court Law of Northern Nigeria.

I will now examine the provisions of sections 62 and 63(1) of the High Court Law and section 238 of the 1979 Constitution taking into account the submissions of learned counsel and the interpretations placed on section 63(1) of the High Court Law both before and after 1979.

Section 63(1) provides:-

“63(1) In the exercise of its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal”

Section 62 provides:-

“62. The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are the subject of the jurisdiction of the Sharia Court of appeal) from Upper Area Courts.”

Section 238 of the 1979 Constitution reads:

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.”

The courts have construed the provision of section 63(1) of the High

Court Law in relation to the 1963 and 1979 Constitutions. The decisions in

those cases will no doubt be of assistance in the present exercise.

I will for now consider the cases of Oladunni Akerele v. Jimoh Alapata (1973) supra, Ado v. Dije (1984) supra and Oloriegbe v. Omotesho (1993) supra. In Akerele v. Alapata, the defendant who lost in the Upper Area Court, Lokoja, appealed to the High Court Ilorin. His appeal to the High Court was dismissed and dissatisfied with the decision of the High Court, he appealed to this court. In order to appeal to this court, he needed leave by virtue of section 117(4) (c) of the 1963 Constitution which provides:

“117(4) Subject to the provisions of sub-sections (2) and (3) of this section, an appeal shall lie from decisions of the High Court with the leave of the High Court or the Supreme Court in the following cases.....”

(c) decisions in any civil or criminal proceedings in which an appeal has been brought to the High Court from some other court.”

An objection to the hearing of the appeal was raised on the ground that the court which granted the application for leave to appeal was not properly constituted in that the application should have been heard by three Judges instead of one Judge. The objection was based on sections 62 and 63 of the High Court Law of Northern Nigeria, 1963.

In construing sections 62 and 63 of the High Court Law, this court held that a single Judge can preside over the proceedings in the High Court in the exercise of its original jurisdiction; in the exercise of its appellate jurisdiction, the court must be constituted of three members and that the order granting leave to appeal by a single Judge was made without jurisdiction.

In Ado v. Dije supra it was contended before the Court of Appeal among other issues that section 63(1) of the High Court Law (Cap. 49) Laws of Northern Nigeria, 1963 is inconsistent with the provision of section 238 of the 1979 Constitution and is to the extent of the inconsistency null, void and of no effect.

In this case, the High Court which heard and determined the appeal from the Area Court was composed of two Judges of the High Court and one Judge of the Sharia Court of Appeal. Coker, J.C.A. (as he then was) in the lead judgment of the court stated:-

“The 1979 Constitution of Nigeria prescribes in sections 234 and 235 for the establishment of the High Court of a State and the mode of appointment of its Judges and of their qualification. Similarly sections 240 and 241 of the same Constitution provide for the establishment and jurisdiction of a Sharia Court of Appeal of a State and the qualification for appointment of its members.

ment of its members.

The two courts are separate and distinct with different jurisdiction and membership. A Judge of one is different from that of the other and its membership cannot be interchanged. It is only the Constitution of the country which established both courts and prescribed the qualification of their members and jurisdiction, that could make a Judge of one court sit in another; but regrettably, no such provision exists in the present Constitution.

For the reasons aforesaid, therefore I hold that ground 4 of the appeal succeeds and the judgment of the Kano State High Court as constituted at the hearing of the appeal is incompetent and a nullity."

In *Olorigbe v. Omotesho* supra, this court raised suo motu whether the Kwara State High Court was properly constituted in view of section 238 of the 1979 Constitution when it heard and determined an appeal from the Upper Area Court. A Kadi of the State Sharia Court of Appeal participated in the proceedings. This court held that in so far as the section permitted a person other than a Judge of the High Court to sit as a member, the section i.e. section 63 of the High Court Law was not in conformity with section 238 of the 1979 Constitution.

In the three cases set out above, what came before the courts for determination was the participation of a person other than a Judge of the High Court when that court was exercising its appellate jurisdiction. From the above decisions it is beyond doubt that section 63(1) of the High Court Law is to that extent inconsistent with section 238 of the 1979 Constitution having regard to sections 240, 241, 234 and 235 of the Constitution.

The only aspect of section 63(1) of the High Court Law which calls for determination in this appeal is the number of Judges of the State High Court which can constitute the court in its appellate jurisdiction. Section 63(1) of the High Court Law of Kwara State as amended reads:"

63(1) In the exercise of its jurisdiction under section 62, the High Court shall be constituted of two members who shall be Judges of the High Court."

Now, is the provision of two Judges in section 63(1) inconsistent with section 238 of the Constitution? The operative words in section 238 of the Constitution are:-

"any jurisdiction", "shall" and "at least."

Mallam Mahmoud had submitted in his brief that the key to the construction of those words lies in the meaning of those words. It was his submission that the significance of the words "at least" used in the section is that it is permissive of a High Court of a State being constituted by a number

higher than one. I agree with him. The framers of that section of the Constitu-

tion contemplated a number higher than one.

The words “any jurisdiction” appearing in the said section definitely means the original, appellate and supervisory jurisdictions of the High Court.

The word “shall” used in statutes or the like is generally mandatory. In ordinary or common parlance and in its ordinary signification, the terms “shall” is a word of command which has always been given a compulsory meaning as denoting obligation. See *Achineku v. Ishagha* (1988) 4 NWLR (Pt. 89) 411 at 420, but it may be construed as merely permissive or directory (as equivalent to “may”) to carry out the legislative intention. However, the use of the words “at least” in the section shortly after the word “shall” reduces its command effect. In the context of section 238, the word “shall” loses its mandatory and compulsive effects: See *Rockefeller v. Hogue* (1968) 244 Ark 1029, S.W.2d.85, at 85. In my opinion, the word “shall” in section 238 of the Constitution is directory and not mandatory.

The words “at least” cannot be said to be superfluous or mere surplusage. A cardinal principle of interpretation of the Constitution is that words of a Constitution may not be ignored as meaningless. In construing a Constitution, some meaning or effect should be given to all the words used therein if it is possible to do so in conformity with the intention of the framers. Where the language used is clear and unambiguous, its meaning and intent are to be ascertained from the instrument itself by construing the language as it is written.

Again, it is the province and duty of courts to say what the law is. Judges who apply the rule to particular cases must of necessity expound and interpret that rule and where two laws are in conflict, the courts must decide on the operation of each. See *Attorney-General of Bendel State v. Attorney-General of the Federation & 22 ors.* (1981) 10 S.C.1 at 132.

Against this background, I am satisfied that section 63(1) of the High Court Law of Kwara State is not inconsistent with section 238 of the 1979 Constitution. In my opinion, section 238 of the Constitution permits a State High Court to be constituted by more than one Judge.

Section 238 of the Constitution cannot be construed as self-executing in the sense that it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. Having come to the conclusion that section 238 of the Constitution permits a State High Court to be constituted by more than one Judge, the question which arises is, who is to provide for that number higher than one?

This brings me to section 239 of the 1979 Constitution which reads:-

“239. The High Court of a State shall exercise jurisdiction vested in

it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time prescribed by the House of Assembly of the State.

Section 238 and 239 are enabling provisions. It is the State House of Assembly that will provide for that number higher than one. The power to do so can be found in the above section.

Moving further from section 239 of the Constitution, that portion of section 63(1) which provides for the constitution of the High Court by two Judges of that court when exercising its appellate functions is not inconsistent with section 238. It is an existing law.

An existing law is defined in section 274(4) (b) to mean:-

“(b)any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date;”

Section 274(1) provides:-

“274(1) Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be:.....

(b) a law made by a House of Assembly to the extent that it is a law with respect to any matter or which a House of Assembly is empowered by this Constitution to make laws.”

Section 63(1) of the High Court Law, Cap 49, Laws of Northern Nigeria, 1963 had been modified by the case of Oloriegbe v. Omotesho among others. What remains of section 63(1) is in my opinion not inconsistent with section 238 of the Constitution. Following from all I have said above, no inconsistency was contemplated by the framers of section 238 of the Constitution.

The following are some subsidiary issues raised in the briefs of argument filed. I will consider them before I conclude this judgment.

1. Mr. Bello for the defendant and Chief Ajala, Senior Advocate of Nigeria: specifically invite the court to depart from and overrule its decision in Akerele v. Alapata supra as its application to future cases will according to Chief Ajala, S.A.N. perpetuate injustice. In the light of the conclusion I have arrived at in this appeal, the decision in that case is good law at the time it was decided and it remains so despite the 1979 Constitution. The principle laid down by the court in that case is in keeping with the intention of the framers of section 238 of the 1979 Constitution.

2. Reliance was placed by the proponents of the inconsistency of section 63(1) of the High Court Law with section 238 of the Constitution on the decision of this court in Chief Jim I. Nwobodo v. Chief Christian C. Onoh & Ors (1984) 1 S.C. 1; (1984) 1 SCNLR 1. In that case Araka, C.J. sitting alone before he empanelled five Judges including himself as members the Election Court made orders for security for costs and substituted service. The question arose whether he had jurisdiction to make those orders having regard to sections 127(1) and 119(3) of the Electoral Act, 1982 which read as follows:

"127(1) At the time of filing the petition or within such extended time as may be allowed by the court the petitioner shall give security for an amount fixed by the court and as directed by the court 10
....."

"119(3) For the purpose of exercising any jurisdiction conferred by this Act upon the Federal High Court or the High Court of a State, in any case involving the office of the President, Vice-President, Governor or Deputy-Governor, the Chief Judge of the Federal High Court or the High Court of a State as the case may be, shall determine the number of Judges that shall constitute the court." 15

On appeal to this court, Bello, J.S.C. (As he then was) said:
"The provisions of the Constitution, in my opinion, are clear that a Judge of the High Court sitting alone has jurisdiction to entertain all matters relating to an election petition including, conducting pre-trial proceedings and making any order arising therefrom and also hearing and determination of the petition itself. The provisions of section 119(3) of the Act which empowers the Chief Judge of a State to determine the number of Judges that shall constitute an election court cannot derogate from the provisions of section 238 of the Constitution. In my view the orders made by Araka, C.J. before the election panel was constituted had constitutional backing and the power of a Chief Judge to determine a panel of more than one Judge to constitute an election court under section 119(3) of the Act would not affect the validity of the orders." 20
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This court did not nullify any of the two proceedings i.e. the proceedings before the panel of five Judges and those before Araka, C.J. sitting alone. The proceedings before Araka, C.J. were pursuant to section 238 of the Constitution whereas those before the panel of five Judges were pursuant to section 119(3) of the Electoral Act, 1982. The two proceedings were held to be valid. No pronouncement was made by the court on any inconsistency between the Electoral Act and the Constitution. That case therefore does not support the contention that section 63(1) of the High Court Law is invalid. 35

For the above reasons and the fuller reasons contained in the lead

judgment of my learned brother Ogundare, J.S.C., I agree that the leave granted by Orilonise, J. to the defendant to appeal to the Court of Appeal on 31:7:87 was incompetent as the same was not granted by the competent High Court of Kwara State. The decision of the Court of Appeal based on the incompetent appeal was null and void. See Ukekwe Erisi & Ors. v. Uzor Idika & Qrs. (1987) 3 NWLR (Pt. 66) 503. The proposed grounds of appeal were all grounds of facts and mixed law and facts. Leave was required therefore under section 221 (1) of the 1979 Constitution.

Having resolved the first issue for determination identified by the plaintiff/respondent/cross-appellant in his favour, it is not necessary to consider issue and indeed any other issue in both appeal. The defendant's main appeal fails. There shall be no order as to costs.

ADIO JSC (Dissenting)

I have had the opportunity of reading, in advance, the lead judgment just read by my learned brother Ogundare, J.S.C. With great respect, I regret to say that, for reasons given by me hereunder, I find myself unable to agree with it.

The present appeal arose from an action which the respondent instituted against the appellant and which was heard in the Upper Area Court, Omu-Aran, in Kwara State. It was a claim, by the respondent, of the ownership of the land in dispute. After due consideration of the evidence before it, the trial court dismissed the respondent's claim. Dissatisfied with the judgment, the respondent lodged an appeal to the High Court, Omu-Aran Judicial Division, Kwara State.

The High Court, for the purpose of the exercise of its appellate jurisdiction, consisted of two judges of the High Court, namely, Hon. Justice Gbadeyan and Hon. Justice Orilonise. The appeal was duly heard by the two Judges. They gave judgment against the appellant. The decision of the trial court was reversed and the land in dispute was awarded to the respondent. Dissatisfied with the judgment, the appellant, pursuant to his intention to lodge an appeal against the judgment, applied to the High Court, still in exercise of its appellate jurisdiction, for leave to appeal to the Court of Appeal. A Judge of the High Court, namely, Justice Orilonise, sitting alone, heard and granted the application for leave to appeal to the Court of appeal.

When the appeal came up before the Court of Appeal, the respon

dent raised the issue whether the appeal was properly before the Court of Appeal in view of the fact that the leave to appeal to the Court of Appeal was

granted by a single Judge of the High Court sitting alone. The contention was that since the High Court, in exercise of its appellate jurisdiction, that heard the appeal consisted of two Judges of the High Court in accordance with the provisions of section 63(1) of the High Court Law, Cap. 49 of the Laws of Northern Nigeria, 1969 applicable in Kwara Court Law, Cap. 49 of the Laws of Northern Nigeria, 1969 applicable in Kwara State, a leave to appeal to the Court of Appeal against the decision of the aforesaid High Court granted by a single Judge of the Court sitting alone was invalid being against the provisions of section 63(1) of the Law. The Court of appeal overruled the objection and held that a single Judge of the High Court could validly and properly grant the leave to appeal. The appeal eventually partially succeeded. An order of non-suit was substituted for the order dismissing the respondent's claim by the trial court.

Dissatisfied with the judgment of the Court of Appeal, there has been a further appeal to this court. The present appeal is against that part of the decision of the Court of Appeal which substituted an order of dismissal of the respondent's claim, by the trial court, with an order of non-suit. In this court too, the respondent has raised the question whether the appellant's appeal was properly before the Court of Appeal having regard to the fact that the leave to appeal was granted by a Judge of the High Court sitting alone in exercise of the Court's appellate jurisdiction. The contention here too was that the leave granted was invalid being against the provisions of section 63(1) of the High Court Law.

In effect, the contention was that having regard to the provisions of section 63(1) of the High Court Law, and bearing in mind that the substantive appeal was heard by two Judges of the High Court in exercise of the appellate jurisdiction of the High Court, a single Judge of the High Court sitting alone had no jurisdiction to exercise the appellate jurisdiction of the High Court under section 62 of the High Court Law, Cap. 49 of the Laws of Northern Nigeria, 1963, applicable in Kwara State. The issue of jurisdiction is very fundamental and it can be raised at any stage of the proceedings in the High Court, Court of Appeal, and in this court by any of the parties or by the court itself. See *Ezomo v. Oyakhire*, (1985) 2 S.C. (1985) 1 NWLR (Pt.2) 195 260 at p. 282; and *Saude v. Abdulahi*, (1989) 4 NWLR (Pt. 116) 387. When the jurisdiction of a court to entertain a matter is challenged, it is better and neater to settle the issue before proceeding to hear the case on its merit. See *Attorney-General, Lagos State v. Dosunmu*, (1989) 3 NWLR (Pt. 111) 552; *State v. Onagoruwa*, (1992) 2 NWLR (Pt. 221) 33. For that reason, this court directed that the issue should be argued straightaway together with the propriety of the order of non-suit. In view of its constitutional importance, the objection was argued before a full

court by the learned counsel for the appellant and the learned senior and other counsel, as amici curiae who kindly responded to this court's request. The assistance of the amici curiae was very useful and appreciated. They filed briefs and made oral submissions. The main issue was whether a single Judge of the High Court sitting alone, could in exercise of the appellate jurisdiction of the High Court, properly or validly grant the leave to appeal from the High Court to the Court of Appeal when the substantive appeal was heard by two Judges of the High Court. Several submissions were made to us on the issue.

Majiyagbe Esq., S.A.N., submitted that the question of whether or not the order in question was valid had arisen as a result of the provisions of section 238 of the Constitution of the Federal Republic of Nigeria, 1979. The practice of letting two Judges of the High Court hear an appeal was a matter of history; one Judge of the High Court sitting alone could hear an appeal. When the High Court was granting leave to appeal it was exercising its original jurisdiction. Section 63(1) of the High Court Law, whether as it is or as amended, was inconsistent with section 238 of the 1979 Constitution and was, therefore, void. In his view, the state legislature had no jurisdiction to legislate on the matter as necessary provision had been made in section 238 of the Constitution.

Chief Ajala, S.A.N., argued that section 63(1) of the High Court Law was inconsistent with section 238 of the 1979 Constitution. He however, conceded that section 63(1) of the Law was an existing law by virtue of section 274 of the 1979 Constitution. He pointed out that the requirement in section 63(1) of the Law that the High Court in exercising its appellate jurisdiction shall consist of two Judges of the High Court was inconsistent with the provisions of section 238 of the Constitution because under the present provision of the section a single Judge could not lawfully sit in exercise of the appellate jurisdiction of the High Court. In his own view too, if section 63(1) of the Law was amended so as to let its provision be exactly like the provision of section 238 of the Constitution, it would still be invalid as the House of Assembly had no power to legislate on the matter. He cited *Nwobodo v. Onoh* (1984) ANLR 1 (1984) 1 SCNLR 1 and submitted that the court should construe the provision of section 63(1) of the Law in conformity with the provision of section 238 of the Constitution but in practice two Judges of the High Court should sit when exercising the appellate jurisdiction of the High Court. I will say more about the foregoing submission.

Mr. Horn, the Honourable Attorney-General of Benue State, argued that a single Judge of the High Court could sit when the court was exercising its appellate jurisdiction and he cited *Nwobodo's* case, *supra*. In his view, section 63(1) of the Law was not inconsistent with the provision of section

238 of the Constitution because the use of the expression “at least one Judge” in section 238 of the Constitution was deliberate as the expression meant that the minimum number of Judges that could hear an appeal was one but there could be more than one Judge. Therefore, the word “shall” In section 63(1) of the Law was directory and not mandatory. He finally, argued that section 238 of the Constitution was an enabling provision which made it possible for each state to make its own provision: 5

Mr. Mahmoud argued that in construing section 238 of the Constitution one must have regard to the word “shall” and the words “at least” therein. In his view, the words were not superfluous. The section was not self-executing. The section did not frown on more than one Judge of the High Court sitting for the purpose of exercising its appellate jurisdiction. For that reason, he argued that section 63(1) was not inconsistent with section 238 of the Constitution. The court that was constituted to hear the appeal should also hear the application for leave to appeal to the Court of Appeal. 10

The learned counsel for the appellant filed an additional brief on the issues involved in the present objection and was present at the hearing. For reasons stated in the lead judgment, the respondent’s counsel did not file an additional brief on the issue and was absent at the hearing. The provision of section 238 of the 1979 Constitution is as follows:- 15

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.” 20

The provision of section 63(1) of the High Court Law before the decision of this court in *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 270) 386 was as follows:- 25

“63(1) In exercising its jurisdiction under section 62 the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal.” 30

After the said decision of this court in *Oloriegbe’s* case, its provision now is that the court shall be constituted of two Judges of the High Court.

As from the 1st of October, 1979, all courts in Nigeria derive their jurisdictions from the 1979 Constitution. A court is a creation of a statute based on the Constitution and its jurisdiction is always based on a statute. In other words no court assumes jurisdiction over any matter without an enabling statute. See *Osadebay v. Attorney-General, Bendel State*. (1991) 1 NWLR (Pt. 169) 525. The foregoing principles account for the making of the provisions contained in sections 62 and 63(1) of the High Court Law despite the fact that relevant provision on the matter was contained in section 238 of the 35

Constitution. With reference to the contention that section 63(1) of the Law was not unconstitutional, it could be argued that as two Judges of the High Court could under the provision of section 238 of the Constitution sit for the purpose of exercising the appellate jurisdiction of the High Court there was

5 nothing in the provision of section 63(1) of the Law which made it inconsistent with the provision of section 238 of the Constitution. I have already set out above the provision of section 238 of the Constitution. The law is that literal interpretation should be adopted in construing the provisions of the Constitution. Except in cases of ambiguity or injustice may internal or external

10 aid be used. See *Adesanya v. President of Nigeria & Anor.* (1981) 2 NCLR 358 at p. 257, (1981) 5 S.C. 112; and *Attorney-General, Ogun State v. Aberuagba*, (1985) 1 NWLR (Pt.3) 395; (1984) 1 S.C. NLR 427 at p. 478 (1984) 1 SCNLR 427. Applying the foregoing principle, literal interpretation should be

15 given to the provision of section 238 of the Constitution as it is not ambiguous. In the circumstance, the expression: “a High Court of a State shall be duly constituted if it consists of at least one Judge of that court” therein makes it perfectly constitutional and, of course, lawful for one Judge of the High Court to sit alone while exercising the appellate jurisdiction of the High Court. Section 63(1) of the High Court Law, is a provision of a statute, and where the

20 provision of a statute is clear and unambiguous, it is the words used that govern. The words are given their plain and grammatical meaning. See *Abioye v. Yakubu* (1991) 5 NWLR (Pt. 190) 130. Therefore, if the provision of section 63(1) of the High Court Law, as it is, is given its plain and grammatical meaning then the expression “the High Court shall be constituted of two Judges of the

25 High Court” therein would, as was being contended by some learned counsel in this case, make it illegal for a single Judge of the court to sit alone when exercising the appellate jurisdiction of the court. In short, the sitting of a single Judge of the High Court alone when exercising the appellate jurisdiction of the High Court which is possible and perfectly constitutional under the

30 provision of section 238 of Constitution is made impossible and illegal by section 63(1) of the High Court Law. That certainly is absurd. Section 63(1) of the High Court Law which was based on and was enacted pursuant to the provision of section 238 of the Constitution could not derogate or detract from the provision of section 238 of the Constitution. It has never been the

35 case in our law that the provision of an ordinary statute would render nugatory the relevant provision of the Constitution. In *Nwobodo v. Onoh*, (1984) All NLR 1 (1984) 1 SCNLR 1 the question was whether a Judge of the High Court sitting alone had jurisdiction to entertain all matters relating to an election petition including conducting pre-trial proceeding and making any order

arising therefrom and also hearing and determining the petition itself. Section 119(3) of the Electoral Act which empowered the Chief Judge of a High Court or a Federal High Court to determine the number of Judges that would constitute an election court was as follows:-

“119(3) For the purpose of exercising any jurisdiction conferred by this Act upon the Federal High Court or a High Court of a State in any case involving the office of President, Vice President, Governor or Deputy Governor the Chief Judge of the Federal High Court or the High Court of a State, as the case may be, shall determine the number of Judges that shall constitute the court.”

Before the Chief Judge of Anambra State exercised the power conferred upon him by section 119(3) of the Act to determine the number of Judges (usually more than one) that would constitute the election court, the Chief Judge, sitting alone, made two orders for security for costs and one for substituted service. At the hearing of the petition objection was taken that the two orders had not been made by the election court, that court had no jurisdiction to entertain the petition. The election court overruled the objection. On appeal to the then Federal Court of Appeal, the majority (four Justices of the Court) were of the opinion that there was no valid order for security for costs and consequently there was no valid petition in the election court. There was a further appeal to the Supreme Court, Bello, J.S.C., (as he then was) stated, *inter alia*, as follows:-

“Now it seems to me that for invalidating the orders made by Araka, C.J., the majority of the Justices of the Court of Appeal relied heavily on section 119(3) of the Act,

I think that it was only Phil-Ebosie, J.C.A., that hit the nail on the head when he stated, quite rightly in my view, that the jurisdiction of the High Court to hear and determine election petitions is conferred upon it by section 237 of the Constitution, and section 238 of the same provides:-

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court.”

The provisions of the Constitution, in my opinion, are clear that a Judge of the High Court sitting alone has jurisdiction to entertain all matters relating to an election petition including conducting pre-trial proceedings and making any order arising therefrom and also hearing and determination of the petition itself. The provisions of section 119(3) of the Act which empowers the Chief Judge of a State to determine the number of Judges that shall

constitute an election court cannot derogate from the provisions of section 238 of the Constitution. In my view the orders made by Araka, C.J., before the election panel was constituted had constitutional backing and the power of a Chief Judge to determine a panel of more than one Judge to constitute an election court under section 119(3) of the Act would not affect the validity of the orders.”

If section 119(3) of the Electoral Act which related to constitution of an election court for the purpose of exercising its jurisdiction, could not derogate from the provisions of section 238 of the Constitution it is reasonable to conclude that section 63(1) of the High Court Law which relates to constitution of the High Court for the purpose of exercising its appellate jurisdiction, could not derogate from the provisions of section 238 of the Constitution. Section 63(1) of the High Court Law derogated from section 238 of the Constitution by making it impossible and illegal for a single Judge to sit alone when exercising the appellate jurisdiction of the High Court while such is possible and constitutional under section 238 of the Constitution. In the circumstance, the order granting leave to appeal to the Court of Appeal made by a single Judge sitting alone in this case had constitutional backing. It was because the two orders for security for costs made by Araka, C.J., sitting alone before the constitution of the election court had constitutional backing of section 238 of the Constitution that this court held that the orders were in order. In the present case, the leave of court which Orilonise, J., sitting alone in exercise of the appellate jurisdiction of the High Court granted was in accordance with and had the backing of section 238 of the 1979 Constitution. In other words, if an order by a court has the backing of the provision of the Constitution it does not matter if it contravenes an ordinary statute like the Electoral Act or the High Court Law. In any case, the legal consequence of section 63(1) of the High Court Law derogating from and being inconsistent with section 238 of the Constitution is that it is to the extent of the inconsistency void as the constitutional position in the law of this country is that if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void. That is the constitutional position whether in a military or a civil regime.

Section 63(1) of the High Court Law had been in existence before the 1979 Constitution came into force. It may, therefore, prima facie, be said to be an existing law within the meaning of the words in section 274 of the Constitution. “Existing Law”, as defined by section 274(4) (b) of the 1979 Constitution

is any law and includes any rule of law or any enactment or instrument what-

soever which is in force immediately before the date when that section came into force or which having been passed or made before that date comes into force after that date. See Osadebay's case, (supra) Section 63(1) of the Law, even if it is regarded as an existing law under section 274 of the Constitution, cannot legally be allowed to remain as it is or in its present form because the provision of section 274(1) of the Constitution is that, subject to the provisions of the Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the relevant provisions of the Constitution. The present controversy has arisen because the appropriate authority, as defined in section 274(4) (a) of the Constitution, has not exercised at all the powers conferred by section 274(2) of the Constitution. The section provides that the appropriate authority may at any time by order make such changes in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of the Constitution. The word "conformity" in section 274(1) of the Constitution was not defined by the Constitution. Its ordinary meaning, as stated in Websters New 20th Century Dictionary, is resemblance, harmony or agreement. As section 274(1) of the Constitution provides that an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution, section 63(1) of the Law can only have the effect of enabling a High Court of a State to be duly constituted if it consists of at least one Judge of that court, in conformity with the provisions of section 238 of the Constitution. It was, for that reason, that this court in *Mustapha v. Governor of Lagos State* (1987) 5 S.C. 114 at p. 143; (1987) 2 NWLR (Pt.58) 539 took the view that the Chiefs Law which was an existing Law should be interpreted such that its provisions did not conflict with the provisions of the Constitution. The section cannot be allowed or be made to have an effect which is not consistent or not in conformity with the provisions of section 238 of the Constitution otherwise it will be void. This is because a law which is regarded as an existing law may be declared by the court to be invalid if it is found to be inconsistent or not in conformity with the provisions of the 1979 Constitution. See Osadehay's case, (supra).

The provisions made in section 274 of the 1979 Constitution in relation to an "existing law" are not new in the Constitutional development of this country. There were similar provisions in the 1960 Constitution but the fundamental difference between those provisions and those in section 274 of the 1979 Constitution was that the relevant provisions in the 1960 Constitution limited the time within which necessary changes, in the then existing law, should be made by the appropriate authority to six months. There was no

limitation of time in the case of the provisions relating to existing law in the 1979 Constitution. For example, paragraph 3(2) of the Nigeria (Constitution) Order in Council, 1960, provides inter alia, as follows:-

“3(2). *The Governor-General of the Federation of Nigeria may by order at any time within six months after the commencement of this Order make such amendments to any existing law.....*”

(a) For bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions.”

Similar Powers were conferred upon the Governors of the Regions. If section 274 (2) of the 1979 Constitution had prescribed a time within which the powers it conferred should be exercised there would have been no difficulty in knowing what the proper legal situation is.

A court has an important role to play in construing and in relation to the effect, if any, to be given to an existing law under the provisions of section 274 of the Constitution. There is a decision of this court which supports the foregoing principle and the proposition that section 274(1) of the Constitution imposes an exercise on the court in its interpretative jurisdiction in order that effect shall be given to an existing law without prejudice to their powers to declare invalid any provision of an existing law on the ground of inconsistency with the provision of the 1979 Constitution. This court has also decided in the same case that a court has an obligation to construe an existing law in such a way as to make it have effect, and, if need be to apply such modification to make the existing law effective. See *Adigun v. Attorney-General, Oyo State* (1987) 1 NWLR (Pt.53) 678. In the circumstance, this court held in the same case that if the provisions of an existing law require minor alterations to bring it into conformity with the provisions of the Constitution, the existing law shall be read with such modifications and, when so read shall be deemed a law of the National Assembly or a law of a House of Assembly, as the case may be. Where what is required is to make textual changes in the existing law to bring the law into conformity with the provisions of the Constitution, it is for the appropriate authority to make such textual changes by way of an adoption order. See *Adigun’s case*, (supra).

A learned author has, rightly in my view, expressed views similar to the principles enunciated in *Adigun’s* case which have been set out above. Professor Nwabueze, S.A.N. stated, inter alia, in his book, *Federalism in Nigeria under the Presidential Constitution*, at pp. 159 ’97 160, as follows:-

“By section 274(1) ‘an existing law’ shall have effect with such modi-

fications as may be necessary to bring it into conformity with the provisions of the Constitution, and the word 'modification' is defined in section 274(4) (c) to include 'addition, alteration, omission or repeal.'

The power of adaptation under section 274(1) belongs to the courts alone and is entirely separate from that conferred upon the 'appropriate authority' by section 274(2). Section 274(1) is a direction to the courts as to how to interpret existing laws. Only the courts can give an authoritative and binding reading of a law. The power thus enables the courts to read appropriate designations, titles, names etc., into the wording of an existing law.

.....

But the important point to notice is that the appropriate authority's power of adaptation under section 274(2), like the court's under section 274(1) is designed to facilitate the continued application of existing laws by enabling verbal or textual changes, like the changes in names, titles, designations, etc., to be made without going through the elaborate and time consuming process of law '97 making to the legislative assembly.'

I am of the firm view that section 63(1) of the High Court Law is an existing law. Whether one takes the view that it requires only minor alterations to bring it into conformity with the provisions of section 238 of the Constitution or textual changes for the same purpose, a court in reading it or the appropriate authority in effecting the textual changes, as the case may be, should have regard to the fact that the exercise should be done to bring it into conformity with the provision of section 238 of the Constitution. The result of both exercises should be the same, that is, to make it have effect such that a High Court of a state shall be duly constituted if it consists of at least one Judge of the High Court for the exercise of its appellate jurisdiction. That is the way in which it can be said that section 63(1) of the High Court Law has conformed with the provision of section 238 of the Constitution and has not derogated from it.

If the provision of section 63(1) of the High Court Law is dealt with in accordance with the relevant provisions of section 274 of the Constitution itself as suggested above the new provision of section 63(1) that will be in conformity with section 238 of the Constitution will be as follows:-

"63(1) In exercise of its jurisdiction under section 62 the High Court shall be duly constituted if it consists of at least one Judge of that court."

It may be argued and has, in fact been suggested, that section 238 of the Constitution was intended to make broad provision leaving it to each

State to make provision for the constitution of the High Court in exercise of its

appellate jurisdiction, that suited it (the State) best. It has been suggested or argued further that it was only such an arrangement that could make it possible for the court to be constituted by two Judges of the High Court in the Northern States and for the court to be constituted by one Judge in the Southern States. Assuming, for the present purpose, that the argument is correct, it does not excuse leaving the provision of section 63(1) of the High Court Law in the present form which is an absurd situation in which it contains a provision which derogates from the provision of section 238 of the Constitution as demonstrated earlier in this judgment. The new section 63(1) of the High Court Law reproduced above that will remain in force if the section is made to conform with section 238 of the Constitution can lawfully and constitutionally achieve the same purpose without, under any circumstances, derogating from the provision of section 238 of the Constitution. The provision of the new section 63(1) of the Law will remain as above and there will be nothing to prevent the court from being constituted by two or more Judges of the Court. There certainly can be no objection to such an arrangement on the ground that constitution of a court can be regulated only by statute and cannot be left to the Chief Judge. Section 119(3) of the Electoral Act empowered the Chief Judge of a High Court or a Federal High Court to determine the number of Judges that would constitute an election court and it has never been suggested or argued that it was not a valid legislation.

Alternatively, if I am wrong in holding that section 63(1) of the High Court Law is an existing law, then its provision requiring two Judges of the High Court to constitute the court for the purpose of exercising its appellate jurisdiction is inconsistent with the provision of section 238 of the Constitution that requires at least one Judge to constitute the court for the purpose of exercising its appellate jurisdiction. The provision of section 63(1) of the Law is, therefore, void. The provision of the section is rigid. It is two Judges that have to sit in exercise of the appellate jurisdiction of the High Court; no more no less. One Judge can't lawfully do so and three or more Judges can also not lawfully do so under the provision of the section whereas one Judge, two and more Judges can lawfully do so under the provision of section 238 of the Constitution. If the provision of section 63(1) of the Law is void then it will be safe to rely on section 238 of the Constitution as what is really constitutional cannot be said to be unlawful since the Constitution is superior to an ordinary legislation or statute. If there is any inconsistency between the provision of any law and any provision of the Constitution, the provision of the Constitution prevails and the provision of the law is void to the extent of the inconsistency. In the circumstance, in the event of section 63(1) of the Law being declared void, the situation still remains the same whether under the new

section 63(1) quoted above or under section 238 of the Constitution; the court in exercise of its appellate jurisdiction can be constituted by at least one Judge of the High Court sitting alone.

The result is that the leave to appeal granted by a single judge of the Kwara State High Court in relation to the appeal from the High Court to the Court of Appeal was valid. It has the constitutional backing of section 238 of the Constitution. The appeal was properly before the Court of Appeal and the appeal to this court is competent. The objection is overruled. The question whether in obedience to section 63(1) of the High Court Law or whether in practice if two Judges hear the substantive appeal the same number of Judges should hear the application for leave to appeal cannot prevent this court from giving effect to the provisions of section 238 of the Constitution.

It is for the foregoing reasons that I found myself unable to agree with the lead judgment. The leave to appeal to the Court of Appeal by a Judge of the High Court sitting alone in exercise of the court's appellate jurisdiction was valid. The appeal was, therefore, properly before the Court of Appeal.

IGUHJSC

I have had the advantage of a preview of the lead judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree with the reasoning and conclusion therein. However, because of the constitutional nature of the issues raised in the appeal, I consider it necessary to say a few words of my own.

The facts relied upon by both parties to this appeal have adequately been set out in the lead judgment of my learned brother. I need not repeat them all over again here. I will, in this judgment, only be concerned with some aspects of these facts which, in my view, are relevant to my contribution in the appeal. It suffices to state that the respondent in this appeal who was the plaintiff at the Upper Area Court of Omu-Aran Judicial Division, Kwara State had instituted an action against the appellant who was the defendant therein claiming declaration of title to a piece or parcel of land. The Upper Area Court which was constituted by three members dismissed the claim. The plaintiff being dissatisfied with this judgment lodged an appeal to the High Court of Kwara State, Omu-Aran Judicial Division which reversed the Upper Area Court's decision and found for the plaintiff.

It is worthy of note that the Kwara State High Court which heard the appeal in its appellate jurisdiction pursuant to Sections 62 and 63 of the High

Court Law of Northern States, Cap. 49, Laws of Northern Nigeria 1963, applicable to Kwara State, was constituted by two High Court Judges. The defendant being dissatisfied with the decision of the appellate Division of the Kwara State High Court appealed to the Court of Appeal which allowed the appeal and entered an order of non-suit. He has lodged a further appeal to this Court
5 against this judgment of the Court of Appeal.

By virtue of section 221(1) of the Constitution of the Federal Republic of Nigeria, 1979 (hereinafter referred to as the 1979 Constitution) an appeal from a judgment of the High Court in respect of appeals from Upper Area or Customary Court heard by the High Court in its appellate jurisdiction can only
10 be validly entertained by the Court of Appeal with leave of the said High Court or the Court of Appeal. Accordingly after the High Court of Kwara State had given judgment in favour of the respondent, the appellant duly filed an application before the High Court of Kwara State in its appellate jurisdiction and sought leave to appeal to the Court of Appeal, Kaduna. The application was
15 heard on the 31st July, 1987 and leave was granted to the appellant by Orilonise, J. sitting alone in his original jurisdiction as a Judge of the Kwara State High Court.

It must be mentioned that the respondent who was non-suited by the Court of Appeal also cross-appealed to this court. Earlier on, before
20 Orilonise, J., his learned Counsel had raised the issue of the competence of a single Judge of the High Court of Kwara State to hear and determine the appellant's application before that court for leave to appeal to the Court of Appeal from the decision of the High Court, Sitting in the appellate jurisdiction. The respondent's objection was overruled and the leave sought was, as
25 already stated, granted.

In the Court of Appeal, learned counsel for the respondent took exactly the objection and complained that the appeal before that court was incompetent as the order for leave to appeal granted by Orilonise, J. as aforesaid was invalid and a nullity in that it was given by the Kwara State High
30 Court in its appellate jurisdiction constituted only by one single Judge. He contended that the application for leave ought to have been heard by the appellate Division of the Kwara State High Court duly constituted by two High Court Judges. The Court of Appeal in overruling this objection per Ogundere, J.C.A., observed as follows:

35 *'The appellant's reply was that under Sections 222() (sic), 236, 238 of the 1979 Constitution and the decision of this court in suit No. FCA/K/69/81 Mallam Ado and Another v. Hajiya Diye, leave to appeal granted by a single Judge of the High Court is good in law. This submission is unassailable as section 238 of the Constitution provides that for the purpose of*

exercising any jurisdiction conferred upon it under this Constitution, or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court. The submission of the appellant is upheld and the preliminary objection of the respondent is dismissed. See Madukolu And others v. Nkemdilim (1962) 1 All NLR 587 at 595; CA/K/123/87 Agaka v. Balogun of 11/1/88"

The respondent has again raised the same issue before this court in his cross-appeal. He has formulated two issues for determination before this court in these appeals as follows:-

"1. Whether there was any valid and competent appeal and grounds of appeal before the Court of Appeal, Kaduna on which the Court of Appeal's judgment could be based, and

2. Whether the Court of Appeal's order of non-suit is reasonable, warranted and can be supported by the weight of evidence before the court even if parties' counsel had been duly invited to address the Court of Appeal on the propriety of ordering a non-suit."

It is crystal clear that the first issue raised undoubtedly touches on the competence and jurisdiction of the Court of Appeal to entertain the appeal. The issue of the constitution of a court, that is to say, whether or not a court is properly or lawfully constituted, among others, is fundamental and raises the question of the competence of that court. In *Madukolu and others v. Nkemdilim* (1962) 2 SCNLR 341; (1962) 1 All NLR 587 at 594, which was cited with approved in *Skenconsult (Nigeria) Limited and Another v. Godwin Secondly Ukey* (1981) 1 S.C. 6 at 26, *Bairamian, F.J.*, as he then was, had this to say on the issue of the competence of a court, namely:-

"A court is competent when:-

1. It is properly constituted as regards numbers and qualification of the members of the bench, and no member is disqualified for one reason or another; and

2. the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

3. The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction. Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided, the defect is extrinsic to the adjudication."

There can be no doubt that the above observations of *Bairamian, F.J.*, as he then was has stood the test of time and cannot be more happily put. It is on the first arm of this judicial definition of the competence of a court that these

appeals resolve on.

The question of jurisdiction being basic and fundamental may be raised at any stage of a proceeding and even for the first time in a court of last resort, such as this court, as a judgment delivered by a court without jurisdiction is a nullity and therefore void. See *Timitimi v. Amahehe* 14WACA 379, 5 Mustapha v. Governor of Lagos State (1987) 5 SCNJ 143 (1987) 2 NWLR (Pt.58) 539 and *Tukur v. Government of Gongola State* (1989) 4 NWLR (Part 117) 517 at 545. So, too, where a constitutional issue, as in the present case is raised, the court must examine the issue closely to ensure that it is rightly treated. A constitutional issue, like the question of jurisdiction, is not only 10 fundamental but must be disposed of as soon as it is raised to ensure that the Constitution which is the supreme law of the land is not breached or disregarded. See *Alhaji Agbaje and others v. Mrs. W.A. Adelekan and others* (1990) 7 NWLR (Pt.164) 595 at 614. It is in the interest of the best administration of 15 justice that where the issue is raised in any proceedings before any court of law, it should be dealt with at the earliest opportunity and before trial or a consideration of any other issues raised in the cause as anything done without or in excess of jurisdiction by any court established under the Constitution is a nullity. See *Onyema and others v. Oputa and others* (1987) 2 N.S.C.C. 20 900 (1987) 3 NWLR (Pt.60) 259, *Attorney-General of the Federation and others v. Sode and others* (1990) 1 N.S.C.C. 271 (1990) 1 NWLR (Pt.128) 500 and *Madukolu and others v. Nkemdilim* (supra). Proceedings which are manifestly irregular and incompetent thus affecting the jurisdiction of a court and rendering the proceedings incurably defective and null and void may not be waived 25 as acquiescence cannot confer jurisdiction. See *Skenconsult (Nig.) Ltd. & Anor. v. Godwin Ukey* (1981) 1 S.C. 6 at *Management Enterprises Limited & Anor. v. Jonathan Otusanya* (1987) 2 NWLR (Pt.55) 179. *Hewitson and Miller v. Fabre* (1888) 21 Q.B.D.6, *Obimonure v. Erinoshio & Anor.* (1966) 1 All NLR 250 and *Macfoy v. U.A.C. Limited* (1961) 3 All E.R. 1169 at 1172. Accordingly, 30 I will proceed to examine the first issue which questions the jurisdiction or competence of the Court of Appeal to entertain this cause now on appeal

Learned counsel for the respondent, Oyewole Olajide Esq. in his brief of argument filed in respect of both the original appeal and the respondent's 35 cross-appeal contended that there is no valid and competent appeal and/or grounds of appeal before the Court of Appeal to which that court's judgment could be tied. He submitted that the leave to appeal against the decision of the High Court of Kwara State sitting in its appellate jurisdiction granted by a single Judge of that High Court sitting in its original jurisdiction, as is the case

in the instant appeal, is invalid and incompetent. He relied in support of his contention, on the decisions in Haruna Abidogun v. Alhaji Samho (1975) - 78) KW.L.R. 29 at 30 and Udekwe Erisi and others v. Uzor Idika and others (1987) 11 - 12 SCNJ 27 at 33 (1987) 4 NWLR (Pt.66) 503. He argued that since there was no valid leave from a competent court to appeal and since leave was a condition precedent in law to the filing of the appeal before the Court of Appeal, there was therefore no valid or competent appeal before the court below on which its judgment could be based as ex nihilo nihil fit. He urged the court to allow the respondent's cross-appeal, set aside the judgment of the Court of Appeal, affirm the judgment of the High Court, Omu-Aran and to dismiss the appellant's appeal.

Mr. Shittu A. Bello, learned counsel for the appellant in his reply brief to respondent's cross-appeal simply argued that a single Judge of a State High Court is competent to grant leave to appeal under Sections 236 and 238 of the 1979 Constitution. He relied on the decision in Nwobodo v. Onoh and others (1984) 1 S.C. 1 at 28-29 for the proposition that Section 238 of the 1979 Constitution empowers a Judge of the High Court sitting alone to entertain all matters before the court.

In view of the constitutional importance of the question raised, the far reaching effect the decision of this court on the issue would have on the practice, particularly in many Northern States of the Federation, and the other reasons which are fully contained in the lead judgment, a number of senior and eminent learned counsels were invited by this court as amici curiae to address the court further on the matter.

The sole issue on which this court invited addresses from learned amici curiae is framed thus:-

"What is the constitution of the High Court of Kwara State when sitting to determine an application by a losing party for leave to appeal to the Court of Appeal against the decision of the said High Court sitting in the appellate jurisdiction having regard to Section 238 of the 1979 Constitution and Section 63 of the High Court Law, Cap. 49 of the Laws of Kwara State of Nigeria."

Following the aforesaid invitation, M.A. Sanni Esq. Learned Attorney-General, Kwara State, J.B. Majiyagbe Esq., learned S.A.N. Chief J.A.T. Ajala learned S.A.N., B.J. Horn Esq., learned Attorney-General, Benue State and A.B. Mahmoud Esq. of learned counsel filed very useful briefs of argument and made stimulating and thought provoking oral submissions in amplification thereof.

Learned counsel for the appellant, S.A. Bello Esq. also filed an additional brief on the question of the construction of section 238 of the 1979 Constitution.

This time, he clearly put in some admirable and impressive hardwork on the issue. He contended that the High Court of Kwara State can only be validly constituted if there is compliance with the provisions of section 238 of the 1979 Constitution when sitting to determine an application for leave to appeal to the Court of Appeal against its own decision taken in its appellate jurisdiction. He cited various sections of statutory law, the 1963 and 1979 Constitutions of the Federal Republic of Nigeria and several decided cases and concluded by submitting that the High Court of Omu-Aran, Kwara State, was validly constituted by a single Judge when it made its order of the 31st July, 1987 granting leave to the appellant to appeal to the Court of Appeal, Kaduna against its decision given in its appellant jurisdiction on the 9th July, 1987.

It is desirable at this stage to express profound gratitude to the learned gentlemen of both the inner and Outer Bar for the scholarly presentation of both their briefs and oral submissions before this court as *amici curiae*. Their respective briefs were comprehensive, illuminating and clearly impressive. They reflected in no uncertain terms, the apparent industry with which they were prepared. Speaking for myself, I found them of great assistance in these proceedings and must take this opportunity to express my appreciation to learned counsel for professional assignments well executed.

Learned Attorney-General of Kwara State, M.A. Sanni Esq. in his brief referred to the provisions of Sections 62 of the High Court Law of Kwara State and 2(2) of the Kwara State Area Court Edict No.2 of 1967 which conferred appellate jurisdiction on the High Court of Kwara State to hear appeals other than those in respect of matters which are subject to the jurisdiction of the Sharia Court of Appeal. He drew attention to Section 63 of the High Court Law of Northern States which made provision for the High Court in the exercise of its appellate jurisdiction under section 62 of the same law to be constituted of three members, two of whom shall be Judges of the High Court and one of whom shall be Judge of the Sharia Court of Appeal. The 1963 Constitution of Northern Nigeria however ceased to have effect on coming into force of the Constitution of the Federal Republic of Nigeria, 1979. He pointed out that following this development and the decision in *Ado and Another v. Hajiya Dije* (1984) 5 NCLR 260 and *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 269) 386, that part of Section 63(1) that provided for the inclusion of a Judge of the Sharia Court of Appeal in the constitution of the High Court when sitting in its appellate jurisdiction became inapplicable as inconsistent with section 238 of the Constitution. He contended that by section 238 of 1979 Constitution which

provides that a High Court of a State shall be duly constituted if it consists of

at least one Judge of that court, the provisions of section 63 of the High Court Law of Northern States became permissive and not mandatory. He therefore argued, referring to the decision of this court in *Nwobodo v. Onoh and others* (1984) NSCC 1 at 12 (1984) 1 SCNLR 1 and *Omoboriowo v. Ajasin* (1984) All NLR 105 at 126, (1984) 1 SCNLR 108 that a single Judge can validly constitute a High Court in Kwara State for the purpose of exercising appellate or any jurisdiction. He submitted that section 63 of the High Court Law was enacted to take care of substantive appeals only as against what he described as “pre-appeal and post-appeal procedures.” He argued that since the application for leave to appeal from a decision of the High Court in its appellate jurisdiction was not an appeal, it did not come within the purview of section 63 of the High Court Law of Kwara State. He contended that the decision of this court in *Oladunni Akerele v. Jimoh Alapata* (1973) 6 S.C. 147 was decided per incuriam and must not be affirmed. He stated that even if the application for leave to appeal were to be construed as an appeal, it would not matter that it was determined by one single Judge of the High Court in view of the provisions of section 238 of the Constitution. He concluded by submitting that a single Judge of the High Court of Kwara State has powers under section 238 of the Constitution to assume jurisdiction over an application for leave to appeal to the Court of Appeal in respect of a matter which the High Court decided in its appellate jurisdiction. Consequently, it was his view that the notice of appeal in issue in the present case is competent.

Learned Senior Advocate of Nigeria, J.B. Majiyagbe Esq in his own brief delved incisively into the history of various statutory and constitutional enactments with regard to the composition of the Appellate Division of the High Court of the Northern States. A number of decided cases including those of *Mallam Ado v. Hajiya Dije* (1984) 5 NCLR 260 and *Oloriegbe v. Omotesho* (1993) 1 NWLR (Pt. 268) 386 at 409 - 410 and 413 were also referred to by him. After some analytical review of the authorities, learned counsel was of the view that section 63(1) of the High Court Law of Kwara State (and indeed the High Courts of Northern States) is in conflict and inconsistent with section 238 of the 1979 Constitution and is therefore invalid. In this regard, he drew attention to the decision in *Mallam Ado & Another v. Hajiya Dije* (supra) which fully brings out the areas of inconsistencies alluded to. He contended that section 63(1) of the High Court Law of Northern States is not an existing law because section 53(4) of the 1963 Constitution on which it was founded has not been re-enacted in the 1979 Constitution. He further submitted that the sole guide to the composition of the High Court in its original and appel

late jurisdiction is section 238 of the 1979 Constitution which provides that

the High Court of a State shall be duly constituted if it consists of at least one Judge of that court. He argued that any attempt to water down the provisions of section 238 of the Constitution by reference section 63(1) of the High Court Law by treating the latter as complementary to the said section 238 of the Constitution must be rejected. He therefore submitted that a single Judge of
 5 the Kwara State High Court (or indeed of the High Court of the Northern States) can validly grant leave to appeal to the Court of Appeal and that the decision of this court in *Oladunni Akerele v. Jimoh Alapata* (1973) 6 S.C. 147 must be considered overruled.

Chief J.A.T. Ajala, learned S.A.N in his own brief extensively re-
 10 viewed a host of authorities and relevant statutory and constitutional provisions and submitted that section 238 of the High Court Law of Northern States, Cap. 49, Laws of Northern Nigeria, 1963, as amended, is inconsistent with the provision of section 238 of the 1979 Constitution. He argued that the said section 63 of the Law is therefore unconstitutional and void. He con-
 15 tended that the composition of the High Court of Kwara State in its appellate jurisdiction vested in section 63(1) of the High Court Law has been invalidated by section 238 of the 1979 Constitution. He, too, referred to the decision of the Court of Appeal in *Mallam Ado and Another v. Hajiya Dije* (supra) which decision has received the approval of this court in *Olorieghe v. Omotesho*
 20 (supra) on the issue. He considered that it is permissible for a single Judge of the High Court to deal with proceedings which are brought before the High Court of the State in its appellate jurisdiction and, indeed to determine an application for leave to appeal, as in the present case on appeal. He criticized the decision of this court in *Oladunni Akerele v. Jimoh Alapata* (1973) NSCC
 25 408 where it was laid down that in the exercise of its appellate jurisdiction, the High Court of the Northern States must be constituted of three members, two of whom must be Judges of the High Court and the third a Judge of the Sharia Court of Appeal and submitted that it could no longer stand the test of time. He urged this court to depart from and overrule this earlier decision.

30

Learned Attorney-General of Benue State, B.I. Horn Esq. for his own part, reviewed the relevant provisions of the Constitution and statutory law applicable and contended that section 63 of the High Court Law which, he conceded, is an existing law must be read and tested against the provisions of
 35 sections 274 and 238 of the 1979 Constitution to determine the issue raised in this appeal. He relied on the decision of this court in *Nwuhodo v. Onoh* (supra) and submitted that notwithstanding the provision of section 63 of the High Court Law of Northern States, the Kwara State High Court was duly constituted if a single Judge thereof sat and granted leave to appeal to the

Court of Appeal against the decision of the High Court of that State sitting in its appellate jurisdiction.

A.B. Mahmoud Esq. of counsel, in his own submission took an entirely different stand on the issue. He, too, exhaustively reviewed the history of the statutory and constitutional enactments on the composition of the High Court of the Northern States of Nigeria while exercising its appellate jurisdiction. He referred to the decisions in *Olawoyin v. Commissioner of Police* (1961) 1 SCNLR 210; (1961) NSCC 90 (1961) 1 All NLR 203 and *Oladunni Akerere v. Jimoh Alapata* (1973) 6 S.C. 147 and submitted that the only radical departure from the pre-1979 position of the law is the introduction of section 238 of the 1979 Constitution. He argued that section 63(1) of the High Court Law of Northern States as it stands is partly void, being in conflict with section 238 of the 1979 Constitution and relied on the decisions in *Mallam Ado v. Hajiya Dije and Oloriege v. Omotesho*, *supra*, in support of his contention. Learned counsel was *ad idem* with his learned friends that the kernel of the issue under consideration is the construction of section 238 of the Constitution. He however contended the use of the words "at least" subsequently in that section of the Constitution signifies that the word "shall" therein used could not be construed in the context as mandatory but permissive as it is logical impossibility to have a court constituted by less than one Judge. He was also of the view that section 238 of the Constitution must be construed as not being self executing. He argued that some legislation such as the respective High Court Laws of the States is contemplated in aid of the said section 238 to make its provisions fully operational in the matter of the constitution of the High Court. He submitted that the High Court Law of Northern States which is applicable to Kwara State is an existing law by virtue of the provisions of section 274 of the Constitution. He argued that there is no conflict whatsoever between section 63 of that law and section 238 of the Constitution in so far as the latter provides for a number higher than one Judge for the constitution of the Kwara State High Court sitting in its appellate capacity. It was also his contention that the decision of this court in *Oladunni Akerere v. Jimoh Alapata* (*supra*) may still be regarded as good law and he argue the court to affirm the same. In conclusion, he submitted that the High Court of Kwara State exercising its appellate jurisdiction as the law presently stands can only be properly constituted with two High Court Judges sitting. His answer to the issue under consideration therefore is that the constitution of the Kwara State High Court while sitting to determine an application for leave to appeal against its decision given in its appellate jurisdiction is two Judges.

Upon a careful consideration of all the submissions of learned counsel

in this appeal, it seems to me clear that the answer to the issue in question rests mainly on the interpretation of Section 238 of the 1979 Constitution. There are other legal side issues that necessarily arise for consideration. These include whether what remains of section 63(1) of the High Court Law of Northern States, Cap. 49, Laws of Northern Nigeria 1963, applicable to Kwara State
 5 after the modification to it by *Ado v. Dije* and *Olorieghe v. Omotesho* (*supra*) is in conflict or inconsistent with the provisions of section 238 of the Constitution and, if not, the extent section 238 of the Constitution has affected the provisions of the said section 63(1) of the High Court Law. The nub of this appeal put shortly, is whether the proceedings in the appeal heard and dis-
 10 posed of by the Court of Appeal, Kaduna in this case are a nullity or otherwise competent.

In deciding this issue, it should be observed that prior to the promulgation of the 1979 Constitution, the constitution or composition of the High Courts throughout the Federation was determined by reference only to the
 15 provisions of the respective State High Court Laws. In some States, particularly in the Northern States, the constitution of the High Courts varied from original to appellate jurisdictions. These courts, again particularly in the Northern States, are in the exercise of their original jurisdiction duly constituted if they consisted of one High Court Judge of the Court. The position is however
 20 different in the exercise of their appellate jurisdiction. I will deal with this later on in this judgment.

There can be no doubt that the High Court Law of Northern States, Cap. 49, Laws of Northern Nigeria 1963 is an existing law by virtue of the provisions of section 274(1) (b) and 274(4) (b) of the 1979 Constitution. These
 25 sections provide as follows:-

“274(1) *Subject to the provisions of this Constitution, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of the Constitution and shall be deemed to be -*

30 (b) *a law made by a House of Assembly to the extent that it is a law with respect to any matter in which a House of Assembly is empowered by this Constitution to make laws.*”

“(4) *In this section, the following expressions have meanings assigned to them respectively:-*

35 (b) *“existing law” means any law and includes any rule of law or any enactment or instrument whatsoever which is in force immediately before the date when this section comes into force or which having been passed or made before that date comes into force after that date*”

It is also relevant to mention that by virtue of section 274(3) of the 1979

Constitution, the courts are empowered to invalidate any provision of any existing law on the ground of inconsistency with the provision of any other law inclusive of any provision of the 1979 Constitution. It is now convenient to reproduce sections 62 and 63 of the High Court Law, Cap. 49, Laws of Northern Nigeria 1963, applicable to Kwara State.

Section 62 of the said Law Confers appellate jurisdiction on the Kwara State High Court as follows - 5

“S.62. The High Court shall have jurisdiction to hear appeals (other than appeals in respect of matters which are subject of the jurisdiction of the Sharia Court of Appeal) from Grade A and Grade A Limited, Native Courts and Provincial Courts” 10

It ought to be mentioned that “native courts” alluded to in section 62 above referred to, have since 1967 changed to become Area Courts in Kwara State. In this regard, section 2(2) of Area Courts Edict No.2 of 1967, Laws of Kwara State provides thus:-

“2(2) Without prejudice to the interpretation Law, references in any law to a native court shall, unless the contrary intention appears be construed as references to a Area Court as defined in sub-Section 17 15

Accordingly it is the combined provisions of section 62 of the High Court Law and section 2(2) of the Area Courts Edict, 1967 that confer appellate jurisdiction on the Kwara State High Court in respect of matters therein mentioned. I will now return to the issue of the composition of the High Courts of Northern States in their appellate capacity. 20

The constitution of the High Courts of Northern States for the exercise of their appellate jurisdiction is provided for in section 63(1) of the High Court Law as follows:- 25

“63(1) In the exercise of its jurisdiction under section 62, the High Court shall be constituted of three members two of whom shall be Judges of the High Court and one of whom shall be a Judge of the Sharia Court of Appeal” (Italics supplied)

Accordingly in line with the said provision of section 63(1) of the High Court Law, the High Court of Kwara State sitting in its appellate jurisdiction to hear appeals from Area Courts was duly constituted with three Judges made up of two Judges of the High Court and one Judge of the Sharia Court of Appeal. This position of the law, as it then stood, was confirmed by the decision of this court in the case of Oladunni Akerele v. Jimoh Alapata (1973) 6 S.C. 147 where Fatayi-Williams, J.S.C., as he then was, interpreting the provisions of sections 62 and 63(1) of the High Court Law of Northern States 30 35

applicable to Kwara State pronounced thus:-

“An application to the High Court of Kwara State for leave to appeal against the decision of the Court in the exercise of its appellate jurisdiction is, without doubt, made to that High Court in its appellate jurisdiction. In dealing with such an application, therefore, the High Court must be duly constituted in the manner provided for in section 63 of the High Court Law.

5 *The court is not properly constituted with only one Judge.*

.....
From the above provisions, it seems to us that a single Judge can preside over the proceedings in the High Court in the exercise of its original jurisdiction. In the exercise of its appellate jurisdiction however, the court
 10 *must be constituted of three members, two of whom must be Judges of the High Court and the third a Judge of the Sharia Court of Appeal*

.....
As the order granting the defendant/appellant leave to appeal was made without jurisdiction, it is null and void. The consequence of this is that
 15 *no leave of the court below or of this court has been obtained before appealing against the decision of the Ilorin High Court*
 *That being the case, the appeal is not properly before this court”*

It seems to me well settled that the above remained the correct position of the law until the 1979 Constitution came into force. I will have cause to return to this decision later in this judgment.

With the promulgation of the 1979 Constitution, however, a radical departure from certain aspects of the above mentioned pre-1979 state of the law was introduced by section 238 of the said 1979 Constitution. That section
 25 deals with the constitution of the High Courts and provides as follows:-

“238. For the purpose of exercising any jurisdiction Conferred Upon it under this jurisdiction or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court”

The crucial issues that now call for consideration are whether section 63(1) of
 30 the High Court Law of Northern States (applicable to Kwara State) is in conflict or inconsistent with the provisions of section 238 of the 1979 Constitution and, in particular, whether the composition of the High Court in its appellate jurisdiction vested in section 63(1) of the High Court Law is still valid in law or whether it has been eroded into and taken away by section 238 of the
 35 1979 Constitution thus making it permissible for a single Judge to entertain matters before the State High Court in its appellate jurisdiction.

In this Connection, attention must be drawn to the case of Mallam Ado and Another v. Hajiya Dije (1984) 5 N.C.L.R. 260 where the Court of Appeal per Coker, J.C.A. (as he then was) held that section 63(1) was in con-

flict with section 238 of the 1979 Constitution in so far as it provided for persons other than Judges of the High Court to sit and participate in the proceedings of the High Court. Said the learned Justice-

“The two courts (i.e. High Court and Sharia Court of Appeal of a State) are separate and distinct, with different jurisdiction and membership. A Judge of the one is different from that of the other and its membership cannot be interchanged. It is only the Constitution of the country which established both courts and prescribed the qualification of their members and jurisdiction, that could make a Judge of one court sit in another, but regrettably, no such provision exist (sic) in the present Constitution”

I need only say that I am in full agreement with Coker, J.C.A. (as he then was) in the above observations. The earlier provision before the 1979 Constitution as set out in section 63(1) of the High Court Law might have been made for the convenience of the courts and the speedy administration of justice. It must however now give way to the supremacy of the 1979 Constitution which creates no room for a combination of Judges of the High Court and the Sharia Court of Appeal provided for under section 63(1) of the High Court Law of the Northern States as these courts, namely, the High Court and the Sharia Court of Appeal are separate and distinct in all respects in terms of jurisdiction.

I should perhaps add that the said decision in *Ado v. Dije* was recently affirmed by this court in *Oloriegbe v. Omotesho* (1993) INWLR (Pt. 270) 386 where it was held that in so far as section 63(1) aforesaid permitted a person other than a Judge of the High Court to sit as a member of the High Court of Kwara State in its appellate jurisdiction, that section was not in conformity with the provisions of the 1979 Constitution. It therefore seems to me that section 63(1) of the said law is partly void to the extent of its inconsistency or confliction with the provisions of section 238 of the 1979 Constitution as aforementioned. Accordingly I am prepared to hold that section 63(1) of the High Court Law is effectively modified by virtue of the provisions of section 274(1) of the 1979 Constitution. I will now deal with the important question of whether there is any conflict between what remains of section 63(1) after the modifications to it by the decisions in *Ado v. Dije* and *Oloriegbe v. Omotesho* (supra) and section 238 of the 1979 Constitution.

At the risk of repetition I propose once again to reproduce section 238 of the 1979 Constitution thus-

“238. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High Court of a State shall be duly constituted if it consists of at least one Judge of that court”

(Italics are mine).

In my view “any jurisdiction” under section 238 of the 1979 constitution clearly refers to both original, appellate and supervisory jurisdiction of the High Court. Also “any law” therein mentioned will include existing laws which are valid and not in consistent with the 1979 Constitution. There is also
 5 the word “shall” used in the said section and I ask myself in what sense that word is used. Is “shall” there used in a mandatory sense or is it mainly used in a directory or permissive manner.

Learned amicus curiae A.B. Mahmoud Esq. In his brief answer this question as follows:-

10 *“I submit that the use of the words “at least” subsequently in the section signifies that the word “shall” could not be construed as mandatory in the context. If the view is taken that “shall” is used in the mandatory sense, the result is a logical absurdity. Surely it is not possible to have court constituted by less than one Judge.....*

15 *What then is the significance of the words “at least” used in that section? It is submitted that since it is logically impossible to have a court constituted by less than one Judge, in which case the section would have been construed as providing the smallest number, the logical construction of section 238 is that it is permissive of a High Court of a State being constituted by a number
 20 higher than one.”*

I have given the above submissions some anxious consideration and I entirely agree with the learned amicus curiae that the word “shall” in section 238 of the Constitution is used in a directory or permissive context and not in a mandatory sense. In my view, the words “at least” used in that section
 25 of the 1979 Constitution may not be ignored as meaningless. In construing a Constitution, some meaning or effect should be given to all the words or language used if it is possible to do so in conformity with the intention of the framers and unless the context suggests otherwise, words are to be given their natural, obvious or ordinary meaning.

30 There is certainly an ocean of difference between a statutory or constitutional provision to the effect that the High Court of a State shall be properly constituted by “at least one Judge” as against another provision that such a court shall be properly constituted by “One Judge”. The former provision clearly connotes a minimum of one Judge for a proper constitution of that
 35 court thus making it permissible for one or more Judges of that court to exercise any jurisdiction conferred on such a court. The latter, on the other hand, would appear to make it mandatory that in exercising its jurisdiction, that court

shall be duly constituted by one Judge. I am therefore of the view that the use

of the words “at least” seems to suggest that the word “shall” in section 238 of the 1979 Constitution cannot be construed as a mandatory provision in that section of the Constitution. I agree entirely with learned counsel that the word is therein used in a directory sense only and that the logical construction of section 238 is that it is permissive of a High Court of a State to be duly constituted by a number of Judges higher than one.

On the issue of how that number higher than one Judge may be provided for, I am in agreement with Mr. Mahmoud that section 238 of the Constitution must be construed as an enabling constitutional provision and that it is therefore not self-executing. This, in effect, connotes, that some legislation by the State legislatures is contemplated to make that provision of the constitution become fully and completely operative.

A constitutional provision is said to be self-executing when it is complete in itself and does not need the aid of a supplemental legislation to become fully operative. On the other hand a provision is not self-executing if it appears, upon a proper construction, that it may not become completely operative without supplemental or enabling legislation. See Section 48 of 16 C.J.S. (Corpus Juris Secundum) Constitutional Law. It is my view that section 238 of the 1979 Constitution not being self-executing, the various High Court Laws and Rules which regulate the practice and procedure of such High Courts would appear to be the supplemental legislations contemplated by the said sections 238 and 239 of the 1979 Constitution. Such State supplemental legislations are expected to fix the number of Judges to constitute their respective High Courts subject however to a minimum of one Judge of such High Court. In the circumstance it seems to me that the provision of section 63(1) of the High Court Law of Kwara State cannot be said to be inconsistent or in conflict with section 238 of the 1979 Constitution in so far as the latter makes provision for a number of Judges higher than one for the constitution of the Kwara State High Court sitting in its appellate jurisdiction. Accordingly, the provisions of section 63(1) of the said High Court Law being an existing law under section 274 of the Constitution remains sacrosanct and valid law. It is clearly mandatory and not directory in terms and I have no difficulty in coming to the conclusion that the various State High Courts of the Northern States of the Federation which are subject to section 63(1) of the High Court Law shall, to be properly and lawfully constituted, comply with its provisions. It may therefore be said, and quite rightly in my view, that the High Court of Kwara State exercising appellate jurisdiction shall only be properly constituted sitting with two Judges of the High Court as provided for in section 63(1) of the High Court Law of Northern States applicable to Kwara States. This, of course, is without prejudice to the right of the other States of the Federation to legislate

for a single Judge or for two or more Judges, as the case may be, for the due or proper constitution of their respective appellate High Courts.

Learned counsel for the respondent/cross-appellant in his brief urged
 5 this court to hold that Orilonise., J. having sat in his original jurisdiction as a Judge of the Kwara State High Court Jacked jurisdiction to grant the appellant the purported leave to appeal. In his view, it is the court that heard the appeal that ought to entertain the application for leave to appeal. He concluded as follows:

10 *“The single Judge (meaning Orilonise, J) who was not even the presiding Judge and who was sitting in its original Jurisdiction which granted the appellant’s purported leave to appeal is not that High Court that gave the decision appealed against.”* (Words in brackets supplied)

With profound respect, it is a misconception of the law on the part of
 15 the learned counsel for the respondent to equate a Judicial Division of the High Court of a State with the State High Court. Each State within the Federation has one single High Court of Justice with various judicial divisions within the State. Learned respondent’s counsel was in error to have come to the conclusion that only the Judges who heard an appeal and delivered judgment
 20 therein are competent to entertain an application for leave to appeal against such a judgment where leave is required. I am to state that if the word “that” referred to by learned counsel in his submission refers to the appellate jurisdiction of the High Court, then my answer is that leave to appeal can be given by any competent High Court in its appellate jurisdiction. It has to be empha-
 25 sized that it does not necessarily mean that the same Judges who heard the appeal must in law be the one to give leave to appeal. Any competent High Court of the appellate jurisdiction of a State duly constituted under the law has jurisdiction to entertain an application for leave to appeal against the judgment of another High Court of the same State sitting in its appellate
 30 jurisdiction. It does not matter and it will make no difference that the panel of Judges that heard the application for leave to appeal is different from the panel that heard the appeal.

There was also an invitation to this court to overrule the decision in
 Oladunni Akerele v. Jimoh Alapata (1973) 6 S.C. 147, on the ground that it
 35 cannot now stand the test of time, that the decision is wrong in law and that, its application to future cases and/or continuous operation will perpetuate substantial miscarriage of justice. I have earlier on in this judgment set out the

main decision of this court in that appeal. It suffices to state that I have given

this invitation a most careful consideration but find myself unable to question this decision which seems to me sound law. The decision was handed down prior to the promulgation of the 1979 Constitution and was clearly good law at the time it was given. Although the provision of section 238 of the 1979 Constitution together with the decisions in *Mallam Ado and Another v. Hajiya Dije and Olorieghe v. Omotesho* (supra) no doubt eliminated the inclusion of a third Judge of the Sharia Court of Appeal in the composition of the High Courts of the Northern States sitting in their appellate jurisdiction, the decision of this court in *Akerele v. Alapata* (Supra) would still appear to be the present position of the law. The mere fact that there was a change of the law by the promulgation of the 1979 Constitution is no reason to overrule it since the decision was correctly decided as at the time it was handed down. Although some aspects thereof are now no longer applicable, the principles therein enunciated remain good law. In these circumstances, I find myself unable to overrule that decision of this court.

Learned counsel for the appellants relied on the decisions in *Chief Akin Omoboriowo & Another v. Chief Michael Ajasin* (1984) All NLR 105 at 126 (1984) 1 SCNLR 108 and *Chief Jim Nwobodo v. C.C. Onoh* (1984) All NLR 1 at 10; (1984) 1 SCNLR 1 in his contention that the High Court, Omu-Aran was validly constituted by a single Judge of the court under section 238 of the 1979 Constitution when it made the order of the 31st July, 1987 granting leave to the appellant to appeal to the Court of Appeal, Kaduna in this matter. With great respect, I am unable to agree with learned counsel on the point. In my view, reliance on these two cases is completely off the mark and totally misconceived. Section 238 of the 1979 Constitution in *Nwobodo's* case concerned the power given to a State Chief Judge to decide the number of Judges that will sit on a panel to constitute an election tribunal as provided under section 119(3) of the Electoral Act, 1992. In the same vein, *Omoboriowo's* case had to do with election petition and no more. Neither of both cases had anything to do with the appellate jurisdiction of their respective High Courts nor was it suggested that there were any provisions of any laws similar to those in sections 62 and 63(1) of the High Court Law of Northern States which were applicable to Ondo and Anambra States from which those two cases emanated. I am of the firm view that these cases are totally irrelevant to the issues that arise for determination in this appeal.

In the final result, it must be emphasized that an application to High Court of Kwara State for leave to appeal against the decision of the Court in the exercise of its appellate jurisdiction is undoubtedly made to that High Court in its appellate jurisdiction. Section 63(1) of the High Court Law of Northern States, Cap. 49, Law of Northern Nigeria, 1963, applicable to Kwara

State is an existing law under the Constitution by virtue of section 274 of the 1979 Constitution. That section of the High Court Law of Northern States is also not inconsistent or in conflict with section 238 of the Constitution and it is therefore a valid law. It is further a mandatory provision of the law and binds all the High Courts which are subject to its provisions. Accordingly, the constitution of the High Court of Kwara State in the exercise of its appellate jurisdiction to hear and determine appeals from Upper Area Courts or the Customary Courts or to entertain an application for leave to appeal to the Court of Appeal against the decision of the said court sitting in its appellate jurisdiction is two Judges of the High Court:

By virtue of section 221(1) of the 1979 Constitution, an appeal from the judgment of a High Court in its appellate jurisdiction in respect of appeals from the Upper Area Court or a Customary court can only be heard by the Court of Appeal with leave of the High Court or the Court of Appeal. This provision is mandatory. Where, as in the present case, an appeal does not lie as of right but with leave, an appeal filed without an appropriate leave is incompetent before the Court of Appeal and ought to be struck out. See *Ubekwe Erisi and others v. Uzor Idika and others* (1987) 11-12 SCNJ 27 at 33-34 (1987) 4 NWLR (Pt.66) 503 and *Oladunni Akerele v. Jimoh Alapata* (supra). And I ask myself whether the leave granted in this appeal not by an appellate High Court as constituted by section 63(1) of the High Court Law of Northern States but by Orilonise, J. sitting as a single Judge of the High Court is valid. My firm answer must be in the negative.

In the circumstance, the leave purportedly granted by the learned Orilonise, J. was clearly made without jurisdiction and is therefore incompetent, invalid and a nullity. Accordingly the proceedings before the Kaduna Division of the Court of Appeal were not properly before that court as they were invalid and incompetent. The said proceedings and judgment of the Court of Appeal are hereby declared null and void.

Having resolved the main issue that has arisen in this appeal for determination in favour of the respondent/cross-appellant, it will be idle and unnecessary for me to consider issue No.2 formulated by the respondent/cross-appellant. This issue questions the propriety of the order of non-suit entered in the case by the Court of Appeal. The main appeal of the defendant being incompetent, fails and it is accordingly struck out. The cross-appeal of the plaintiff succeeds and it is hereby allowed. I abide by the consequential orders inclusive of those as to costs contained in the lead judgment.