

SUPREME COURT OF NIGERIA
19TH SEPTEMBER 1995. SC. 1/1994
CORAM:- S.M.A. BELGORE, M.E. OGUNDARE,
U. MOHAMMED, Y.O. ADIO, JJSC.

NIGERIA-ARAB BANK LIMITED APPELLANT
AND	
ENGINEERING NIGERIA LTD RESPONDENT

JUDGMENTS - *Delivery of judgment - Overriding constitutional provision that it be in public - Must be adhered to.*

JUDGMENTS - *Venue - Case heard ab initio in open court - Whether therein can be given in Chambers.*

PRACTICE & PROCEDURE - *Nullity - Failure to give judgment in open court - Whether the entire proceedings is nullified and vitiated.*

FACTS

The appellant was sued for damages in negligence at the trial court. The trial progressed in open court with both parties offering evidence on their leadings and their counsel giving their respective addresses. However, on the day fixed for judgment, the trial Judge inexplicably called the respective counsel to his Chambers and thereupon delivered his judgment granting all the prayers of the plaintiff, now the respondent.

Dissatisfied, the appellant challenged the decision of the trial court in the Court of Appeal citing particularly the constitutional impropriety of giving judgment in the judge's chambers. The Court of Appeal, Lagos division upheld the judgment given by the trial court in Chambers while reducing the claim awarded the respondent for general damages. It also upheld the claim awarded the respondent for special damages. Still aggrieved, the appellant has now appealed to the Supreme Court raising five issues, which the court narrowed down to two dealing with the propriety of the trial court delivering its judgment in Chambers.

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that a judgment of a High Court delivered in chambers for no explicable reason and which is contrary to the express provisions of the rules of court and the Constitution of the Federal Republic of Nigeria is regular and valid in law.

2. Whether the Court of Appeal was right in law in implying by its

judgment that the dictum of Obaseki JSC (as he then was in Oyeyipo vs Oyinloye (1987) 1 NWLR 356,377 OVERRULED the Supreme Court decision in the case of Oviassu. (1973) 11 SC 315

HELD (Unanimously allowing the appeal per lead judgment of **BELGORE JSC**)

Case heard ab initio in open court

1. From the above quoted rules of High Court there is nothing covering case that was heard ab initio in open Court in the full glare of the public that permits the judgment to be given out of public view in chambers. “Hearing in public” entails a situation where the public is not barred. A judge chambers is not open Court or “in public” because only those invited therein, by the judge are permitted to be present. (p. 1733 F)

Delivery of judgment

2. The aforementioned constitutional provisions and rules of Court made thereunder are peculiar to the Supreme Court; they do not extend to other superior Courts of record. Therefore the provisions of s.33(3) of the Constitution are fundamental and must be adhered to strictly by all Courts of record subject to the exception explained above in respect of certain applications before the Supreme Court. (p. 1734 E)

Nullity - Failure to give judgment in open court

3. I regret that this issue has vitiated the trial through the error of the trial judge and misapplication of the error by the Court of Appeal. On this issue alone of giving judgment not in public as demanded in Section 33(3) under Fundamental Rights in Chapter IV of 1979 Constitution, but in chambers the judgment is a nullity and vitiates the entire proceedings. I therefore allow this appeal and order a retrial before another judge of Lagos State High Court. (p. 1734 G)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Supremacy of the Constitution

For the avoidance of any doubt the words of the Constitution in a civilian regime give effect to the existence of all laws and institutions and procedures. As a temporary measure, the Military regimes have always made their decrees superior to the Constitution, see Decree No. 28 of 1970, and Decree No. 13 of 1984, this is for obvious reasons of protecting their very existence remembering what Lakanmi vs. Governor of Western Region (1979)

All NLR would have meant. But even in a Military regime those portions In Constitution as are deemed necessary to retain or modify take force and are superior to any other laws. (p. 1731 G)

KUTIGI JSC

2. Case of Oviasu v. Oviasu has not been overruled

From the foregoing it would by now be clear that OVIASU V. OVIASU (supra) is still the law and it has not been overruled by the decision in OYEYIPO V. OYINLOYE (supra). The Court of Appeal was clearly in error holding otherwise. So as it was in OVIASU V. OVIASU, it will also be in this appeal. The irregularity occasioned by the delivering of judgment in Chambers contrary to clear and unambiguous provision of section 33 (3) of the 1979 Constitution above is very fundamental and vitiates the whole trial. (p. 1737 D)

OGUNDARE JSC

3. Ratio decidendi distinguished from obiter dictum

The doctrine of judicial precedent (otherwise called stare decisis) requires Inordinate courts to follow decisions of superior courts even where these decisions are obviously wrong having been based upon a false premise; this is the foundation on which the consistency of our judicial decision is based - see: Ngwo v. Monye (1970) 1 All NLR 91, 100. It is, however, the principle of law upon which a particular case is decided that is binding. Such a principle is called the ratio decidendi. A statement made in passing by a judge which is not necessary to the determination of the case in hand is not a ratio decidendi of the case but an obiter dictum and it has no binding effect for the purpose of the doctrine of judicial precedent. (p. 1752 G)

4. Breach of constitutional provision - Whether mere technicality

Whatever the learned Judge's reason(s) the defect here is fundamental and goes to the root of the entire proceedings. To suggest that because the hearing was in open court, the delivery of judgment in chambers is a technicality as no miscarriage of justice was occasioned thereby, is to beg the issue. The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental. (p. 1753 E)

5. Public right to court proceeding cannot be waived by any party

Secret trials, whether civil or criminal, are not normal norms of a democratic society. True, there are strictly defined exceptions in the proviso to

subsection (13) of section 33 of the Constitution to the right of the public to free access to court proceedings. The case on hand does not come within these exceptions. Being a public right, therefore, the Defendant nor any party to a suit cannot waive the right. (p. 1754 A)

B REPRESENTATION

F.O. Fagbohunge with Ayo Ajayi, for the Respondent
Ademola Akinrele with Ikechi Mgbeoyi, for the Appellant

CASES REFERRED TO

- C Oyeyipo v. Oyinloye (1987) 1 NWLR (Part 50) 356 357
Oviasu v. Oviasu (1973) 11 SC 315
Lakanmi v. Governor of Western Region (1970) All NLR
Governor of Ondo State v. Adewumi (1985) 2 NWLR (Pt 13) 4931
Ariori v. Elemo (1983) All NLR 1
D Adegoke Motors v. Adesanya (1989) 3 NWLR 250, 274 & 292

STATUTES AND RULES REFERRED TO

- Constitution of the Federal Republic of Nigeria, 1979, ss. 33(1)(3)(13), 216
Decree No. 28, 1970
Decree No. 13, 1984
E High Court of Lagos State (Civil Procedure) Rules, 1972, Order 43, rules 1, 2, 13; Order 36, rule 1

LEAD JUDGMENT BY BELGORE JSC

- The appellant was the defendant at the trial High Court. It was sued for
F damages in negligence by the respondent who claimed that the appellant negligently handled the processing of three letters of credit whereby the respondent suffered substantial loss and damages. After offering of evidence by both parties on their pleadings, and addresses by their respective counsel, the learned trial Judge who heard the case up to this stage in the
G open court adjourned for judgment to 29th August 1991. On that day, he, for no reasons advanced to either party, called the counsel to his chambers and delivered his judgment there granting all the prayers of the plaintiff, now respondent. The appellant then appealed to the Court of Appeal which upheld the judgment given by the trial Court in Chambers but reduced the
H claim for general damages from five million Naira (N5,000,000.00) to five hundred thousand Naira (N500,000.00). The Court of Appeal upheld the special damages awarded by the trial court in the sum of N88,074.55 (eighty eight thousand seventy-four Naira and fifty five kobo). The Court of Appeal upheld the judgment of the trial Judge given in chambers by relying on the dictum of Obaseki J.S.C. in Oyeyipo v. Oyinloye (1987) NWLR

(Pt.50) 356, 357 believing that it overruled the earlier decision in *Oviasu v. Oriasu* (1973) 11 S.C. 315 (also reported in (1973) NSCC 502). The appellant to this court, who lost in the two courts below, filed two grounds of appeal, both on law, with particulars, as follows:

"Grounds of Appeal"

1. *The Court of Appeal erred in law in holding that the part of the proceedings (the judgment) in the chambers of the Judge was in public when on the admitted deposition before the court there is no evidence that the public was invited thereby contravening Order 36 Rule 14 of the High Court of Lagos Rules and Section 33 of the Constitution of the Federal Republic.*

2. *That the Court of Appeal erred in law on the issue of the liability when on the letters of credit the liability to pay in foreign exchange arose only on the granting of foreign exchange by the Central Bank on which did not happen in this case.*

3. *That the Court of Appeal erred in holding that no question of contributory negligence arose in the present case when the respondent was dilatory in complying with the conditions required by the Central Bank of Nigeria and their Overseas supplier failed to meet with the requirement of Chase Manhattan Bank London (appointed by the Central*

Bank on the refinancing exercise) and thereby misdirected itself of the issue of damages.

4. *That the judgment is against the weight of evidence."*

The respondent also cross-appealed as follows:

"Grounds of Appeal"

Ground 1

The Court of Appeal erred in law when it held that the plaintiff's loss of goodwill and loss of business were not necessary and immediate consequence of the respondent's negligence act of failing to process the appellant's application for foreign exchange in time.

Particulars of Error

(a) *The Court of Appeal found in concurrence with the trial court's findings of fact that the respondent is liable for its negligence in failing to diligently process the appellant's application for foreign exchange.*

(b) *The appellant had given uncontroverted and unchallenged evidence of the cancellation of its credit facility of 1.5 Million Pounds Sterling by its foreign suppliers.*

(c) *The appellant had given uncontroverted evidence of its consequential inability to take and perform huge contracts in the then developing*

city of Abuja.

(d) Whereas the Court of Appeal found as a fact that the appellant's ".....access to supplies which it needed for its business was also no doubt interrupted as regards its suppliers, Oakland".

B (e) Whereas the Court of Appeal found that the respondent will need to negotiate new credit facility with its suppliers and rehabilitate whatever dent has been occasioned to its standing.

(f) The Court of Appeal held as follows:

C "There cannot be any doubt that the respondent in addition to exchange fluctuation loss, had suffered loss directly resulting from the appellant's negligent act"(Italics added)

Ground 2

D The Court of Appeal erred in law when it reduced the amount of general damages awarded in favour of the appellant from N5 million to N500,000.00 when there was nothing before the court to justify such reduction.

Particulars of Error

(a) There was no burden on the appellant to adduce further evidence of the general damages suffered once the respondent's liability had been established by the court.

E (b) The general damages claimed by the appellant was a necessary, direct and immediate consequence of the respondent's negligent act.

(c) The Court of Appeal found as a fact that the appellant had suffered loss directly resulting from the respondent's act.

(d) Whereas the Court of Appeal consequently held as follows:

"Qualification of such loss is difficult"

F (e) The Court of Appeal failed to give any convincing reason why the general damages awarded in the appellant's favour by the trial court should be reduced."

In support of the grounds of appeal the appellant formulated the following issues for determination in this appeal as follows:

G "1. Whether the Court of Appeal was right in holding that a judgment of a High Court delivered in Chambers for no explicable reason and which is contrary to the express provisions of the rules of court and the Constitution of the Federal Republic of Nigeria is regular and valid in law.

H 2. Whether the Court of Appeal was right in law in implying by its judgment that the dictum of Obaseki J.S.C. (as he then was in Oyeipo v. Oyinloye) (1987) 1 NWLR (Pt.50) 356, 377 overruled the Supreme Court decision in the case of Oviasu v.Oviasu (1973) 11 S.C. 315 .

3. Whether from the totality of the evidence adduced in trial, the Court of Appeal was right in affirming that the appellant was negligent.

4. *Whether from the totality of the evidence, the lower courts misdirected themselves in fact by not holding that the respondent was contributory negligent to the inability of the appellant to obtain exchange cover under the Central Bank financing scheme.*

5. *Whether the award of damages by the Court of Appeal was not excessive and unreasonable in the circumstances.*"

It is clear the issue of the judgment given in Chambers is very important as the respondent in his issues for determination alluded to it as follows:

"Whether or not the Court of Appeal was right in holding that the judgment of the Lagos High Court delivered in chambers in this suit on 29/8/91 did not in anyway vitiate or invalidate the said judgment vis a vis the cases of Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt.50) 356 at p. 377 and Oviasu v. Oviasu (1973) NSCC (Vol. 8) 502."

At the hearing of the appeal it became obvious that the judgment given in Chambers as opposed to the one given in open court is very weighty and we asked the counsel to the parties to address us only on that issue in view of the provisions of the 1979 Constitution in S. 33(3) (as re-enacted in Cap. 62 Laws of the Federation of Nigeria 1990 which read:

33(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public."

It is in my view better to set out the provisions of sub-section (1) of section 33 of the same Constitution so as to appreciate the purport of sub-section (3) (supra).

"33(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to ensure its independence and impartiality."

For the avoidance of any doubt the words of the Constitution in a civilian regime give effect to the existence of all laws and institutions and procedures. As a temporary measure, the Military regimes have always made their decrees superior to the Constitution, see Decree No. 28 of 1970. and Decree No. 13 of 1984. this is for obvious reasons of protecting their very existence remembering what Lakanmi v. A.-G, Western Region (1974) 4 ECSCR 713; (1977) would have meant. But even in a Military regime those portions of the Constitution as are deemed necessary to retain or modify take force and are superior to any other laws - Governor of Ondo State v. Adewunmi (1985) 3 NWLR (Pt.13) 493.

The Court of Appeal took refuge in the case of *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt.50) 356. 377 where Obaseki J.S.C. opined:

"When the court sits in chambers, all that it means is that the Judges of the court are transacting the business of the court in chambers instead of open court (see Hartmont v. Foster (1881) 8 OBD 82, 84 . It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers. See proviso to section 33 (13) of the Constitution of the Federal Republic of Nigeria 1979.

A Judge may sit in chambers without excluding members of the public. It is therefore not unconstitutional to sit in chambers."

The learned Justices proceeded from, that statement of Obaseki J.S.C, which unfortunately was obiter, and looked at as a whole with his concurring judgment, has not in the least derogated from the provisions of the Constitution and *Oviasu v. Oviasu* (supra) to hold that sitting in chambers to deliver judgment out of view of the public was right. As the leading judgment of *Karibi- Whyte J.S.C.* bears out and concurred to by the other Justices on the panel, *Oyeyipo v. Oyinloye* (supra) was decided in the light of the provisions of the Constitution and Rules of Supreme Court as to certain matters that could be dealt with in Chambers.

Learned counsel for the respondent pointed out that the High Court of Lagos State (Civil Procedure) Rules 1972 Order 43 rules 1, 2 and 13 permitted the practice of judgment in chambers. The rules cited provide:

"1. In any proceeding before the Judge in Chambers any party may, if he so desire, be represented by a legal practitioner.

2. The business to be disposed of in chambers by the judges shall consist of the following matters, in addition to the matters which under any other Rule or by Statute may be disposed of in chambers-

(1) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights or where the title depends only upon proof of the identity or the birth, marriage, or death of any person.

(2) Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter.

(3) Applications in partnership actions with the consent of all the partners for payment or transfer to any person of all cash or securities standing to the credit of the action.

(4) Applications for payment to any person of the dividend or interests of any securities standing to the credit of any cause or matter,

whether to a separate account or otherwise.

(5) Applications on behalf of infants, where the infant is a ward of court, or the administration of the estate of the infant, or the maintenance of the infant, is under the direction of the court.

(6) Applications as to the guardianship and maintenance or advancement of infants.

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(7) Applications connected with the management of property.

(8) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into court and investment of the purchase money.

(9) All applications for the taxation and delivery of bills of costs and for the delivery by any legal practitioner of deeds, documents, and papers.

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(10) Applications for orders on the further consideration of debenture holders' actions or of any cause or matter where the order to be made is for the distribution of the estate of an inter-State.

(11) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, for substituted service, and generally all applications relating to the conduct of any cause or matter.

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(12) Applications by the Public Trustee under section 10 of the Public Trustee Law.

(13) Such other matters as a Judge may think fit to dispose of at chambers.

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13. It shall not be obligatory on the court or judge in Chambers to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order."

From the above quoted rules of High Court there is nothing covering a case that was heard ab initio in open court in the full glare of the public that permits the judgment to be given out of public view in chambers. "*Hearing in public*" entails a situation where the public is not barred. A Judge's Chambers is not open court or "*in public*" because only those invited therein by the Judge are permitted to be present.

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Oviasu v. Oviasu (supra) is a case under Matrimonial Causes Act with its own peculiar procedure. But in accordance with the Constitution of 1963, provision similar to S. 33(3) of 1979 Constitution was in issue. Unless the parties to the petition for divorce apply and leave was granted it has not been the business of the Judge to hear the petition out of the view of the public. In that case there was no such application and *Sowemimo J.S.C.* (as he then was) held that learned trial Judge should not have decided, on his own, to hear the petition in chambers because a judge's

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chambers is not a court hall to which the public would normally have access.”

Oyeyipo v. Oyinloye (supra) was decided solely on the law and rules as applied in the Supreme Court. The Constitution of the Federal Republic of Nigeria in S. 213(4) provides:

B *“The Supreme Court may dispose of any application for leave to appeal from any decision of the Court of Appeal in respect of any civil or criminal proceedings in which leave to appeal is necessary after consideration of the record of the proceedings if the Supreme Court is of opinion that the interests of justice do not require an oral hearing of the application.”*

C In S. 216 of the same Constitution it is provided that:
“216 Subject to the provisions of any Act of the National Assembly the Chief justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court.”

The Supreme Court Rules 1985 provides in Order 6 r 3(1):

D *“3(1) Without prejudice to the powers of the court to hear oral argument, an application under rule 2 of this order may be considered and determined by the court in Chambers, only on the written argument and documents as required by the rule, submitted by the applicant in support without hearing oral argument either in open court or in Chambers. The court may, under this rule, refuse such application, only if in its opinion the*
 E *application is completely devoid of merit.”*

The aforementioned constitutional provisions and rules of court made thereunder are peculiar to the Supreme Court: they do not extend to other superior courts of record. Therefore the provisions of S. 33(3) of the Constitution are fundamental and must be adhered to strictly by all courts
 F of record subject to the exception explained above in respect of certain applications before the Supreme Court.

The Supreme Court itself is confined to such applications as enumerated in Order 6 rule 2(1), (2), (3) and (4) and also order 6 r 3(1), (2) and (3) to decide on documents filed, and in other cases apart from such applications, it must hear matters and give judgments and rulings upon them in
 G the open court or in public.

Consequence of not abiding by S. 33 (3) of Constitution of Nigeria 1979; trial de - novo.

H I regret that this issue has vitiated the trial through the error of the trial Judge and misapplication of the error by the Court of Appeal. On this issue alone of giving judgment not in public as demanded in section 33(3) under Fundamental Rights in Chapter IV of 1979 Constitution, but in chambers, the judgment is a nullity and vitiates the entire proceedings. I therefore allow this appeal and order a retrial before another Judge of Lagos State

High Court.

I award N1,000.00 as costs in this court. N500.00 as costs in the Court of Appeal and costs awarded in the trial court if already paid to be refunded to the appellant and an equal sum is awarded as costs in that court to the appellant against the respondent.

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KUTIGI JSC

The appellant in his brief submitted 5 (five) issues for determination which can be classified as follows-

Issues (1) & (2) - procedural issues

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Issues (3) & (4) - substantive issue of liability

Issue (5) - quantum of damages .

At the hearing of the appeal we decided to hear the parties on the procedural issues only which read as follows -

"1. Whether the Court of Appeal was right in holding that a judgment of a High Court delivered in Chambers for no explicable reasons and which is contrary to the express provisions of the rules of court and the Constitution of the Federal Republic of Nigeria is regular and valid in law.

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2. Whether the Court of Appeal was right in law in implying by its judgment that the dictum of Obaseki J.S.C. (as he then was) in Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt.50) 356, 377 overruled the

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Supreme Court decision in the case of Oviasu v. Oviasu (1973) 11 S.C. 315."

According to the appellant the procedural issue arose from the fact which is a common ground, that the learned trial judge who conducted the entire proceedings up to the time of judgment in public and in open court, for no explicable reason decided to give his judgment in Chambers in the presence of counsel. The Court of Appeal dealing with the issue said on page 371 (per Ayoola J.C.A. who read the lead judgment) thus -

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"Now, when in this case the learned trial judge sat in Chambers to deliver his judgment was he sitting in a place where the public are excluded, G or put in another way, was he sitting in a place where the public have a right to be present? But for the fact that I am trammelled by authority. I would have felt grave hesitation in holding that a sitting held in the judges chambers is one held in public. The trammeling authority is Oyeyipo v. Oyinloye (1987)1 NWLR (Pt.50) 356, 377 where Obaseki J.S.C. said"-

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"When a Court sits in Chambers all that it means is that the Judges of the court are transacting the business of the court in Chambers instead of open court (See Hartmont v. Foster (1881) 8 QBD 82, 84 . It does not

mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers. (See proviso to section 33(13) of the Constitution of the Federal Republic of Nigeria 1979. A Judge may sit in chambers without excluding members of the public. It is therefore not unconstitutional to sit in Chambers.”

.....it would appear from the case of *Oyeyipo v. Oyinloye (supra)* that such exclusion cannot be inferred merely from the fact that the proceedings were held in the Judges Chambers.....I am constrained to agree with counsel for the respondent that the proceedings are not vitiated by reason of the fact that judgment was delivered in Chambers.”

I think the Court of Appeal was unnecessarily trammelled by the case of *Oyeyipo v. Oyinloye (supra)*. That case was concerned with an application asking this court to set aside its own decision dismissing applicant's appeal in Chambers for want of prosecution under appropriate rules of court validly made by the Chief Justice of Nigeria vide section 216 of the Constitution of 1979. So the decision in *Oyeyipo v. Oyinloye (supra)* must be confined and limited to the appropriate provisions of the Supreme Court's Rules relating to matters specified in those rules which can be dealt with in Chambers. In the instant case the Lagos State High Court (Civil Procedure) Rules provides under Order

36 Rule 1 as follows-

“1. The judge shall, at or after trial, deliver judgment in open court and shall direct judgment to be entered as he shall think fit. No motion for judgment shall be necessary in order to obtain such judgment.”

Section 33 sub-sections (1) & (3) of the 1979 Constitution also provided thus -

“33(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(3) The proceedings of a court or the proceedings of any tribunal relating to matters mentioned in sub-section (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.”

These enactments clearly show that the learned trial Judge should have sat in public and in open court to deliver his judgment.

Order 43 rules 1 - 13 of the Lagos State High Court Civil Proce-

dures Rules, 1972 also set out a list of businesses which a Judge may perform or transact in Chambers. The list clearly and quite rightly too omits delivery of judgment. If it had included it, that would clearly be unconstitutional as shown above.

The case of *Oviasu v. Oviasu* (supra) was about a Petition for dissolution of marriage. On appeal this court held that the learned trial Judge should not have decided on his own, to hear the petition in Chambers (which did not contain such matters which by law ought to be heard “in camera” in a court room) because a Judge’s Chamber is not a court hall to which the public would normally have access, and that any act of secrecy, however desirable it might seem, detracts from the aura of impartiality, independence, publicity and unqualified respect which enshrouds *“justice given without fear or favour”*. The court also held that the irregularity occasioned thereby was fundamental. It therefore allowed the appeal and ordered a retrial de-novo.

From the foregoing it would by now be clear that *Oviasu v. Oviasu* (supra) is still the law and it has not been overruled by the decision in *Oyeyipo v. Oyinloye* (supra). The Court of Appeal was clearly in error for holding otherwise.

So as it was in *Oviasu v. Oviasu*, it will also be in this appeal. The irregularity occasioned by the delivering of judgment in Chambers contrary to clear and unambiguous provision of section 33(3) of the 1979 Constitution above is very fundamental and vitiates the whole trial.

It is for these reasons and others contained in the lead judgment of my learned brother Belgore J.S.C (which I read before now), that I allow the appeal. I also set aside the judgments of the lower courts and order a retrial de-novo before another Judge of the Lagos High Court. I endorse the order for costs.

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother, Belgore J.S.C. I agree with him that there is merit in issues 1 & 2 formulated in the appellant’s Brief and that consequently this appeal should be allowed. Because of this conclusion there is no need to go into the other issues in view of the order of retrial that is being now made I, however, wish to say a few words of my own on the issues of general importance raised in the submissions of learned counsel.

The only main issue that arises for determination in this judgment is whether or not the proceedings in the trial High Court are a nullity the

judgment of that court having been delivered in Chambers rather than in open court. Arguments on the other issues raised in the appeal to this court are to wait the decision on the issue under consideration.

The plaintiff who is respondent in this appeal, had sued the defendant claiming-

B “(a) *Special damages in the sum of N88,074.55.*

Particulars of Special Damages

C *The sum of N88,074.55 being the difference between the Naira equivalent of the sum of 37,985 sterling as at 24/11/82 (N10,140.95) for which the defendant opened letter of Credit Numbers 78382, 78482 and 78582 but negligently failed to obtain cover from the Central Bank and the sum of N98,215.50 being the present Naira equivalent (calculated at the ruling exchange rate at the time of filing this claim) of the said sum of 37,985 sterling which sum the plaintiffs now liable to pay as a result of the defendant’s negligence.*

D *(b) The difference between the sum claimed above and any future increase in plaintiffs liability as aforesaid occasioned by any further exchange rate fluctuations up to the time the whole amount claimed be fully paid and same forwarded to the plaintiff’s suppliers - Oakland Elevators Limited of London.*

E *(c) General Damages in the sum of Five Million Naira (N5 Million) for the loss of Goodwill, Loss of Business, Unwarranted Delays and Embarrassment occasioned by the aforementioned negligence of the defendant.”*

F Pleadings having been filed, exchanged and delivered and subsequently amended the action proceeded to trial. At the conclusion of the trial and after addresses by learned counsel for the parties, judgment was reserved. On 29th August, 1991, the day fixed for judgment, the parties and their counsel were in court when they were invited into the chambers of the learned trial judge where the latter delivered his judgment finding in favour of the plaintiff in terms of his claim.

G Being dissatisfied with the said judgment the defendant appealed to the Court of Appeal on a number of grounds of appeal one of which read:

H *“1. The learned trial Judge erred in law and acted without jurisdiction in delivering judgment in this matter in chambers in disregard of the express provision of Order 36 rule (1) of High Court of Lagos rules and section 33(3) of the Constitution of the Federal Republic of Nigeria thereby rendering the trial a nullity.”*

After briefs had been filed and exchanged the court below heard arguments on all the issues raised before it. In a considered judgment it dismissed defendant’s appeal but reduced the award of general damages

from N5 million to N500,000.00. On the issue raised in ground (1) above, Ayoola, J .C.A. in his judgment with which the other justices agreed, had this to say:

“The procedural question arose from the fact, which is common ground, that the learned trial judge having conducted the proceedings in open court delivered judgment in his chambers, but in the presence of the plaintiff as the record shows and of counsel of both parties. On that issue the submission made by counsel on behalf of the appellant is that the action of the trial Judge in giving his judgment in the case in chambers vitiated the proceedings. Reliance was placed on Order 36 of the Rules of the High Court which enjoins the judge to deliver judgment in open court and section 33(3) of the Constitution (1979) which stipulated that the proceeding of a court shall be held in public. Oviasu v. Oviasu (1973) 11 S.C. 315 was also cited in support of the contention. Counsel for the respondent’s reply to this argument is two pronged: first, that by participating in the proceedings in chambers without complaint, the appellant had waived the irregularity, and, secondly, that there was nothing intrinsically illegal or unconstitutional in the delivery of judgment in chambers and the appellant has not alleged that a miscarriage of justice has been occasioned.

Order 36 of the Lagos State High Court (Civil Procedure) Rules provides as follows:

‘The Judge shall, at or after trial, deliver judgment in open court.

.....
Section 33(3) of the Constitution of the Federal Republic (1979) provides that:

‘The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in Subsection (i) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.’

These enactments lend high statutory force to what had already been a fundamental characteristic of administration of justice in our legal system which accepts that publicity is generally, barring well defined exceptions, of the essence of dispensation of justice. In Scott, v. Scott (1912) P. 241, 260, Vaughan Williams L. J. described the rule as a ‘precious characteristic of English Law’ while at page 287 Farwell L. J. said’..... the open and public hearing and determination of suitors’ rightsand complaints is the salt of the constitution.....” When the principle of publicity of court hearing came for consideration in the case of Oviasu v. Oviasu (1973) 11 S.C. 315 ; the supreme Court relying on the Privy Council decision in McPherson v. Mcpherson (1936) A.C. 177 regarded the decision of the trial Judge to hear proceedings in chambers in that case an irregularity of such

a fundamental nature as to vitiate the proceedings, and set aside the judgment and orders made by the trial Judge, it is thus undoubted, both at common law and by statute, that to deliver judgment in circumstances that publicity is denied, except the case falls within clearly stated exception, is a fundamental irregularity sufficient to vitiate the proceedings....

B *The question that arise in this case, however, are whether such irregularity can be waived, and whether the mere sitting by the Judge in Chambers to deliver a judgment is per se a negation of publicity requirement.*

The right to be present at public trial of cases which publicity entails and not to be excluded therefrom is a right which belongs to the public. The right derives from public interest in due and even handed administration of justice which secrecy can only impair. Public confidence in the administration of justice can be weakened by secrecy. Even handed justice is best done when it is done in the public gaze. The right to publicity is thus not a right which belongs only to the parties and which they can waive by consent or conduct. In Nagle Gillman v. Christopher (1876-77) 4 Ch.D 173 Jesse M.R. (p.174) considered that:

'The High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of courts or where a public trial would defeat the object of the action.....'

E *In the instant case, although the appellant's counsel was present when judgment was delivered in the judge's chambers, such fact by itself alone, cannot regularise the proceeding if it is otherwise irregular.*

Whether a Judge sitting in chambers to conduct proceedings which should be conducted in open court is sitting in public or in camera seems in the final analysis to be a question of fact. A trial in camera is one in which the public has been expressly excluded. Where there is no express exclusion and the trial was not described as in camera, whether inference of implied exclusion can be drawn depends on the circumstances.

In McPherson v. McPherson (1936) AC 177 such implied exclusion though not intended resulted from the word 'private' on the outer door of the room where proceedings were held. In regard to this, the Judicial Committee of the Privy Council said at page 200:

'But, even although it emerges in the last analysis that their actual exclusion resulted only from that word 'private' on the outer door, the learned judge on this occasion, albeit unconsciously, was.....denying his court to the public in breach of their right to be present.....'

The words 'open court' do not include a court where the public are (1917) 2 KB 254, 271). Now, when in the case the learned judge sat in chambers to deliver his judgment, was he sitting in a place where the public

are excluded? Or put in another way,

was he sitting in a place where the public have a right to be present? But for the fact that I am trammled by authority, I would have felt grave hesitation in holding that a sitting held in the Judge's chambers is one held in public. The trammeling authority is Oyeyipo v. Orinloye said:-

'When the court sits in chambers, all that it means is that the judges of the court are transacting the business of the court in chambers instead of open court (see Hartmont v. Foster (1881) 8 QBD 82, 84 . It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers. See proviso to section 33(13) of the Constitution of the Federal Republic of Nigeria 1979

A Judge may sit in chambers without excluding members of the public. It is therefore not unconstitutional to sit in chambers.'

The determinant factor is the exclusion of the public and that is a matter of fact. It therefore behoves a party who contends that proceedings are not held in public to show that the public have been excluded. It would appear from the case of Oyeyipo v. Oyinloye (supra) that such exclusion cannot be inferred merely from the fact that the proceedings were held in the judge's chambers. For these reasons, and, I must confess, not without some hesitation. I am constrained to agree with counsel for the respondent that the proceedings are not vitiated by reasons of the fact that judgment was delivered in chambers."

Sulu-Gambari J.C.A. in his judgment also observed:

"Delivering a judgment in chambers (not closed to the public) by the judge after the trial proceedings had been conducted in open court should not mean that the trial was conducted not in open court and, in my respectful view, should not be held to have vitiated the proceedings ...

The defendant was again unhappy with the judgment and further appealed to this court. The plaintiff also cross-appealed on the reduction, by the court below, of the trial court's award of damages in his favour. One of the defendant's grounds of appeal reads:

"1. The Court of Appeal erred in law in holding that the part of the proceedings (the judgment) in the chambers of the Judge was in public when on the admitted deposition before the court there is no evidence that the public was invited thereby contravening order 36 rule 14 of the High Court of Lagos, Rule and section 33 of the Constitution of the Federal Republic."

Briefs were filed and exchanged. The following issues are identi-

fied in the appellant's brief as calling for determination in the main appeal, to wit:

B “1. *Whether the Court of Appeal was right in holding that a judgment of a High Court delivered in chambers for no explicable reason and which is contrary to the express provisions of the rules of court and the Constitution of the Federal Republic of Nigeria is regular and valid in law.*

2. *Whether the Court of Appeal was right in law in implying by its judgment that the dictum of Obaseki J.S.C. (as he then was) in Oyeypio v. Oyinloye (1987) 1 NWLR (Pt.50) 356, 377 overruled the Supreme Court decision in the case of Oviasu v. Oviasu (1973) 11 S.C. 315,*

C 3. *Whether from the totality of the evidence adduced in trial, the Court of Appeal was right in affirming that the appellant was negligent.*

4. *Whether from the totality of the evidence, the lower courts mis-directed themselves in fact by not holding that the respondent was contributorily negligent to the inability of the appellant to obtain exchange cover under the Central Bank financing scheme.*

D 5. *Whether the award of damages by the Court of Appeal was not excessive and unreasonable in the circumstances”*

The plaintiff had set out four issues in his brief, Issue 1 in plaintiff's brief is the same as Issues 1 and 2 put together in the defendant's brief while the other three issues in both briefs are identical.

E In respect of the cross-appeal, the plaintiff who is the cross-appellant set out two issues in his brief on the cross appeal, that is to say:

F “1. *Whether or not the appellant's proved loss of goodwill and loss of business were a necessary and immediate consequence(s) of the respondent's negligence in failing to diligently process the appellant's letters of credit applications timeously.*

2. *Whether or not it was proper for the Court of Appeal to reduce the amount of general damages awarded to the appellant (by the trial court) from N5million to N500,000.00 when there was nothing before the court to justify such reduction.”*

G The above two issues are consolidated as one issue in the defendant/cross respondent's brief and reads as follows:

H “*Whether the cross appellant was entitled to general damages when he had not pleaded any specific loss of business nor adduced any credible evidence to substantiate any loss of goodwill, contracts at Abuja etc? and whether the amount awarded was not excessive in the circumstance?”*

In view of the importance of the question raised in issues 1 and 2 in the defendant's brief (which is issue 1 in the plaintiff's brief) and the effect it would have on the whole proceedings, if it were answered in defendant's favour, we decided to have the question resolved first and con-

sequently called on learned counsel for the parties to address only on it.

After recalling the event that led to the delivery of the judgment of the trial court in chambers, Mr. Akinrele learned counsel for the defendant/appellant submits that the action of the trial Judge violated the provisions of section 3 (3) of the Constitution of the Federal Republic of Nigeria 1979 (hereinafter is referred to as the 1979 Constitution) and the cardinal rule governing the trial of action in the High Court of Lagos State as contained in Order 36 rule I of the Lagos State High Court Civil Procedure Rules, 1972. He submits that both provisions are mandatory and not discretionary and the High Court is obliged to comply with them. Learned counsel observed that the court below, per Ayoola J.C.A., would have resolved the question under consideration in favour of the defendant but for the fact that the court felt it was 'trammelled' by a decision of this court in *Oyeyipo v. Oyinloye* (1981) 1 NWLR (Pt.50) 306, 377. He submits, with respect, that the reasoning of the court below was untenable as the passage relied on was an obiter in the case which is not binding on the court as distinct from the ratio decidendi of the case which would be binding.

Learned counsel submits that on the authority of *Oviasu v. Oviasu* (1973) 11 S.C 315; (1973) 8 NSCC 502. The court below ought to resolve the question in favour of the defendant and declare the proceedings before the trial court a nullity. Learned counsel submits, in oral argument, that - the word "public" as used in section 33(3) of the 1979 Constitution means "a place where the general public has a right to enter as of right."

In the appellant's reply brief it is submitted that the delivery of judgment is part of the hearing and any procedure adopted by the court during the hearing must be in consonance with the imperative provisions of section 33(1) and (3) of the 1979 Constitution. It is further submitted that on the authority of *Ariori v. Elemo* (1983) All NLR 1 (1983) 1 SCNLR 1, the right to fair hearing is not a personal right qua personal right but a personal right involving public policy and/or public interest.

Learned counsel, in the Reply Brief, argues that constitutional right to fair hearing includes a public right which cannot be compromised, waived or lost by consent. It is argued in conclusion that -

"1.2 As regards the respondent's submission that rules of substantial justice take precedence over technical rules: the appellant concurs but submits that an imperative constitutional provisions aimed at protecting the integrity of the judicial process and public faith in the due process of law cannot be equated with a mere technical procedure."

1.3 A breach of a fundamental provision of the constitution cannot be dismissed as an argument premised on a 'technicality'."

Learned counsel for the plaintiff, Mr. Fagbohungebe, gave a summary of

the facts leading to the delivery of judgment in chambers in these words:

In resolving the issue of venue of delivering the judgment, there are two facts which are disputed and uncontroverted:

(a) The entire proceedings at the trial court (comprising all interlocutory applications heard, trial and addresses by counsel) was done in open court and only the judgment was delivered in chambers.

(b) Counsel for both parties attended the delivery of the judgment in chambers and participated in same without any complaint or objection whatsoever. In fact counsel for the appellant addressed the trial Judge on the issues of costs (see page 27 of the record)

He then argues that -

"4.01 It would certainly be inequitable to permit the appellant who participated without protest or complaint in the delivery of judgment in chambers to now turn round to challenge the said judgment that it be set aside on a ground which should have been raised before the delivery of judgment by the trial Judge, but which was never so raised.

4.02 The appellant must be taken to have waived the right to complain against the irregularities since no complaint was raised before the trial judge when there was ample opportunity to do so.

4.04 The appellant could not have properly raised the issue before the Court of Appeal without obtaining prior leave of the Court of Appeal to do so particularly since the issue was not raised before the trial Judge when the opportunity to do so existed. It is trite that a litigant cannot approbate and reprobate at the same time."

After referring to passages in, *Adegoke Motors v. Adesanya* (1989) 3 NWLR (Pt.99) 250, 274 & 292, learned counsel submits that the defendant having failed to seize the moment to complain at the High Court must be deemed to have waived that right and can no longer be heard to complain. It is submitted that there is nothing intrinsically illegal or unconstitutional in the delivery of judgment in chambers neither has the appellant alleged any miscarriage of justice occasioned thereby. Learned counsel relies on a passage, per Obaseki J.S.C. in *Oyeyipo v. Oyinloye* (supra) and submits:

"4.09 In the absence of any proved allegation of prejudice or miscarriage of justice occasioned to the appellant by the delivery of judgment in chambers, the respondent submits that the appellant's complaint in that regard is totally unfounded.

4.10. The Honourable Court has in recent years and in numerous decisions thereof stated emphatically that Nigerian Courts should strive to do substantial justice in cases that come before them as opposed to technical justice, Laws are made for men and not men for laws,"

Mr. Fagbohunge further submits that Oviasu v. Oviasu (supra) is inapplicable to the facts in the matter in that in Oviasu the entire trial therein was conducted in chambers while in the present case only the judgment was delivered in chambers whilst trial was conducted in open court. Learned counsel finally submits that delivery of judgment in chambers “*did not and cannot vitiate or invalidate the judgment as the judgment would have been the same whether read in open court or in chambers.*” B

I have given very careful consideration to the submissions of learned counsel and have read the various authorities to which our attention has been drawn both in the briefs and in oral arguments. It is not disputed-

(a) that the trial of the suit, the subject matter of this appeal was conducted in open court; C

(b) that the judgment was, at the instance of the learned trial Judge and in the presence of learned counsel for the parties, delivered in chambers on 29th August 1991.

Before I proceed further with this judgment let me at this stage set out the statutory provisions relevant to this case. Section 33. D

“(1) *In the determination of his civil rights and obligations, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal.....*

(3) *The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection 1 of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.*” (Italic is mine) E

Order 36 rule 1. High Court Civil Procedure Rules of Lagos State
“*The judge shall, at or after trial, deliver judgment in open court.*” (Italics is mine) F

It is not seriously disputed by the plaintiff that the learned trial Judge, by his delivery of his judgment in his chambers, breached the provisions of section 33(3) and order 36 rule 1. Defendant, relying on Oviasu v. Oviasu (supra) contends that this breach renders the whole proceedings before him a nullity. The plaintiff contends to the contrary. He relies on Oyeyipo v. Oyiloye (supra) and says that the breach is a mere irregularity which, in any event, was waived by the defendant’s counsel being present at the reading of the judgment in chambers and raised no objection. Both Oviasu v. Oviasu and Oyeyipo v. Oyiloye are decisions of this court. The court below, applying to the appeal before them the dictum of Obaseki J.S.C. in Oyeyipo v. Oyiloye as that by which it was bound, reached the conclusion- Ayoola J.C.A, with some hesitation - that the delivery of the judgment in chambers was none-the-less in open court and did not render the proceedings a nullity. Surprisingly enough the learned justices of the court below did not G H

adhere to the more direct authority of *Oviasu v. Oviasu* .

In *Oviasu v. Oviasu & Anor.* the appellant, as petitioner, brought a petition for dissolution of the marriage between herself and the 1st respondent, on grounds of adultery, cruelty and desertion. The 1st respondent cross-petitioned for dissolution on ground of desertion. The learned trial Judge heard evidence in chambers. The marriage was dissolved on the 1st respondent's cross-petition. The petitioner appealed to the Supreme Court. This court held, among other things, that the petition and answer did not contain such matters which by law ought to be heard "*in camera*" in a court action and that any act of secrecy, however desirable it might seem, detracts from the aura of impartiality, independence, publicity and unqualified respect which enshrouds "*justice given without fear or favour.*" It was further held that the irregularity occasioned by the hearing of evidence in chambers is fundamental, *Sowemimo, J.S.C.* (as he then was) delivering the judgment of this court observed at pages 506-507 of the latter Report (pages 323-324 of the first report):

"*The hearing of this matrimonial case took place in the Judge's Chambers. Neither the counsel nor the parties requested for the hearing of the divorce proceedings 'in camera.' A Judge's Chamber is not a court hall to which the public will normally have any right of access. The petition and answer did not contain such matters, which by law, ought to be heard' in camera' in a court room. But surely the law is no respecter of persons. Divorce proceedings, no doubt, presents a veritable ground for scandal peddlars. There are, however, legal processes by which such situations are controlled and the persons concerned protected. It is of the essence of justice that it should not only be done but that it should be seen to be actually done. Any act of secrecy, however desirable it might seem, detract from the aura of impartiality, independence, publicity and unqualified respect which enshrouds 'justice given without fear or favour.' Its acceptance by the public at large, and the confidence it demands depend on these aura being strictly adhered to. These attributes have been considered so fundamental that they are enshrined in our constitution.*"

(Italics is mine)

After setting out the provisions of section 22(1) and (3)(a) of the Constitution of the Federation, 1963 (which are *Verbis v. verbissima* with section 33(1) and (3) of the 1979 Constitution except for the proviso to subsection (3) of section 22 which is omitted in section 33(3) and which, in any event, is irrelevant to the present proceedings) and of Order 25 rule 3 of the High Court (Civil Procedure) Rules of Western Region of Nigeria applicable to the case, and after referring to *McPherson v. McPherson* (1936) A.C. 177 which I shall consider later, the learned justice of the Supreme Court concluded at

page 508 (Pp. 328-329 of the first Report) thus:-

"The hearing of this divorce case in the chambers of the learned trial Judge was not made a specific issue in the grounds of appeal filed before us, but during the arguments however, our attention was drawn to it by learned counsel for appellant as been (sic) irregular. As the counsel for the respondent did not apply for the hearing of the case in chambers there was nothing he could say. On the record it seems that the decision to take; the case in chambers was the decision of the learned trial Judge himself. We regard the irregularity as being, fundamental; which touches the legality (the whole proceedings including the judgment and the incidental orders made thereafter. We then hold all that happened in the judge's chambers did not constitute a regular hearing of an action in a court.

In view of the conclusions we have reached, we do not think any useful purpose will be served in examining the points canvassed before us. The trial held in the chambers of the judge is not in accordance with the law and we shall therefore set aside the judgment and orders made by the trial Judge."

(Italics are mine)

In McPherson v. McPherson, which this court referred to in Oviasu v. Oviasu an undefended divorce action was tried in the Judge's law library which was not one of the regular courts in the court House; a decree nisi was granted. After the decree had been made absolute and the petitioner had remarried, the respondent in the divorce action brought a fresh action seeking to have the decrees nisi and absolute rescinded and set aside on the ground (inter alia) that the trial in the Judge's law library had not been a trial in open court according to law and that the resultant decrees nisi and absolute were null and void. The validity of the decrees was taken up as a preliminary issue at the trial and the issue was dismissed. On appeal to the appellate Division of the Supreme Court of Alberta, Canada, the decision of the trial Judge was affirmed. The plaintiff appealed further to the Privy Council. The Board, per Lord Blanesburgh, after quoting the dictum of Lord Halsbury in Scott v. Scoff (1913) AC. 417, 440 that

"Every court of justice is open to every subject of the king" Went on to observe at P:200:"

But publicity is the authentic hall-mark of judicial as distinct from administrative procedure

The actual.....be done."

Their Lordships of the Privy Council concluded that the decrees being challenged were voidable only, and not void, and that the time for avoiding them has long gone by, They indirectly applied the principle in Dines v.

Proprietors of the Grand Junction Canal, 3 HLC 759; (1852) 10 E.R. 301 where it was held that an order made by the Lord Chancellor who was personally interested in the result was, while voidable, not void and, challenged on appeal, it was set aside by the House of Lords.

So far for *Oviasu v. Oviasu*. I now turn to consider *Oyeyipo v. Oyinyoye*. The facts run thus: The appellants lodged an appeal against the decision of the Court of Appeal delivered on 11th June 1985 on that same day. The record of appeal was duly compiled and the appellants received their copy on 2nd May, 1986. By 11th July, 1986, 'when the time for filing appellants brief ran out, they had not filed any brief. They also did not apply for extension of time to file brief since they had only 10 weeks to file their brief. The respondent filed an application to dismiss the appeal for want of prosecution on 27th October, 1986. On 12th November, 1986, the Supreme Court sat in chambers, considered the respondent's application and the court being satisfied that the appellants have failed to file their brief dismissed the appeal for want of prosecution. The order of dismissal was then drawn up, sealed and signed. The appellants then filed an application to set aside this decision as being contrary to section 33(1) and (13) of the 1979 Constitution on the grounds that:

The appellant's appeal was dismissed in Chambers instead of in open court as provided under section 33(13) of the 1979 Constitution"

This court, unanimously dismissing the application, held, inter alia, that the power of the Supreme Court to sit and determine applications in Chambers is derived under the Supreme Court Rules 1985 made pursuant to section 216 of the 1979 Constitution and was thus not inconsistent with section 33(13) of the Constitution. In his lead ruling. Karibi-Whyte J.S.C. observed at pages 369-370 of the Report:

"I think Chief Afe Babalola was right in his contention that the provisions of order 6 rule 9 was validly made having been made by virtue of powers vested in the Chief Justice of Nigeria by section 216 of the Constitution 1979. The power of the Chief Justice of Nigeria to make rules to regulate practice and procedure in the Supreme Court is undoubted. The contention of Chief Williams S.A.N. is that the only power the Chief Justice can exercise is with respect to sitting in chambers in respect of matters contained in S. 213(4) of the Constitution 1979. This is in respect of applications for leave to appeal. This contention seems to me to have ignored other provisions of the Constitution. For instance section 213(4) provides that the Supreme Court may dispose of any application for leave to appeal from any decision of the Federal Court of Appeal in respect of any civil or criminal proceedings in which leave to appeal is necessary after consider-

ation of the record of proceedings if the Supreme Court is of opinion that the interest of justice do not require an oral hearing of the application. It is conceded that section 213(4) of the Constitution refers specifically to application for leave in appeal. But the applicant did not apply for extension of time within which to file his brief of arguments. It was obvious that applicant having failed to do the things required of him to come before the court falls within the provisions of order 6 r. 3(2) under which the court was empowered by its rules to hear the application in Chambers.

I think the regulation of the exercise of the right of appeal and of the practice and procedure thereto, enables the Chief Justice to determine when there will be hearing and the form the hearing should take. Hence it has been provided that a party who has not filed his brief of argument is only entitled to oral hearing by leave of this court - see Order 6 r. 5(5). Oral arguments is only allowed at the hearing where brief of argument has been filed to emphasize and clarify the written argument. Accordingly, as in this case, where no written brief had been filed and there was no leave of the court to dispense with the requirement, appellant has not brought himself within the scope of being heard by the court. Concisely, stated, applicant has not satisfied the conditions necessary for the hearing of his appeal in court. He was in fact not entitled to a hearing, oral or written. The provisions of section 3 (13) relied upon by the appellant is applicable to proceedings in court for the determination of rights. Applicant has not submitted his case for consideration as he was required by the rules of this court to do. There is clearly no inconsistency between the power here exercised and the provisions of s.33(1):'

Obaseki, J.S.C. in his judgment, observed at Pp. 375-376 thus:

"On the second question for determination (that is, was it competent for the Supreme Court to sit in Chambers or other wise than in public for the hearing and determination of the respondent's motion aforesaid), learned counsel for the respondent submitted that the proper approach to the interpretation of the constitutional power of the court is to read together section 33(1), (2), (3), (4) and (13); section 213(6) and section 216 of the Constitution of the Federal Republic of Nigeria.

It appears to me that the emphasis of Chief Williams, SAN, learned counsel for the appellants/applicants is on failure of the court to notify the date of the hearing of the motion to dismiss the appeal. He emphasised that if the date of hearing had been notified to the appellant, the notification would have spurred them up to take the necessary steps to be heard. I agree with Chief Afe Babalola that the constitution of the Federal Republic of Nigeria should be read as a whole so as to be able to give it the correct and proper construction and interpretation. It is a wrong approach to

interpret each section in isolation.

The Constitution by section 213(2) gives a right of appeal to the Supreme Court in certain cases as of right. By section 213(3) of the Constitution, the right of appeal is conferred only when leave of the Court of Appeal or the Supreme Court is obtained to appeal to the Supreme Court.

B Sub-section 4 of section 213 gives power to the Supreme Court to dispose of an application for leave to appeal from any decision of the Court of Appeal without an oral hearing of the application after consideration of the record of proceedings. Subsection 6 of section 213 is very important. This subsection gives direction of how the right of appeal to the Supreme Court
C from decisions of the Court of Appeal is to be exercised. It reads:

Any right of appeal to the Supreme Court from the decisions of the Court of Appeal shall, subject to section 216 be exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure.'

D In other words, the Supreme Court Act and the Supreme Court Rules prescribe the mode of exercise of the right.

Section 216 of the Constitution gives power to the Chief Justice of Nigeria to make rules regulating the practice and procedure of the Supreme Court. The constitutional provision that an appellant shall follow the Supreme
E Court Act (which is deemed to be an Act of the National Assembly) and the Supreme Court Rules (Rules made by the Chief Justice of Nigeria) in the exercise of the right of appeal given him by the Constitution prescribes and qualifies the mode of compliance with section 33 of the Constitution on the issue of fair hearing in the Supreme Court.

F The rules of court, i.e. Supreme Court Rules 1985 in its format and provisions set out the mode of achieving fair hearing. Basically, the rules give opportunity to both an appellant and respondent of setting out their arguments in the appeal in writing instead of putting them forward orally for the consideration of the court. It does not need to be an oral
G hearing to constitute a hearing by a court.

The application for leave to appeal receives a hearing under section 213(4) when it is considered on the written briefs including the record of proceedings. It is no less fair because it is considered on the written briefs and record of proceedings without an oral hearing.

H Similarly, the consideration of an application for dismissal for want of prosecution is no less fair because it is granted after considering the record of proceedings. The service of the record of proceedings on the appellant is notice to the appellants that they should set down their argument

in the appeal in writing. The service of the notice of motion is notice to the appellants that not having argued their appeal in writing and utilised the opportunity of being heard, albeit in writing. the appeal will be dismissed unless they take steps to save it. The failure to notify the date when the court will sit to dismiss it is of no constitutional importance. Since the rules made in pursuance of the power given by the Constitution prescribed the sanction for failure to file brief and since the Constitution decrees compliance with the rules, the action of the court sitting in Chambers to consider and dispose of the application by applying the sanction is constitutional.” (words in the first brackets and Italics are mine) B

Concluding his judgment, the learned Justice of the Supreme Court C observed at page 377:

“When the court sits in Chambers all that it means is that the judges of the court are transacting the business of the court in Chambers instead of open court [see Hartmont v. Foster (1881) 8QBD 82, 841 . It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers. See proviso to section 33(13) of the Constitution of the Federal Republic of Nigeria 1979. D

A Judge may sit in Chambers without excluding members of the public. It is therefore, not unconstitutional to sit in Chambers. E

The objection of the appellants/applicants that it is unconstitutional for this court to sit in Chambers to consider the application is without substance.”.

This is the passage that impelled the court below to decide as it did. And this is the passage learned counsel for the defendant submits, is F obiter. I shall come to it later.

UWAIS, J.S.C. in his own judgment observed as follows on page 378:

“Now before there can be (exercise of) any right of appeal a party must, by virtue of the provisions of section 213 subsection (6) of the Constitution, quoted above, comply with the requirements of the Supreme Court G Rules, 1985. The applicants failed to file their brief of argument within time, and the respondent applied to this court in accordance with the provisions of Order 6 rule 9(1) for the applicants’ appeal to be dismissed for want of prosecution and this was done by the court. Could the applicant complain that the court had acted in violation of the Constitution, in particular section 33(1) and (13) thereof? It is clear that the court’s action was H governed by the provisions of the 1985 Rules, which were made in accordance with the Constitution. The Rules, have constitutional force because

they derive from the provisions of section 216 of the Constitution.” (words in brackets and italics are mine)

OPUTA, J.S.C.: also observed at pages 383-384:

“*The second ground for complaint is that ‘The making of the said decision otherwise than in open court (i.e. the court sitting in public) is a contravention of sub-section 13 of section 33 of the Constitution of the Federal Republic of Nigeria. The short answer to this ground of complaint is ‘that if the dismissal of an appeal for want of prosecution under Order 6 Rule 9(1) of the Supreme Court Rules is both legally and constitutionally valid under sections 213(6) and 216 of the 1979 Constitution then it will be totally irrelevant whether the dismissal was in open court or in Chambers. For one thing having not filed any brief the defaulting appellants will not be entitled to a hearing either in Open Court or in chambers.’*”

It is crystal clear from the judgments delivered in the case that one of the rationes decidendi in the case (and the one relevant to the present proceedings) is that the right of this court to sit in Chambers as provided in the Supreme Court Rules, 1985 derives its validity from sections 213(6) and 216 of the 1979 Constitution which give the Rules constitutional validity. It was not an issue in the case, as it is in the case on hand, that whether sitting in Chambers to hear evidence and/or deliver judgment amounts to sitting in “*public*” I as required by section 33(3) and (13) 1 or in “*open court*” (as required by order 36 rule 1 of the Lagos State High Court Civil Procedure Rules). For this reason, therefore. I agree with Mr. Akinrele that the passage in Obaseki J.S.C.’s judgment on which the court below based its decision in an Obiter dictum. In *Oviasu v. Oviasu* (supra) the question was directly in issue and was resolved by this court. It is but fair to mention that that decision was not brought to the notice of this court in *Oyeyipo v. Oyinloye* (supra) because perhaps, it was not necessary. Even going by the dictum of Obaseki J.S.C., it is not disputed that sitting in Chambers is not the same as sitting in open court.

The doctrine of judicial precedent (otherwise called *stare decisis*) requires all subordinate courts to follow decisions of superior courts even where these decisions are obviously wrong having been based upon a false premise; this is the ‘foundation on which the consistency of our judicial decision is based- see: *Ngwo v. Monye* (1970) 1 All NLR 91, 100. It is, however, the principle of law upon which a particular case is decided that is binding. Such a principle is called the *ratio decidendi*. A statement made in passing by a Judge which is not necessary to the determination of the case in hand is not a *ratio decidendi* of the case but an *obiter dictum* and it has no binding effect for the purpose of the doctrine of judicial precedent - see *Ofunne v. Okoye* (1966) 1 ANLR 94. The passage in Obaseki J.S.C. judg-

ment in *Oyeyipo v. Oyinloye* supra) being an obiter dictum is not binding on the court below. What is binding is the clear and unambiguous ratio decidendi in the decision of this court in *Oviasu v. Oviasu* (supra) to the effect that the sitting in Chambers to hear an action is a fundamental irregularity which touches the legality of the whole proceedings including the judgment and the incidental orders made thereunder; it is not the regular hearing of an action in a court. B

Coming back to the case on hand, it is my respectful view that sitting in chambers to deliver judgment is not, on the facts before us, sitting in public or in open court. A judge's Chambers is not one of the regular courtrooms nor is it a place to which the public have right to ingress and egress as of right except on invitation by or with permission of the Judge, C
There is no evidence that such an invitation was issued to the public in this case nor is there evidence that any member of the public attended. The facts before us show that counsel for the parties were already seated in the regular courtroom waiting for the Judge to sit to deliver judgment when they were called into chambers and the judgment was delivered by the learned trial Judge. There is in this case a clear breach of the mandatory provisions of section 33(3) and (13) of the 1979 Constitution and Order 36 rule 1 of the High Court Rules of Lagos State. Why the learned trial Judge resorted to this unusual procedure one would, perhaps, never know. It is, D
however, not of the making of any of the parties or their counsel. Whatever the learned Judge's reason(s) the defect here is fundamental and goes to the root of the entire proceedings. To suggest that because the hearing was in open court, the delivery of judgment 'in chambers is a technicality as no miscarriage of justice was occasioned thereby, is to beg the issue. The delivery of judgment is, in my respectful view, part of the hearing of a cause or F
matter. A breach of a mandatory constitutional provisions is more than a mere technicality; it is fundamental. And it is no argument that there has been no miscarriage of justice. This is borne out by the decisions of this court on section 258(1) of the Constitution before the amendment of 1985 - see: *Ifezue v. Mbadugha* (1984) 1 SCNLR 427; (1984) All NLR 256. G

It is submitted on behalf of the plaintiff that defence counsel having attended the sitting in chambers without protest, the defendant must be taken to have waived his right to have judgment delivered in public or in open court. I regret I cannot accept this submission. The right provided under section 33(3) and (13) and Order 36 rule I is a public right for "every H
court of justice is open to every subject of the King" per Lord Halsbury in *Scott v. Scott* (supra), "The Court must be open to any who may present themselves for admission" per Lord Blanesburgh in *McPherson v. McPherson* (supra). Secret trials, whether civil or criminal, are not normal norms of a

democratic society. True, there are strictly detained exceptions in the proviso to sub-section (13) of section 33 of the Constitutional the right of the public to free access to court proceedings. The case on hand does not come within these exceptions. Being a public right, therefore, the defendant nor any party to a suit cannot waive the right - see: *Ariori v. Elemo* B (1983) 1 All NLR 1; (1983)1 SCNLR 1 .

The conclusion I reach is that by the delivery of the judgment in this case the learned trial Judge has committed a fundamental breach of the provisions of section 33(3) and (13) of the 1979 Constitution and of order 36 rule 1 of the High Court Rules of Lagos State. The breach vitiates C the entire proceedings before him. There must be no room at any stage of the hearing of a cause for cloistered justice.

It is for the foregoing reasons and the other reasons contained in the judgment of my learned brother, Belgore J.S.C. that I allow this appeal, set aside the judgments of the Court below and of the learned trial Judge (Adeniji. J.) and order a retrial of this suit before another Judge of D the High Court of Lagos State.

I abide by the order for costs made by my learned brother Belgore J.S.C.

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MOHAMMED JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, J.S.C. and I agree with him that this appeal should be allowed and retrial ordered before another Judge of Lagos High Court.

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I abide by the orders made in the lead judgment on costs.

ADIO JSC

I have had a preview of the judgment delivered by my learned G brother, Belgore J.S.C., and I agree with the judgment. I too allow the appeal and I abide by the consequential orders including the orders for costs.

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