

SUPREME COURT OF NIGERIA
20TH SEPTEMBER, 1996. SC. 196/1990
CORAM:- I.L. KUTIGI, M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

MISS ADKYINKA ABOSEDE BADEJO
(Suing through her next friend APPLICANT/APPELLANT
Dr. Babafemi Badejo

AND

1. FEDERAL MINISTER OF EDUCATION
2. DIRECTOR-GENERAL FEDERAL RESPONDENTS
MINISTRY OF EDUCATION
3. ATTORNEY GENERAL OF THE FEDERATION

ACTIONS - Subject matter - Whether there are materials before the court
- which it found that the subject matter - Had been overtaken by events

ACTIONS - Striking out - Where the facts reveal that the subject matter
has overtaken - Whether court could strike out the action - Without fur-
ther address from counsel.

CONSTITUTIONAL LAW - Fundamental right - Move to enforce it -
Should not degenerate to using the court - As an instrument of subver-
sion.

CONSTITUTIONAL LAW - Fundamental right - Motion *ex pane* - Not
to be employed in placing fundamental right - Above the country, state
or

FACTS

The applicant/appellant sought admission into any of the Federal eminent Colleges by taking the common entrance examination to that Appellant was not invited for the interview because while she scored (lie cutoff mark for her state was 295. Appellant who felt that her funda- mental right to freedom from discrimination was about to be violated a motion through her next friend before the Lagos High Court seeking leave to enforce her fundamental human right. Appellant sought an in- terim restraining the respondents from conducting the interview which was refused, but leave to enforce her fundamental right was granted. As

at the time of hearing the substantive application, the interview in question been conducted.

The trial court held that the appellant, not having shown she suffered greater injuries more than other successful candidates that were also not invited for the interview, has no locus standi. Her application dismissed. Appellant's appeal to the Court of Appeal was allowed as court "held that she has locus. But the Court of Appeal suo motu struck the appellant's application pending before the High Court on the ground that the subject matter has been overtaken by events. Being dissatisfied, appellant has further appealed to the Supreme Court raising two issues

ISSUES FOR DETERMINATION

"1. Whether the Applicant ought to have been prevented p being able to obtain redress for the breach of her fundamental rights because the Respondents had completed the acts complained of while her application was pending? Should the matter have been struck out summarily by the Court of Appeal?

2. Was there any basis for the Court of Appeal's statement that the matters complained of had been completed? Had the case in fact been overtaken by events?"

HELD (Dismissing the appeal per lead judgment of **KUTIGI JSC**, **OGUNDARE & OGWUEGBU JJSC** dissenting)

Actions - Subject matter

1. It was therefore evident from the record that both sides knew and were aware of the fact that when the motion was actually being argued on 20/10/88, the subject matter of the motion, that is, the holding of interviews the Unity Colleges (Federal Government Colleges) had in fact been held on 8/10/88 throughout the entire Federation of Nigeria. That fact was deposed to in the Respondents' Further Counter Affidavit and clearly admitted by appellant's Counsel in his address in Court on that day as shown above. Chief Ajayi was therefore not correct when he said that there was no material before the Court of Appeal upon which it could have based its conclusion that the matter being complained of had been overtaken by events. There certainly were, as shown above. The only evidence required and available here was the positive admission on both sides that the interviews had been accomplished. (p. 1622 D)

Striking out

2. The question now is - Did the Court of Appeal need any further address from Counsel before it could strike out the suit in the High Court as

it did? I answer in the negative. The Court of Appeal on the facts before it had no choice in the matter. Certainly it the declarations and the orders sought by appellant were all founded and based on the Appellants' eligibility to died for interview on 8/10/88 for admission into Secondary - 1 in Federal Government Colleges in 1989, the court of Appeal must be right, when on 8/1/90, some 15 months after the interviews, it held that the subject matter of the appeal had been overtaken by events and that there was nothing left for the High Court to try and therefore struck out the suit in its entirety. I endorse the action. (p. 1622 G)

Move to enforce fundamental right

3. Again Chief Ajayi's submission that the Court of Appeal on 8/10/90 should have cancelled the whole exercise of the interviews of 8/10/88 which affected the Appellant and ordering fresh interviews is to say the least, preposterous. Admittedly, the interviews were held on 8/10/88 the 1989 Academic Year for Secondary - 1 had ended, and the 1990 Academic Year for secondary - 2 (former Secondary - 1) had already commenced when the Court of Appeal delivered its judgment on 8/1/90. In short, Chief Ajayi wanted the Court of Appeal to put the hands of the clock backwards by 2 Academic Years! The end result? Chaos! repeat - Chaos all over the country! No Court should allow itself to be used as an instrument of subversion under the guise of enforcing a fundamental right. (p. 1623 D)

Fundamental right - Motion ex parte

4. A fundamental right is certainly a right which stands above the ordinary of the land, but I venture to say that no fundamental right should stand above the country, state or the people. I think I can safely say now, and Hunks to the vigorous and educational activities of the National Judicial Institute, that gone are the days of wanton grant of ex-parte injunctions when operation of a bank was halted by a person who had been removed as a director; or when, installation ceremonies of chiefs were halted by those had lost and the disputes dragged on for years; or when the convocation ceremony of a university was halted by two students who had failed their examinations! It is quite gratifying for one to observe in this case that the High Court rightly and quite properly too in my view, refused Appellant's request for an order of interim injunction sought against the Respondents just before the interviews of 8/10/88 were held. That was as it should have been. (p. 1623 G)

NOTABLE POINTS OF INTEREST

KUTIGIJSC

1. The entire country is not to be put at the mercy of an individual

Chief Ajayi ought to have realized that for a court of law to have proceeded in the way he suggested would amount to putting the entire Federal Republic of Nigeria at the mercy of one aggrieved individual. A case of total “brutalization” of the people’s fundamental right when compared with an infringement of the Appellant’s fundamental right? That to me would again amount to a subversion. (p. 1623 C)

C OGUNDARE JSC (Dissenting)

2. Court not to make an order that will negate its judgment

Having gone all that way, it is my respectful view, that the court became functus officio. To hold thereafter that “the matter complained in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out” is a complete negation of its own judgment. The order of striking out cannot be a consequential order to the decision that Applicant had locus standi. For a consequential order is “one giving effect to a judgment or order which it is consequential. (p. 1638 H)

3. Denial of fair hearing

I must observe that the Court below could equally exercise its discretion under section 16 of the Court of Appeal Act and Order 1 rule 20(4) and (5) to itself hear the application of the Applicant. In the exercise of this second option, the court was bound to hear both parties, particularly the Applicant. Failure to do this amounts, in my respectful view, to a denial of the Applicant’s constitutional right to fair hearing before a determination, by the court, of her complaint. Having regard to the nature of the reliefs sought in the High Court by the Applicant, (they are all declaratory reliefs), it is indeed arguable whether the completion of the 1988 interview had put an end to her action. If she had been allowed to present her case and had succeeded, declarations of her fundamental rights would have been decreed. It would be for the Respondent to decide what remedial measures to take. Seen from this angle it could not be said that because action had been completed by the Respondents on the 1988 admission exercise, the Applicant’s action had been overtaken by events. (p. 1639 C)

OGWUEGBU JSC (Dissenting)

4. Whether reliefs have been overtaken by events

Apart from the sixth relief claimed by the applicant, where she prayed the court to direct and compel the respondents to invite her for interview for the purpose of admission into a Federal College which can be said to have been taken by events, the first five declaratory reliefs set out earlier B in this judgment appear not to have been overtaken by any event. The Court of Appeal with great respect, misapprehended the reliefs sought by the applicant in confining them to an invitation for an interview which had taken place before the appeal was heard and the candidates selected. (p. 1648 A) C

5. Whether Court of Appeal can strike out a suit that was not heard on its merit

The powers conferred on the Court of Appeal by section 16 of the Court of Appeal Act, 1976 (now Cap. 75, Laws of the Federation, 1990) and D Order rule 20(5) of the Court of Appeal (Amendment) Rules, 1984 wide as they lay appear, do not empower that court to strike out a suit which was never on its merits. It is empowered to rehear a case on the evidence on the of appeal and make any order which the Court of trial is entitled to in order to determine on the merits the real issue in controversy be the E parties. (p. 1648 E)

MOHAMMED JSC

6. Whether court can take up a matter suo motu

It has been the practice of this court not to exercise its discretion to take F points suo motu unless it thinks in the circumstances of the case that justice demands it. In the case in hand the Court of Appeal acted judiciously and did substantial justice by exercising its discretion suo motu to strike out a stale claim. The appellant was not stopped from filing another action if she deems fit to do so. (p. 1651 E) G

ONU JSC

7. Purpose of an order for striking out

In practice and procedure in civil cases, it has been stated that an order for linking out takes place when the court makes an order to that effect H either for the purpose of amendment or to compel one of the parties to do some act. If a defendant, for instance, fails to comply with an order for discovery he is liable to have his defence struck out and to be placed in the same lion as if he had not defended the action. (p. 1654 D)

8. *Sinking out order - Whether parties must be heard*

In the instance case, it is common ground that the grievance being aired by the Appellant having already been over and done with, a striking out which in my view, extinguishes its life, albeit temporarily is the most appropriate order to make in the circumstances. The court below was therefore justified, in my view, in the order for striking out it made as to hold otherwise in my judgment, is to go into the realm of speculation or indulge in an academic exercise. At all events, there is no known requirement of the law that parties must address the court before it exercises its inherent powers to strike out and I so hold. (p. 1657 E)

C

REPRESENTATION

S. A. Olugbemi for the Applicant/Appellant
Tochukwu Onwugbufor Solicitor-General of the Federation with F.M Molokwu (Mrs.) C. I. Ukpoku and Lilian Dike for the Respondents

D

CASES REFERRED TO

- Ransom-Kuti v. A.G Federation (1985) 2 NJWLR (Pt. 6) 21
Ojukwu v. Military Governor of Lagos State (1986) 1 NWLR 621
Ukejianya v. Uchendu 13 WACA 45
E Kigo (Nig.) Ltd. v. Holnian Bros. (1980) 5-7 SC. 60
Shodeinde v Registered Trustees of Alimadiyya Movement in Islam (1980) N.S.S.C. 163
NNSC v. Abama (1988) 2 NWLR 74
Imonikhe v. Attorney-General Bendel State (3992) 6 NWLR 396, 409 - 410
F Ejownomu v. Edok-Eter Mandillas Ltd (1985) 2 NSCC 1 184
Ebba v. Ogodo (1984) 4 SC. 84 99
Kuti v. Jibowu 6 SC. 147
Odojin v. Agu (1992) 3 NWLR 350 at P. 3-72
Ekpenyong v. Nyong (1975) 12 S.C. 71 at 80
G Jadesimi v. Okotie-Eboh (1986)1 N.W.L.R. (Pt. 16) 264
Agbaje v. Ibru S. F. Limited (1972) 5 S.C. 50
Naya v. Wey (1961)1 ALL NLR 123
Hubbuck & Sons Ltd. v. Wilkinson Heywood & Clark (1899)1 Q.B. 86 at 91

H

STATUTES & RULES REFERRED TO

Fundamental Rights (Enforcement Procedure) rules 1979 0.1 rr 2(3) & 6
Constitution of the Federal Republic of Nigeria 1979 ss. 42(1), 6(6), 103(1), 39(1)

Court of Appeal Act s.16

Court of Appeal Rules 0.1 r. 20(4) & (5), .3 r. 23

Supreme Court Act s. 22

LEAD JUDGMENT BY KUTIGI JSC

The appellant commenced this action through her father and B next friend by a Motion Ex-Parte dated 29th September, 1988 pursuant to Order I Rules 2(3) & 6 of the Fundamental Rights (Enforcement Procedure) Rules, 1979 for the following:-

1. *An order granting leave to the applicant to apply to this Honourable Court for an Order to enforce and secure within Lagos State her fundamental human right to freedom from discrimination as contained in Section 39(1) of the Constitution of the Federal Republic of Nigeria 1979 which right has been breached by the respondents who refused to call her for interview for admission into Junior Secondary-1 for the 1989 Session in Federal Government Colleges merely on the ground of the applicant's D state of origin.*

2. *An interim order restraining the respondents their agents and privies from conducting the interview for admission into Junior Secondary-1 for the 1989 session at Queens College, Yaba Lagos, Federal Government College Ijanikin Lagos and all other designated interview centres throughout E Nigeria on Saturday October 8, 1988 or an order directing a stay of all actions on matters relating to admission of students for the 1989 session at Queens College Yaba Lagos, Federal Government College Ijanikin, Lagos and all other Federal Government Colleges in Nigeria for which the interview mentioned in this application is planned until the final determination F of the application of the applicant for an order enforcing and securing the enforcement within Lagos State of the Applicant's said right to freedom for discrimination on the ground of her state of origin."*

3. *An interlocutory order restraining the 1st, 2nd and 3rd respondents and/or their agents and privies from marking the scripts of candidates G for and/or collating and/or releasing the results of the interview examination held all over Nigeria on 8th October 1988 in respect of the admission of candidates into Junior Secondary School in all Federal Government Colleges in Nigeria including Queens College Lagos by any form of publication issuance and despatch of letters of admission until the final determination H of the applicant's application to enforce and secure the enforcement of her fundamental right to freedom from discrimination as provided by Section 39(1) of the Constitution of the Federal Republic of Nigeria 1979 and to deem the said motion as having been properly so amended."*

(Added by an amendment of 20th October 1988, See page 58 of Record).

In the statement accompanying the Ex-Parte motion also dated 29th September, 1988 the appellant sought for the following reliefs:-

- “(i) A declaration that the applicant is entitled to freedom from discrimination on the basis of her state of origin with regards to the cutoff mark B and marks scored by the applicant and the applicant’s eligibility to be called for interview for admission into Federal Government Colleges.
(ii) A declaration that the decision of the respondent not to call the applicant for interview based on the criterion published by the respondents in both the Daily Times and National Concord Newspapers of September C 16th, 1988 which said criterion was adopted by the Respondents in the selection of candidates for interview for admission to Secondary-1 in Federal Government Colleges in 1989 is discriminatory to the applicant, is faulty, irregular, unconstitutional, null, and void.”

On the 5th day of October, 1988 the High Court granted the D appellant leave to apply for the enforcement of her fundamental right but declined or refused her prayer for an interim order of injunction against the Respondents from conducting interview for admission to Federal Government Colleges on Saturday the 8th day of October, 1988 without first giving the respondents a hearing on the issue.

E Pursuant to the grant of leave above, the substantive Motion on Notice for the enforcement of fundamental right was then filed. The papers include Affidavit Verifying the Fact Relied upon and an Affidavit of Urgency. The respondents on their part filed a Counter Affidavit as well as a Further Counter Affidavit. It is important to note at once that the appellant filed no F reply to any of the Counter Affidavits as I will explain later.

Counsel on both sides addressed the court on 20th October, 1988 and Ruling thereon was reserved till 4th November, 1988. On that day the learned trial judge delivered her ruling dismissing appellant’s application or motion when she concluded on page 76 of the record as follows-

G “It is my considered opinion that the applicant had not been able to establish that she had suffered by the acts of respondents, injuries greater than those suffered by all the other successful candidates who were not called for interview in the Common Entrance Examination.

I am therefore of the firm view that the applicant has no locus H standi to bring this application. See also *Gouriet v. Union Post Office Workers* (1978) A.C. 437.

The application therefore fails and it is hereby dismissed.”

Aggrieved by the above ruling, the appellant appealed to the Court of Appeal, Lagos Judicial Division. Only one issue was submitted for

determination which reads:-

“The central issue for determination in the appeal is whether or not the appellant/applicant has locus standi to bring the action. In order to analyze this issue it is pertinent to examine the facts of the case.”

In a reserved judgment the Court of Appeal (Coram Akpata, Babalakin and Awogu J.J.C.A.) unanimously allowed the appeal holding that the appellant had established that she had locus standi to institute the action and awarded costs of N250.00 against the respondents. The Court of Appeal however, proceeded to strike out the entire suit on the ground that the matters complained of in the motion had been completed and overtaken by events such that there was nothing to be remitted to the High Court for further action. The suit as I said above, was therefore struck out.

Further aggrieved by the decision of the Court of Appeal, the appellant has now appealed to this Court. Only one ground of appeal was filed. The parties filed and exchanged briefs of argument as provided by the Rules of Court. These were adopted and relied upon at the hearing. D

Chief G.O.K. Ajayi SAN, learned Counsel for the appellant has submitted in his brief one main and one subsidiary issues respectively as arising for determination in the appeal as follows:-

“1. Whether the applicant ought to have been prevented from being able to obtain redress for the breach of her fundamental rights because the respondents had completed the acts complained of while her application was pending? Should the matter have been struck out summarily by the Court of Appeal?

2. Was there any basis for the Court of Appeal’s statement that the matters complained of had been completed? Had the case in fact been overtaken by events?

Counsel for the respondents was however satisfied to summarize the two issues in one thus:-

“Whether having held that the plaintiff has Locus Standi, the Court of Appeal should have sent back the matter to the lower court for determination”.

I propose to treat together the two issues raised by the appellant in her brief. But before I do that I will first of all set out that part of the lead judgment of Babalakin J.C.A. (concurring by both Akpata and Awogu J.J.C.A.), subject matter of this appeal. It appears on page 135 of the H record as follows:-

“I am satisfied that the applicant has established that she has locus standi to institute the action and I so hold. The appeal is allowed. The Ruling of Akinboboye J. delivered on 4th November 1988 is hereby

set aside. I award N250.00 costs against the respondents. However as the mailers complained of in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out."

B (Underlining supplied by me for emphasis only).

Chief Ajayi in his brief submitted that there was no material before the Court of Appeal upon which it could have based its conclusion that the matter being complained of had been overtaken by events. He said the applicant had complained that she had been discriminated against C by not being called for interview for admission into Federal Government Colleges and that there was no suggestion or evidence that the applicant could no longer be called for such interview. It was therefore submitted that only where there had been positive evidence by the respondents that the applicant could not be called for interview after a specific date that D the Court of Appeal would have been entitled to find that the appeal had been overtaken by events and that there was no such evidence.

It was also submitted that the Court of Appeal having rightly held that the appellant had locus standi ought not to have shutout the appellant from being heard by striking out her case in the High Court. E That the finding ought to have been the beginning of the determination of the infraction of her rights as guaranteed by the Constitution of the Federal Republic of Nigeria 1979. He referred to Page 132 of the record, Section 42(1) of the Constitution and to the case of Ransome-Kuti v. A.G. Federation (1985) 2 NWLR (Pt.6) (21). He said an applicant who F complains that her fundamental right has been or is being contravened is entitled to have her complaint investigated by the Court. he applicant is entitled to be heard he stressed.

It was further submitted that the rationale behind the decision of the Court of Appeal is subversive of the jurisdiction granted to the courts by G Section 6(6) of the Constitution to hear and determine all disputes between individuals and Government, because in an appropriate case all that Government would need to do would be to complete or execute the act sought to be challenged and then go to the High Court and rely upon its action as a complete defence to the application. He cited the case of Ojukwu v. Military Government of Lagos State (1986) 1 NWLR (pt.18) 621 and submitted that the H order which the Court of Appeal ought to have made in this case was one cancelling the whole exercise of the interviews which affected the applicant and, ordering fresh interviews to which the appellant would have been invited. He said where a person complains of a breach of her fundamental rights,

the court has the bounded duty to provide an appropriate remedy to the complainant and not necessarily what she asks for. It was submitted that the Court of Appeal had not addressed its mind to Section 42(2) of the Constitution and that if it had done, the proper order it could have made was to have remitted the case back to the High Court to be heard by another judge on its merit. We were urged to allow the appeal. B

On behalf of the respondents, It was submitted that the record including the orders and reliefs sought, show that the appellant's complaint was about interviews for admission into Junior Secondary - 1 for the 1989 academic year. And that the appellant in a motion and affidavit in support both dated 17/10/88 stated clearly that the interview complained C of had been carried out on 8/10/88. The subject matter of the appeal was therefore no more subsisting when the Court of Appeal gave its judgment and struck out the suit on 8th January, 1990. That neither the High Court nor the Court of Appeal was in a position to enforce the fundamental rights of the appellant with regard to the reliefs and orders sought by her D and that remitting the case to the High Court for trial would only have amounted to an academic exercise. A number of cases were cited in support including *Ukejianya v. Uchendu* (1950) 13 WACA 45 *Ekpeyong v. Nyong* (1975) 2 S.C. 71; *Kigo (Nigeria) Ltd. v. Holman Bros.* (1980) 5 - 7 SC. 60. E

It was further submitted that the Court of Appeal could not have closed its eyes to the various documents before it on record showing dates of the interviews and tests as well as dates for commencement of the academic year for the interviews and admissions complained of. The Court of Appeal therefore needed no further address to be able to arrive F at the conclusion that the 1989 academic year complained of had since expired, and that it is trite that the court will not make an order in vain. Learned Counsel said the Court of Appeal has powers under Section 16 of the Court of Appeal Act 1976 (as amended) and Order 3 Rule 23 of the Court of Appeal Rules 1981, to make the order it made. We were referred G to the cases of *Shodeinde v. Registered Trustees of Ahmadiyya Movement in Islam* (1980) 1- 2 S.C 163; (1980) N.S.C.C. 163 and *A.G. Bendel State v. A.G. Federation & Anor* (1982) 3 NCLR 1; (1981) 10 S.C. 1.

The Court was urged to dismiss the appeal.

It is common ground, and I think there is no doubt whatsoever H about it, that a careful reading of the three orders and the two declarations sought by the appellant from the High Court and reproduced above, all pertained to one thing only, and that was:-

The applicant's eligibility to be called for interview on 8th Octo-

ber, 1988 for admission to Secondary-1 in Federal Government Colleges in 1988.

Let me now examine the facts as revealed on the record. In the Affidavit of Urgency in support of the Motion Ex-Parte for leave, it was deposed thus:-

B “2. That the application is being brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

4. That the application also contains a prayer for an order to restrain the respondents from holding on October 8, 1988 the interview which the respondents seek to exclude the applicant from.

C 6. That if the application is not heard before the said interview date the applicant will suffer irreparable loss because she will be deprived of her said freedom from discrimination and the applicant will be permanently prevented from attending a college of her choice (i.e. Federal Government College). ”

D Also in the Affidavit Verifying the Facts Relied upon for the enforcement of the fundamental right, it was averred as follows:-

“11. That the respondents have issued letters to candidates invited for interview for selection into said Federal Government Colleges and such candidates received their letters on Friday 23rd September, 1988.

E 12. That the interview is scheduled to be held on 8th October, 1988.

15. That if the interviews in the centres mentioned in paragraph 14 above are held before the disposal of the applicant’s application to enforce the fundamental right, the applicant will lose the opportunity of attending a Federal Government College and this will cause the applicant irreparable loss.”

F When on 5/10/88 the learned trial judge granted leave to appellant to apply for the enforcement of her fundamental rights but declined to make the order for interlocutory injunction against the respondents, one Mr. Olugbemi, learned counsel for the appellant was recorded on G Page 52 of the record to have submitted amongst others as follows:-

“On the 2nd leg of the application, Mr Olugbemi relies on paras of the affidavit and paras of the further affidavit to support her application for an Interim Order restraining the respondents, their agents and privies from conducting the interview for admission into the Federal H Government College until this application is disposed of. If the interview is held on October 8th, 1988 as scheduled then the subject matter of the application will be destroyed and there will be no need for the application

M. Olugbemi finally urged the Court to grant their prayer as to allow the

interview to take place on Saturday the 8th October would cause an irreparable damage to the applicant as she will no longer be able to take part in the examination for a Federal Government College."

(Underlining is mine for emphasis only).

It is doubtless therefore that the appellant and her Counsel knew that the interview would be held on 8/10/88 and if so held and before the application was heard, then the subject matter of the application would have been destroyed completely. Now, before the substantive motion on notice pursuant to the grant of leave was moved on 20/10/88, the respondents had filed a Counter Affidavit and a Further Affidavit as I mentioned earlier. Paras. 8, 9, 13 and 20 of the Counter Affidavit read thus:- C

"8. *That the applicant was not invited for the interview because she scored below the cut -off mark of her state of origin and as such was not qualified to be invited for the interview.*

9. *That whereas the cut-off mark for Ogun State was 295 for girls, the applicant scored 293.* D

13. *That the Federal Government Colleges were set up for the purpose of enhancing the unity of this country by bringing children from different parts of Nigeria together so that they can appreciate each other's customs and ways of life*

20. *That it is the responsibility of the Federal Ministry of Education to E implement policies in the manner that reflects the Federal character of Nigeria which implies quota system and to achieve the purpose for which the Unity Schools were set up.*

Paras. 5, 8, 9, 10 and 12 of the Further Counter Affidavit also read:-

"5. *That the interview for the successful candidates who scored up to the F cut-off mark for their respective States of Origin had already been held on 8th October. 1988.*

8. *That having not been invited for the interview which had already been held. she had no further stake in the mode of admission to the Unity schools for the year 1988 and therefore not be allowed to disturb the G other on-going processes of admission to the Unity/Schools for this year.*

9. *That the applicant is just one of the many candidate who did not score up to the cut-off mark for their states of origin and were consequently not invited for the interview and so there is no question of any discrimination.*

10. *That in bringing this application before this Honourable Court, the H applicant is placing her own individual interest of and above that of the Society (i.e. the interest and several thousand other candidates) who qualified and had attended the interview.*

12. *That it would amount to this Honourable Court making an order in*

vain as the interview for admission to the Unity Colleges had already been held on 8th October, 1988"

There was no reply from the appellant particularly to the depositions in the Further Counter Affidavit reproduced above to the effect that the interview had been held on 8/10/88. When the Motion on Notice was B being moved on 20/10/88 and Mr Olugbemi's attention was drawn to the respondent's counter affidavit and further counter affidavit, he was recorded on Page 59 to have said:-

"Mr Olugbemi as regards the Counter Affidavit submitted that this confirms the deposition of the applicant and as such it lacks merit. C As to the Further Counter Affidavit - there is no opposition to the averment of applicant for an interlocutory order "

Further down the page he said:-

..even though the interview had been passed yet the respondents should be restrained from marking papers, collecting the results and releasing the results of the examination to stem this suffering of the applicant. Applicant's inconvenience outweighs that of respondents if any".

It was therefore evident from the record that both sides knew and were aware of the fact that when the motion was actually being argued on 20/10/88, the subject matter of the motion, that is, E the holding of interviews for the Unity Colleges (Federal Government Colleges) had in fact been held on 8/10/88 throughout the entire Federation of Nigeria. That fact was deposed to in the respondent's Further Counter Affidavit and clearly admitted by appellant's counsel in his address in court on that day as shown F above. Chief Ajayi was therefore not correct when he said that there was no material before the Court of Appeal upon which it could have based its conclusion that the matter being complained of had been overtaken by events. There certainly were, as shown above.

The only evidence required and available here was the positive admission on both sides that the interviews had been accomplished. G

The question now is - Did the Court of Appeal need any further address from counsel before it could strike out the suit in the High Court as it did? I answer in the negative. The Court of Appeal on the facts before it had no choice in the matter. Certainly H if the declarations and the orders sought by the appellant were all founded and based on the appellant's eligibility to be called for interview on 8/10/88 for admission into Secondary -1 in Federal Government Colleges in 1989, the Court of Appeal must be right when on 8/1/90, some 15 months after the interviews, it held that the

subject matter of the appeal had been overtaken by events and that there was nothing left for the High Court to try and therefore struck out the suit in its entirety. I endorse the action.

Again, I find no substance in the submission of Chief Ajayi to the effect that the rationale behind the decision of the Court of Appeal was subversive of the jurisdiction granted to the Court by Section 6(6) of the Constitution to hear and determine all disputes between individuals and governments. It will in my view be subversive for a court of law to claim to determine disputes where none existed or had ceased to exist. Quite rightly and properly too in my view, the parties had made it known that the act complained of had been accomplished. The case of *Ojukwu v. Military Governor of Lagos State* (Supra) cited by Chief Ajayi is quite distinct from the present case both on facts and circumstances. It does not therefore apply. Chief Ajayi ought to have realised that for a court of law to have proceeded in the way he suggested would amount to putting the entire Federal Republic of Nigeria at the mercy of one aggrieved individual. A case of total “brutalization” of the people’s fundamental right when compared with an infringement of the appellant’s fundamental right? That to me would again amount to a subversion.

Again Chief Ajayi’s submission that the Court of Appeal on 8/10/90 should have cancelled the whole exercise of the interviews of 8/10/88 which affected the appellant and ordering fresh interviews is to say the least, preposterous. Admittedly, the interviews were held on 8/10/88, the 1989 Academic Year for Secondary-I had ended, and the 1990 Academic Year for Secondary-2 (former Secondary-I) had already commenced when the Court of Appeal delivered its judgment on 8/1/90. In short, Chief Ajayi wanted the Court of Appeal to put the hands of the clock backwards by 2 Academic Years! The end result? Chaos! I repeat - Chaos all over the country! No court should allow itself to be used as an instrument of subversion under the guise of enforcing a fundamental right.

A fundamental right is certainly a right which stands above the ordinary laws of the land, but I venture to say that no fundamental right should stand above the country, state or the people. I think I can safely say now and thanks to the vigorous and educational activities of the National Judicial Institute, that gone are the days of wanton grant of ex-parte injunctions when operation of a bank was halted by a person who had been removed as a director, or when installation ceremonies of chiefs were halted by those who had lost and the disputes dragged on for years; or when the convocation ceremony of a univer-

sity was halted by two students who had failed their examinations! It is quite gratifying for one to observe in this case that the High Court rightly and quite properly too in my view refused appellant's request for an order of interim injunction sought against the respondents just before the interviews of 8110/88 were held. That was as it should have been.

B From all I have said above, the appeal must fail. The Court of Appeal had abundant and uncontradicted affidavit evidence before it, as well as submissions of Counsel on both sides, for it to have come to the conclusions it did. The decision of the Court of Appeal Striking out the appellant's suit before the High Court is hereby confirmed. The appeal is C therefore dismissed with N1,000.00 costs to the respondents.

OGUNDARE JSC (Dissenting)

The proceedings leading to this appeal commenced in the High Court D of Lagos State by way of an application made pursuant to Order 1 rule 2(3) of the Fundamental Rights (Enforcement Procedure) Rules 1979. The applicant (who is now appellant before us) had sought the following reliefs:

- (i) *A declaration that the applicant is entitled to her freedom from discrimination on the basis of her state of origin with regards to the cut-off E mark and marks scored by the applicant and the applicant's eligibility to be called for interview for admission into Federal Government Colleges.*
- (ii) *A declaration that the decision of the respondent not to call the applicant for interview based on the criterion published by the respondents in both the Daily Times and National Concord Newspapers of September F 16, 1988 which said criterion was adopted by the respondents in the selection of candidates for interview for admission to Secondary - I in Federal Government Colleges in 1989 is discriminatory to the applicant, is faulty, irregular, unconstitutional null and void.*
- (iii) *A declaration that the said criterion used for shortlisting candidates G for interview for admission into Federal Government Colleges is against the spirit of national unity and national integration for which the said colleges were established and that the more balanced criterion of National merit state quota and environmental quota which is being used for the final selection (sic) used for shortlisting candidates for interview.*
- H (iv) *A declaration that the action of the respondent through the Federal Ministry of Education in setting one criterion for invitation for interview and another for final selection is a deliberate policy of the respondent and the Federal Ministry of Education to keep the applicant and candidates in similar situations out of Federal Government Colleges*

and is a breach of the Applicant's Fundamental Right to freedom from discrimination as guaranteed by section 39(1) of the Constitution of the Federal Republic of Nigeria 1979.

(v) A declaration that Abuja is merely the Federal Capital Territory and not a state and as such no one can claim to have Abuja as his or her state of origin,"

B

Upon the following grounds:

(a) The said guidelines published by the Federal Ministry of Education states that the cut-off marks for shortlisting candidates for interview in respect of any particular state are the marks scored by the 500th male and 500th female candidate in each State; thus using different cut-off marks for different State and giving preference to State merit as opposed to National merit. The said publication also bases the criterion for the final selection of candidates into the aforesaid colleges on National merit State quota and environmental quota, which gives preference to National merit.

(b) The criterion for shortlisting candidates for interview enabled the Federal Ministry of Education to fix the purported cut-off mark for Bendel State to be 313 for boys and 303 for girls (the highest); for Ogun State which is the State of origin of the applicant, the purported cut-off mark is 303 for boys and 296 for girls while the purported cut-off mark for Kano is 194 for boys and 151 for girls. For Abuja which ought not and has been constitutionally given the status of a State, the cut-off marks is purported 176 for boys and 152 for girls. The above are among other cut-off marks published in the (sic)

(c) The applicant, a girl, who scored 293 marks which in percentage scores is 73.25 % at the said Common Entrance Examination for the aforesaid admission scored enough marks to give her a place among those called for interview.

(d) The applicant was not called for interview because her state of origin is Ogun State whose purported cut-off mark for girls is 296 whereas the respondents have called for the same interview candidates in the same school and the same class as the applicant who scored lower marks but they were called for the interview because their State of Origin is different from that of the applicant, random example (sic) were invited for interview because of their State of Origin shows:-

Candidate No. 150740438 from Lagos State scored 291 marks which is 72.75% (a girl)

Candidate No. 150749216 from Kano State scored 271 which is 67.75% (a boy)

Candidate No. 1150749461 from Benue State scored 214 which

is 58.7% (a girl)

There are so many other candidates who scored between 37.75% and 57.25% and whose States of origin are either Kano or Sokoto who have been invited for interview.

(e) *There is no justification for adopting two criteria for the same purpose of admitting candidates into Federal Government Colleges.*

(f) *The adoption of a criterion of national merit (as proposed (sic) to State merit) and representation will figure a more equitable selection of candidates for interview and eventual admission into the said colleges.*

(g) *The adoption of State merit has no basis in law and is discriminatory and repugnant to natural justice, equity and good conscience.*

(h) *The said criterion for shortlisting of candidates for interview does not give equal opportunity to candidates from all states of the Federation including the applicant to be invited for interview for a possible enrolment in one of the Federal (sic)*

(i) *By the said criterion a total of 22,000 candidates are being invited for interview and the applicant with a total score of 293 marks or 73.25% ought to be one of the 22,000 candidates called for the said interview since candidates who scored 72.75%, 67.75% from the same school as well as candidates who scored between 37.75% and 57.25% are among those invited for interview.*

(j) *All residents of Abuja have their States of origin either in contiguous (sic) State to the Federal Capital Territory or other State of Federation.*

(k) *Because Abuja is not a State it ought (not) to be given the status of a State and the 1000 spaces for interview for admission into Federal Government Colleges.*

(l) *If Abuja's 1000 interview spaces are shared equally among the bona fide twenty-one States of the Federation the applicant will fall within the range of candidates to be invited for the said interview.*

(m) *If such order is not made by the court the applicant's fundamental rights of freedom from discrimination based on her State of origin would be successfully breached by the respondents.*

(n) *If the interview for admission into Federal Government Colleges is held and the applicant is not among those interviewed she will lose the opportunity of attending a Federal Government College which is the Secondary School of her choice as a citizen of Nigeria."*

The application was supported by a 49-paragraph affidavit sworn to by Dr. Babafemi Badejo, the applicant's next friend. There was a 23-paragraph counter affidavit sworn to by one Augustine Ariwodo Ibegbulam an officer in the Federal Ministry of Education; he also swore to a further

counter affidavit wherein he deposed as follows:

4. *That the Common Entrance Examination into Federal Government Colleges/Unity Schools was conducted by the West African Examination Council.*

5. *That interview for the successful candidates who scored up to the cut-off mark for their respective State of Origin had already been held on 8th October, 1988.*

6. *That as the applicant scored 293 instead of 296 was the cut-off mark for girls of Ogun State (sic)*

7. *That the issue in this case is not one of breach of fundamental human rights or discrimination against the applicant as alleged but that the applicant did not perform well enough to score up to the cutoff mark for her State of origin, hence she was not invited for the interview.*

8. *That having not been invited for the interview which had already been held, she had no further stake in the mode of admission to the Unity Schools for the year 1988 and therefore should not be allowed to disturb the other on-going processes of admission to the Unity Schools for this year.*

9. *That the applicant is just one of the many candidates who did not score up to the cut-off mark for their States of origin and were consequently not invited for the interview.*

10. *That in bringing this application before this Honourable Court, the applicant is placing her own individual interest over and above that of the society (i.e. the interest of several thousand other candidates) who qualified and had attended the interview.*

11. *That in the interest of justice the applicant should not be allowed to disturb the process of admission of the qualified candidates who had attended the interview held on 8th October 1989 which she was not qualified to attend.*

12. *That it would amount to this Honourable Court making an order in vain as the interview for admission to the Unity Colleges had already been held on 8th October, 1988.*

13. *That I am informed that the application is frivolous and vexatious and should be dismissed."*

When the application on notice came before the trial Judge for hearing counsel for the parties advanced arguments in support of their respective case. Mr. Adio learned Director of Civil Litigation in the Federal Ministry of Justice (as he then was) in his arguments submitted that the applicant lacked locus standi to bring the application. The learned trial Judge in a ruling delivered on 4th November 1988 after a review of the facts and arguments proffered by learned counsel ruled “

"It is my considered opinion that the applicant had not been able to establish that she had suffered by the acts of respondents, injuries greater than those suffered by all the other successful candidates who were not called for interview in the Common Entrance Examination.

I am therefore, of the firm view that the applicant has no locus standi to bring this application. See also Gouriet v. Union of Post Office Workers (1978) A.C. 437.

The applicant (sic) therefore fails and it is hereby dismissed. The applicant was dissatisfied with the judgment and appealed to the Court of Appeal complaining against the decision that she had no loc us standi to institute the proceedings. In the Notice of Appeal she sought the following reliefs from the Court of Appeal. "Page 79". In the lead judgment of Babalakin J.C.A (As he then was) with which Akpata J.C.A. (as he then was) and Awogu J.C.A. agreed, it was held:

"I am satisfied that the applicant has established that she has locus standi to institute the action and I so hold. The appeal is allowed. The ruling of Akinboboye J. delivered on 4th November, 1988 is hereby set aside."

After awarding costs of N250.00 against the respondents, the learned justice, in a twist, added:

"However as the matters complained of in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out"

Akpata J.C.A. (as he then was) in his own concurring judgment observed:"

The question whether the appellant was likely to succeed in her action was not for consideration at that stage. It was therefore premature to advert to relevant sections of the Constitution, as learned counsel for the respondents did, which call for Federal character and the promotion of national unity by ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in the Government or any of its agencies."

Following this observation the learned justice proceeded to conclude as hereunder:

"It is obvious that reliefs claimed in the court below have become stale. Even if this appeal was determined early last year the result would have been the same since successful candidates, on quota basis and on other parameter, had been granted admission for the 1989 School session.

I accordingly allow the appeal. The appellant's action is however struck-out having been over-taken by lime. I adopt the order as to

costs in the judgment of my learned brother."

(Underlining is mine)

Awogu J.C.A. in his own brief judgment said:-

"I agree with the judgment just delivered by my brother, Babalakin, J.C.A. I abide by the consequential orders made, including the order on costs.

B

(Italics is mine)

The applicant is unhappy with the order of the Court of Appeal striking out her action and has appealed to this court upon one ground of appeal which reads:-

"(1) Error in Law

C

Having held that the applicant had locus standi to maintain the action and having allowed her (sic)

In the High Court when:-

(i) *The only order they could properly have made was to send the case back to the High Court for determination according to law and on the merits.* D

(ii) *They ought not to have made the order striking out her case in the court below without giving the applicant an opportunity of being heard.*

(iii) *The applicant was entitled to have case heard on the merits by the High Court.*

(iv) *By striking out her case the Court of Appeal had deprived the applicant of the right of access to the courts for the enforcement of a fundamental right guaranteed to her by the Constitution of the Federal Republic of Nigeria 1979.* E

(v) *There was no evidence to support the Court of Appeal's conclusion that the applicant's right had been overtaken by events.* F

(vi) *Even if the acts complained of by the applicant had in the meantime been carried out or executed by the respondents, this fact could not operate to extinguish the right which had been violated.*

(vii) *The courts are not and can never be helpless to grant relief to a party complaining of a breach of her fundamental rights merely because the State proceeded to execute the act complained of before the (sic) 42(2) of the Constitution to make any order they may deem appropriate in order to provide a remedy for a breach of a Fundamental Right.* G

(viii) *Once a cause of action has arisen and an action has been commenced before the acts constituting the events alleged to have overtaken the matter perpetrated, the courts are bound to determine the issues properly raised before them and must not accept the actions of the respondents as presenting them with a fait accompli."* H

and sought from this court the following relief:-

“An order setting aside the order striking out the applicant’s claim and directing that the appellant’s application be heard on the merits by another Judge of the High Court of Lagos State.”

Briefs of arguments were filed and exchanged and at the hearing of the appeal before us learned counsel for the parties, particularly the Solicitor-General of the Federation proffered further arguments. Mr. Olugbemi of counsel for the applicant/appellant observed that the appeal was against the consequential order of the Court of Appeal striking out the action in the trial court. In his Brief of argument the following questions are posed:

(1) Whether the applicant ought to have been prevented from being able to obtain redress for the breach of her fundamental rights because the respondents had completed the acts complained of while her application was pending.

(2) Should the matter have been struck out summarily by the Court of Appeal?

In relation to the first question further supplementary questions are posed as follows:

(a) Was there any basis for the Court of Appeal statement that the matters complained of had been completed?

(b) Had the case in fact been overtaken by events?

It is submitted that the order of the Court of Appeal striking out the case is a negation of the determination that the applicant had locus standi to institute the proceedings. It is further submitted that there was no evidence to support the conclusion of the Court of Appeal that the applicant’s right had been overtaken by event. It is learned counsel’s argument in the brief that the attempt by the respondents to pre-empt the remedy sought by the applicant could not in any way operate to extinguish the fundamental right which had been violated. It is further submitted that it is the bounden duty of the courts to determine the rights of the applicant once her cause of action had arisen and an action been commenced before the acts by which the matter was alleged to have been overtaken were perpetrated. Finally learned counsel submitted in the brief that by striking out the applicant’s claims in the High Court on the basis that the matter had been overtaken by events the Court of Appeal sanctioned and encouraged pre-emptive the acts of Government, thereby subverting the right of persons to apply for the enforcement of their fundamental rights as guaranteed by the Constitution.

In the respondents’ brief the issue for determination is formulated as follows:

“Whether, having held that the plaintiff has locus standi, the Court of Appeal should have sent back the matter to the lower court for

determination.

It is argued in the brief that the order of the Court of Appeal striking out the suit instead of remitting it to the High Court for trial is not ultra vires the Court of Appeal because by section 16 of the Court of Appeal Act 1976, the Court of Appeal generally has full jurisdiction in the whole proceedings before it as if the proceedings had been instituted in the Court of Appeal as court of first instance. It is further argued that by virtue of order 3 rule 23 of the Court of Appeal Rules 1981 the Court of Appeal has power to give any judgment or make any order that ought to have been made, and to make such further or other orders as the case may require including any order as to costs. Learned counsel argues that it was apparent on the record before the Court of Appeal that the interview complained of was that of the 1989 academic year and that that interview was already conducted and that therefore, the subject matter of the appeal was no longer subsisting when the Court of Appeal gave its decision and made the order of striking out. Referring to reliefs(i) and (ii) of the reliefs sought by the applicant in her application, it is argued that in 1990 when the judgment of the Court of Appeal was given there was no longer a legal subject matter before the lower court and none of the reliefs sought could be granted even if the plaintiff was successful. It is submitted that if the case had been remitted to the trial court for trial, it would have amounted to an academic exercise and since the court would not make an order in vain the Court of Appeal was right not to have sent the case back to the trial court for trial. Learned counsel referred to NNSC v. Sabana (1988) 2 NWLR (Pt.74) 23; Ukejianya v. Uchendu (1950) 13 WACA45, 86 and Ekpenyong v. Nyong (1975) 2 S.C. 71, 80 in support of his submission. It is finally argued in the brief as follows: “*The court cannot close its eyes to the truth unless there is reason to do so, so in this appeal, the dates of entrance, dates of interview, academic year of admission complained of were all in the courts’ record so that court could not close its eyes to those facts. See A.G. Bendel State v. A.G. Federation and another (1982) 3 NCLR 1; (1981) 10 S.C. 1 at 59 lines 20 - 33.*”

The court did not therefore need any further address to make a decision as to the completion of the events complained of. The court did not need any further address to know that the academic year complained of was 1989 and that the interview complained of had been conducted and that 1990 was a new academic year.”

In his oral argument before us Mr. Onwugbufor, learned Solicitor-General of the Federation submits that there are facts on the record before the court below to inform it to make the order it made. He refers to the motion ex-parte on page 10 of the record and paragraphs 1, 2, 4

and 11 of the affidavit in support of another motion as well as the affidavit in support of the main application to buttress his argument. The learned Solicitor-General concedes it that it is the law, that, in appropriate circumstance, where locus standi is found to be in the plaintiff, the proper order is to remit the case to the trial court for determination. He however, submits that B where such an order will be made in vain, as where the question involved has become academic the court below could, pursuant to section 16 of the Court of Appeal Act, exercise the power the trial court could have exercised to strike out the action. He argues that the court below having found that the matter had been overtaken by events could make the order it made without C sending the matter back to the trial court for the latter court to make the order: He concedes it that the order made by the court below was made suo motu without hearing the parties on it.

Mr. Olugbemi in a brief reply, observes that the reliefs the appellant sought in the proceedings in the High Court are as set out on pages D 12- 13 of the record. He observes that the applicant was never heard in the two courts below on those reliefs before her application was struck out by the Court of Appeal.

The issue for determination as set out in the respondents' brief does not, in my respectful view, embrace the whole question for determination in this appeal. Having regard to the order made by the Court of Appeal and the ground of appeal to this court the question to be determined by this court seems to be: whether the Court of Appeal after finding that the applicant had locus standi to institute her proceedings in the High Court ought to have proceeded to strike out her application without F giving her the opportunity of being heard before such order was made. Babalakin, J.C.A. (as he then was) had in his judgment (with which the other justices agreed) observed as follows:

"It must be emphasized that the issue for determination in this appeal is whether or not the appellant has locus standi to bring the action at all. It is not whether on the merits that the appellant is entitled to the reliefs claimed.

Most of the issues for determination formulated by the respondents are based on the facts that the appellant would not be entitled to the relief sought if the case is decided.

H *It must be borne in mind that it is after a case is heard that judgment is given i.e. that the result of the case is known. What the appellant is fighting for now is an opportunity to be (heard) after which the decision as to whether or not her action will succeed will be determined."*

After a consideration of the issue of locus standi as applying to the facts

in the case before him, the learned justice concluded that the applicant had locus standi and proceeded to allow her appeal and to set aside the decision of the learned trial Judge. He did not end there however. He went beyond the issue for determination in the appeal before the court and proceeded without hearing the parties particularly, the applicant to determine her action by striking it out. Indeed the position taken by Akpata J.C.A. (as he then was), in my respectful view and with profound respect to the learned justice appears to me rather strange. After stating that the question whether the application was likely to succeed in her action was not for consideration at the stage of the appeal before him and that therefore, it was premature to advert to relevant sections of the Constitution as done by the respondents in their brief and oral arguments before the court below went on in the very next paragraph of the judgment to hold that the reliefs had become stale.

This appeal brings into focus once again the following questions:

1. What is the scope of section 16 of the Court of Appeal Act? D
2. Can an appeal court grant a relief not claimed?
3. Can it take up an issue suo motu and decide on it without giving the parties an opportunity to be heard?
4. Has a party in such circumstance had fair hearing in the determination of his action? E

Section 16 of the Court of Appeal Act provides:

“16. The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court’s appellate jurisdiction, order the case to be re-heard by a Court of Competent jurisdiction.” F G H

This section, read along with order 1 rule 20(4) and (5) of the Court of Appeal Rules which reads:

“(4) *The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require, including any order as to costs.*

(5) *The powers of the court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent’s notice has been given in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the court may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.”*

gives to the Court of Appeal wide powers in relation to an appeal before it and, under it, the court can make any order which the High Court could have made and treat the matter before it as if the suit was filed in the first instance before it see *Imonikhe & Another v. Attorney-General Bendel State & Others* (1992) 6 NWLR (Pt.248) 396, where Nnaemeka Agu, J.S.C. observed:

“*It must be noted that by the provisions of section 16 of the Court of Appeal Act, 1976, (now Cap. 75 of 1990) reinforced by order 1 rule 20(5) of the Court of Appeal (Amendment) Rules, 1984, the Court of Appeal has been given certain wide powers intended for expediting the administration of justice: See on this Mrs. Alero Jadesimi v. Adolo Okotie-Eboh & Ors. abNo.2) (1986) 1 NWLR (Pt. 16) 264; Chief P.U. Ejowhomu v. Edok Eter Mandilas Limited (1986) 5 NWLR (Pt.39) 1. In exercise of the powers conferred by that section and the order the Court of Appeal is empowered to rehear the case on the evidence on the record of appeal and make any order which the court of trial is entitled to make in order to determine on the merits the real issue in controversy between the parties.”*

But the powers conferred on the court by this section, as wide as they are, do not give the court supervisory and reviewing jurisdiction over the High Court apart from hearing appeal before it; the Court of Appeal can only exercise the powers granted it by the Constitution and other relevant statutes. This court, in *Ejowhomu v. Edok-Eter Mandilas Ltd.* (1986) 5 NWLR (Pt.39) 1; (1986) 2 NSCC 1184, considered the scope of section 16. Karibi-Whyte, J.S.C. delivering the lead judgment of the court, had this to say at page 1194:

The word rehearing within context of section 16 of the Court of Appeal Act 1976 has been construed by this court in Jadesimi v. Okotie Eboh (No.2) (1986) 1 NWLR (Pt.16) 264 to mean a hearing on the printed record by examination of the whole evidence both oral and docu-

mentary tendered before the trial court and forwarded to it It means an examination of the case as a whole. The purport of section 16 is to vest in the Court of Appeal all the powers of a court of first instance in the determination of the appeal before it. (Italics is mine)

This leads me to the questions: can the Court of Appeal grant a relief not claimed? Can it take up an issue suo motu and decide on it without giving the parties an opportunity of being heard. The general law is that an appellate court should confine itself to the question or questions raised by the parties. This court declared in *Chief Ebba v. Chief Ogodo & Anor.* 1984) 1 SCNLR 372; (1984) 4 S.C. 84, 99.

“With utmost respect, it should be plain to a Court of Appeal that when an issue is not placed before it, it has no business whatsoever to deal with it. A Court of Appeal is not a knight errant looking for skirmishes all about the place.”

See also: *Ejowhomu v. Edok-Eter Mandilas Ltd.* (supra); *Ndiwe v. Okocha* (1992) 7 NWLR 1 (pt.252) 29.

Similarly, a court of appeal is not entitled to give judgment on a point which was neither raised nor argued before it. This principle has been laid down in so many cases that it has become elementary. In *Okhidema v. Toto* (1962) 2 SCNLR; (1962) All NLR 307, 309, Sir Ademola CJF observed:

“During the hearing of the appeal before the learned Judge, arguments were limited to the five grounds of appeal filed, but in his judgment the learned Judge has referred to matters which were not before him on appeal; nor indeed did he call counsel to argue these matters..... I have searched in vain under what section of the law this novel proce dure adopted by the Judge can be found; namely, to give judgment on a point not raised or argued before him.

The defendants did not at any time complain that the case was heard in their absence, and I fail to see on what premises the learned Judge had come to his conclusion that the case be reheard.”

See also *Iyaji v. Eyigebe* (1987) 3 NWLR (Pt.61) 523; (1987) 2 NSCC 1035, 1038 where Oputa J.S.C. observed:

“I have to observe here and emphasize that none of the three grounds of appeal at Pp.91to 93 of the record of proceedings raised the question of the boundaries of the land in dispute as an issue in the appeal before the court below. I say this because an appellate court should ordinarily confine itself to the grounds filed and canvassed before it and to issues that naturally arise out of those grounds. Any supposed issue or Question for Determination which has no reference to any ground of

appeal should not be considered by an appellate court: See Western Steel Works v. Iron & Steel Workers (1987) 1 NWLR (Pt.49) 284 at P. 304. An appellate court should not gratuitously consider issues not raised by any ground of appeal. See Inua v. Ntah (1961) All NLR 576; Ejowhomu v. Edok'97Eter Ltd. (1986) 5 NWLR (Pt.39) 1 at P. 16, P. 30 & Pp. 34735."

B This elementary principle notwithstanding, this court recognises the discretion an appeal court has to take points suo motu if it sees it fit to do so in the determination C of the appeal before it. That discretion must, however, be exercised sparingly and in exceptional circumstances only. And where the points are so taken the parties must be given the opportunity to address it before a decision on the point is made by the appeal court - see: Kuti v. Jibowu (1972) 6 S.C. 147; Ajao v. Ashiru (1973) 1 All NLR (pt.11) 51, 63; Atanda v. Lakanmi (1974) 1 All NLR (Pt.1) 170, 178; Kwi v. Balogun (1978) 1 S.C. 52. 60-61; Olusanya v. Olusanya (1983) 1 SCNLR 134; Ejowhomu v. Edok-Eter Mandilas Ltd. (supra); Usman v. Umaru (1992) 7 NWLR (Pt. 254) 377. The D powers conferred on the Court of Appeal by section 16 of the Court of Appeal Act and Order I rule 20(4) and (5) of the Court of Appeal Rules, however, do not entitle that court to raise all or any issue it pleases. Karibi- Whyte J.S.C. explained this limitation very lucidly in his lead judgment of this court in Ejowhomu v. Edok-Eter Mandilas Ltd. (supra) when at page E 1196 of the report, he said:

"The principle would seem to be that in ensuring the determination on the merits of the real question in controversy between the parties, the Court of Appeal in the exercise of its powers of rehearing under section 16 of the Court of Appeal Act 1981, and Order I r. 20(5) is F entitled to make any order or give any judgment as the case may require. The limiting expression in Order I r. 20(5) is ensuring the determination on the merits of the real question, in controversy between the parties.

The rule does not envisage the circumstance where an appeal court would rely upon an issue unconnected with the real question in controversy G between the parties, and determine the appeal on such ground."

Of importance to the determination of this appeal is the case of Shitta-Bey v. The Federal Public Service Commission (1981) 1 S.C. 40; (1981) NSCC 19 which is virtually on all fours with the facts of the matter on hand. The facts in that case are these

H "The appellant was a legal adviser in the Federal Ministry of Justice. One Iyabo Olorunkoya was found with Indian Hemp at London Airport and was subsequently jailed for attempting to export dangerous substances into the United Kingdom. In the course of investigation into the offence she was found to have in her possession a letter written by a

appellant asking her to send details as soon as she arrived in London. The appellant was by a letter from the Solicitor-General sent on leave pending investigation into his alleged involvement in the criminal case in England against Iyabo Olorunkoya. A further letter followed from the same source informing the appellant that he was suspended from the service without pay pending the outcome of the inquiry. B

At the end of the inquiry the appellant was informed by a letter from the Secretary of the respondent commission that his written representation submitted to the commission having been found unsatisfactory, he had been retired from the service in the public interest under the Civil Service Rules with full retiring benefits. C

The appellant on receipt of the letter of retirement instituted court proceedings in the High Court claiming a declaration that his suspension without pay and his purported retirement respectively were irregular, illegal, null and void.

The High Court (Bada, J.) gave judgment in favour of the appellant and declared both acts of the respondent commission null and void. The respondent did not appeal from the decision, neither did it respond to the judgment nor to the persistent request of the appellant to be re-instated. It was at this stage that the appellant instituted the proceedings in the High Court asking for an order of mandamus to compel the respondent to discharge its duty by issuing the necessary directive to enable the applicant report for duty or in the alternative to compel the respondent to exercise its discretion to give effect to the judgment of Bada J. E

The learned trial Judge (Adefarasin J.) dismissed the action and the Court of Appeal upheld the dismissal, both courts being of the view that the courts could not make an order compelling the Public Service Commission to re-instate a public servant whose employment had been terminated. The Court of Appeal and the trial court relied on the common law rule that mandamus could not issue against the crown or its servants, and that a servant could not be forced on his master. The Court of Appeal in its own judgment, and without having evidence on the point presumed that in any event the appellant's post would have already been filled in line with the normal conditions of the service and refused to exercise its discretion to make an order which according to them would be in vain (based on their presumption). Neither party raised or adduced any arguments on this point. F

The appellant appealed to the Supreme Court. H
This court held that the Court of Appeal erred in basing its decision to refuse the grant of mandamus sought on a ground not argued before it - i.e. that the grant of the order would be in vain since, by the presumption,

the office had already been filled. No court should found its decision on any ground in respect of which it has neither received argument from or on behalf of the litigants before it nor even raised by or for the parties or either of them. Idigbe, J.S.C. delivering the lead judgment of this court observed at pages 30-31 of the Report:

- B “Assuming that the appellant has a right to be enforced or protected by mandamus, and assuming further that the respondent, in the circumstances has a duty to protect or enforce that right, the Court of Appeal (see the passage within the column marked ‘C’ in the lead judgment) has refused to issue the order on the legal maxim, *Lex non cogit ad*
 C *inutilia*. That maxim sometimes expressed as *Lex neminem cogit ad vana seu inutilia* - meaning, the law will not force anyone to do a thing vain and fruitless - is akin to the Roman Law Principle *nemo tenetur ad impossibilia* and derives from common sense and natural equity; and no one doubts that it is applicable in our legal system. This court has on a
 D number of occasions warned against decisions of courts being founded on any ground in respect of which it has neither received arguments from or on behalf of the litigants before them nor even raised by or for the parties or either of them. See *Registered Trustees of the Apostolic Church, Lagos Area v. Rahman Akindele* (1967) 1 All NLR 110 at 112 per Breu, Ag. C.J.N.; *Ogiamien v. Ogiamien* (1967) NMLR 245 at 248-9 per Ademola, C.J.N.; *Augusta Cole v. Sergius Martins and Anor.* (1968) NMLR 216 at 218 per Ian Lewis, J.S.C.; *Shittu Adeosun v. Lawani Babalola and anor.* (1972) 1 All NLR (pt.2) 120 at 126 per Udoma, J.S.C.

- There is no evidence that the office held by the appellant prior to
 F his purported removal and retirement has been filled nor is the presumption (selected by the Court of Appeal) that ‘91under normal civil service conditions, that the post has been filled, the only reasonable one in the circumstances; there is equally a presumption that some other officer of a lower rank may be merely acting in that office. Be that as it may, it is, in my view, not
 G right in the circumstances of this case, for a court to have used such a presumption, *ex proprio motu*, as a basis for declining exercise of its discretion in favour of an award of the order sought.”

- Turning to the case on hand, it is not in dispute that the only issue placed before the court below is the question of the applicant’s
 H locus standi. Babalakinand Akpata JJCA recognised this as much. The court decided that the applicant had locus standi and allowed her appeal, set aside the decision of the trial High Court and awarded costs in her favour. Having gone all that way, it is my respectful view, that the court became functus officio. To hold thereafter that “*the matter complained*

in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out" is a complete negation of its own judgment. The order of striking out cannot be a consequential order to the decision that applicant had locus standi. For a consequential order is "one giving B effect to a judgment or order to which it is consequential. See *Obayagbona v. Obaze* (1970) 5 S.C. 247. It is directly traceable to flowing from that other judgment or order duly prayed for and made," - per Nnaemeka-Agu, J.S.C in *Odojin v. Agu* (1992) 3 NWLR (Pt.229) 350 at P. 372.

Following upon its earlier judgment that the applicant had locus C standi the logical consequential order one would reasonably expect to follow is an order remitting the matter to the trial High Court for it to be determined on its merit.

I must observe that the court below could equally exercise its discretion under section 16 of the Court of Appeal Act and Order 1 Rule 20(4) and (5) D to itself hear the application of the applicant. In the exercise of this second option, the court was bound to hear both parties, particularly the applicant. Failure to do this amounts, in my respectful view, to a denial of the applicant's constitutional right to fair hearing before a determination, by the court, of her complaint. Having regard to the nature of the reliefs sought in the High Court E by the applicant, (they are all declaratory reliefs), it is indeed arguable whether the completion of the 1988 interview had put an end to her action. If she had been allowed to present her case and had succeeded, declarations of her fundamental rights would have been decreed. It would be for the respondent to decide what remedial measures to take. As Idigbe, J.S.C observed in *Shitta-Bey* (supra) at page 31 of the Report: F

"Coercion' we are told' is not always necessary to ensure that the law is obeyed. Litigants will often be content to ascertain their legal rights and duties safe in the knowledge that, once the law is determined, it will be observed. This is particularly true of public bodies, which cannot with stand the public criticism which, normally should follow upon disregard of their legal obligation' see Griffith and Street. Administrative Law 4th Edition (1967) at P. 241. Legal obligations' to which reference is made in the foregoing quotation, of course, include obligation to maintain the rule of law, as well as not to be in contempt of decisions of H competent courts;

Seen from this angle it could not be said that because action had been completed by the respondents on the 1988 admission exercise, the applicant's action had been overtaken by events.

The case on hand is distinguishable from the case of *Alegbe v. Oloyo* (1983) 2 SCNLR 35; (1983) NSCC 315 where by operation of law the plaintiffs seat had become automatically and compulsorily vacant on the happening of any of the events specified in section 103(1) of the Constitution. This court held that to grant the declaration and injunction sought B would be futile, since he had already lost his seat by operation of law.

This court in *Otapo & Ors. v. Sunmonu & Ors.* (1987) 2 NWLR (Pt.58) 587; (1987) 2 NSCC 677 held that a hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing, If one of the parties is refused a hearing or not given an opportunity to be heard, the C hearing cannot qualify as fair hearing. It also held that the denial of fair hearing is fatal to the judgment of the defaulting court. The applicant having been denied of a fair hearing before the court below struck out her action, I must hold that the order of striking out is invalid and must be set aside. I have considered what consequential order that should follow. This court could D exercise its power under section 22 of the Supreme Court Act and hear the case. As a Court of last resort and having regard to the nature of the case. I am of the view that we should have the benefit of the views of the courts below. Consequently, it is my view that the proper order to make in the circumstance is to remit the case to the Federal High Court which now has exclusive jurisdiction in the matter for it to be heard and determined. E

It is for the reasons I have given above that I regrettably dissent from the judgment of my learned brother Kutigi, J.S.C. with which my learned brothers Mohammed and Onu J.S.C. agreed and a preview of which judgment I had ere now. F

OGWUEGBU J.S.C. (Dissenting)

The applicant who is the appellant in this Court brought the action leading to this appeal through her father and next friend under Order 1 rule 2(3) G of the Fundamental Rights (Enforcement Procedure) Rules, 1979.

In the Statement accompanying the application and the motion on notice, the applicant sought the following reliefs:

“i. A declaration that the applicant is entitled to her freedom from discrimination on the basis of her state of origin with regards to the H cut-off marks scored by the applicant and the applicant’s eligibility to be called for interview for admission into Federal Government Colleges.

ii. A declaration that the decision of the respondent not to call the applicant for interview based on the criterion published by the respondents in both the Daily Times and National Concord Newspapers of

September 16, 1988 which criterion was adopted by the respondents in the selection of candidates for interview for admission to Secondary 1 in Federal Government Colleges in 1989 is discriminatory to the applicant, is faulty, irregular, unconstitutional, null and void.

Grounds For Reliefs I and ii

(a) The said guidelines published by the Federal Ministry of Education states that the cut-off marks for short-listing candidates for interview in respect of any particular State are the marks scored by the 500th male and 500th female candidates in each State; thus using different cut-off marks for different State and giving preference to State merit as opposed to National merit. The said publication also bases the criterion for the final selection of candidates into the aforesaid colleges on National Merit, State quota and environmental quota, which gives preference to National merit.

(b) The criterion for short-listing candidates for interview enabled the Federal Ministry of Education to fix the purported cut-off mark for Bendel State to be 313 for boys and 303 for girls (the highest); for Ogun State which is the State of origin of the applicant, the purported cut-off mark is 303 for boys and 296 for girls while the purported cut-off mark for Kano is 194 for boys and 151 for girls. For Abuja which ought not and has been constitutionally given the status of a State the cut-off marks is purported 176 for boys and 152 for girls. The above are among other cut-off marks published in (sic).

(c) The applicant, a girl, who scored 293 marks which in percentage scores 73.25 at the said commons entrance examination for the aforesaid admission scored enough marks to give her a place among those called for interview.

(d) The applicant was not called for interview because her State of origin is Ogun State whose purported cut-off mark for girls is 296 whereas the respondents have called for same interview candidates in the same school and the same class as the applicant who scored lower marks but they were called for the interview because their State of origin is different from that of the applicant. A random example (sic) were invited for interview because of their State of origin shows:-

Candidate No. 150740438 from Lagos State scored 291 marks which is 72.75% (a girl)

Candidate No. 150749216 from Kano State scored 271 which is 67.75% (a boy)

Candidate No. 1150749461 from Benue State scored 214 which is 58.7% (a girl).

There are so many other candidates who scored between 37.75% and

57.25% and whose States of origin are either Kano or Sokoto who have been invited for interview.

- (iv) (Sic) (iii) A declaration that the said criterion used for short-listing candidates for interview for admission into Federal Government Colleges is against the spirit of national unity and national integration for which the said colleges were established and B that the more balanced criterion(sic) of National merit, State quota and environmental quota which is(sic) being used for the final selection(sic) used for short-listing candidates for interview.

Grounds For Reliefs iv (Sic) (iii)

- (a) There is no justification for adopting two criteria for the same purpose of admitting C candidates into Federal Government colleges.
(b) The adoption of a criterion of national merit (as opposed to State merit) and representation will figure a more equitable selection of candidates for interview and eventual admission into the said colleges.
(c) The adoption of State merit has no basis in law and is discriminatory and repugnant D to natural justice, equity and good conscience.

V.(Sic) A declaration that the action of the first respondent through the Federal Ministry of Education in selling one criterion for invitation for interview and another for final selection is a deliberate policy of the first respondent and the Federal Ministry of Education to keep the applicant and candidates in a similar situation out of Federal E Government Colleges and is a breach of the applicant's Fundamental F Right to freedom from discrimination as guaranteed by section 39(1) of the Constitution of the Federal Republic of Nigeria 1979.

Grounds For Reliefs v. (Sic) (iv)

- (a) The said criterion for short-listing of candidates for interview does not give equal F opportunity to candidates from all States of the federation including the applicant to be invited for interview for a possible enrolment in one of the Federal (sic).
(b) By the said criterion a total of 22,000 candidates are being invited for interview and the applicant with a total score of 293 marks or 73.25% ought to be one of the 22,000 candidates called for the said interview since candidates who scored 72.75%; 67.25%; G 58.5% from the same school as well as candidates who scored between 37.75%; and 57.25% are among those invited for interview.

(VI)(Sic) (v) A declaration that Abuja is merely the Federal capital territory and NOT a State and such no one can claim to have Abuja as his or her State of origin.

Grounds for Relief vi (sic) (v)

- H (a) All residents of Abuja have their State of origin either in contiguous (sic) State to the Federal Capital Territory or other State of Federation.
(b) Because Abuja is not a State it ought (sic) to be given the status of a State and the 1,000 spaces for interview for admission into Federal Government Colleges.

(c) If Abuja's 1,000 interview spaces are shared equally among the bonafide twenty one States of the Federation the applicant will fall within the range of candidates to be invited for the said interview.

vii (Sic) An order directing and compelling the respondents to invite the applicant for interview for the purpose of admission into a Federal Government College.

Grounds for Relief vii (Sic) (vi)

B

(a) If such order is not made by the Court the applicant's fundamental rights of freedom from discrimination based on her State of origin would be successfully breached by the respondent.

(b) If the interview for admission into Federal Government Colleges is held and the applicant is not among those interviewed she will lose the opportunity of attending a Federal Government College which is the secondary school of her choice as a citizen of Nigeria."

C

The application was supported by an affidavit of forty nine paragraphs deposed to by the next friend, Dr. Babafemi Badejo. The respondent deposed to a counter-affidavit of twenty three paragraphs and a further affidavit in opposition to the application.

D

The gist of the affidavit in support of the application can be gleaned from the reliefs sought and the grounds for those reliefs. It is therefore not necessary for me to set out the paragraphs of the said affidavit or the annexures.

E

The counter-affidavit was deposed to by one Augustine Ariwodo Ibegbulam, Education Officer Grade 1 (Secondary) in the Federal Ministry of Education. Paragraphs 4, 5, 6, 8, 9, 10, 11, 12, 15, 16, 17, 18, 20, 21 and 22 are relevant and are reproduced hereunder:-

"4. That the Common Entrance Examination into Federal Government Colleges/Unity Schools was conducted by the West African Examination Council.

5. That the said West African Examination Council forwarded the results to the various centres where the candidates took the examination.

6. That letters for interview were issued only to candidates who qualified to be invited for interview.

G

8. That the applicant was not invited for the interview because she scored below the cut-off mark for her State of origin and as such was not qualified to be invited for the interview.

9. That whereas the cut-off mark for Ogun State was 295 for girl, the applicant scored 293.

H

10. That it is the policy of the Federal Ministry of Education that 1,000 candidates be invited for interview from each State of the Federation.

11. That it is also the policy of the Federal Ministry of Education that each child be given an opportunity to compete with children

from his/her slate of origin.

12. That the aforesaid policy is being implemented by categorising entrance examination results according to State of Origin and then extracting the first 500 successful candidates for boys and also for girls respectively at which point the cut-off mark is determined and fixed.

B 15. That equal opportunity is given to children from all States of the federation including the Federal Capital Territory, Abuja, to reflect the Federal Character of Nigeria as enshrined in the 1979 Constitution of the Federal Republic of Nigeria.

16. That the Federal Capital Territory is not treated nor given the status of
C a State in the implementation of policies on common entrance examination.

17. That the Federal Ministry of Education treats the Federal Capital Territory as being made up of people/officer from all parts of Nigeria who are living and working in the territory.

18. That the 1,000 spaces allocated to children from Abuja is for the
D benefit of children who live and school in Abuja by virtue of the fact that their parents live and work there.

20. That it is the responsibility of the Federal Ministry of Education to implement policies in respect of Unity Schools in the manner that reflects the Federal Character of Nigeria which implies quota system and to achieve
E the purpose for which the Unity Schools were set up.

21. That the criteria for final selection of candidates for interview, is based on National Merit, State quota and environmental quota in that order of preference.

22. That the applicant is not affected by the criteria used for final selection of candidates for the admission into the Unity Schools she did not
F qualify to attend the interviews in the first instance."

In the further counter affidavit, Mr. Ibegbulam deposed as follows:-

"4. That the Common Entrance Examinations into Federal Government Colleges/Unity Schools was conducted by the West African Examination Council.

5. That interview for the successful candidates who scored up to the cut off mark for
G their respective State of origin had already been held on 8th October, 1988.

6. That as the applicant scored 293 instead of 296 instead of the cut-off mark for girls of Ogun State. (sic)

7. That the issue in this case is not one of breach of fundamental human rights of discrimination against the applicant as alleged but that the
H applicant did not perform well enough to score up to the cutoff mark for her Slate of Origin, hence she was not invited for the interview.

8. That having not been invited for the interview which had already been held, she had no further stake in the mode of admission to the Unity School for the year 1988 and therefore should not be allowed to disturb

the other on-going processes of admission to the Unity School for this year.
9. *That the applicant is just one of the many candidates who did not score up to the cut of mark for their State Of origin and were consequently not invited for the interview so there is no question of any discrimination.*

10. *That in bringing this application before this Honourable Court, the applicant is placing her own individual interest over and above that of B the society (i.e. the interest of several thousand other candidates) who qualified and had attended the interview.*

11. *That in the interest of justice the applicant should not be allowed to disturb the process of admission of the qualified candidates who had attended the interview held on 8th October 1989 which she was not qualified to attend."* C

The motion on notice was fully argued and in his reply to the submissions of the learned applicant's counsel, the learned Director of Civil Litigation in the Federal Ministry of Justice, submitted in part, that the applicant had no locus standi to bring the application. In a reserved ruling, the learned trial Judge held that the applicant was not able to establish that she had suffered D any injuries greater than those suffered by other successful candidates by the acts of the respondents. She concluded thus:

"I am therefore, of the firm view that the applicant has no locus standi to bring this application. See also Gouriet v. Union Post Office Workers (1978) A.C. 437. The applicant (sic) therefore fails and it is hereby dismissed." E

Aggrieved by the decision, the applicant appealed to the Court of Appeal, Lagos Division. In the grounds of appeal, she complained against the ruling of the trial Judge who held that she has no locus standi to bring the application. The relief which she sought from the Court of Appeal was:

"An order setting aside the Ruling of Akinboboye, J. dated 4th F November, 1988 and directing that the applicant's application be heard on the merits by another Judge."

Briefs of argument were filed and exchanged and after hearing arguments from both learned counsel who represented the parties, the court below in a reserved judgment, allowed the appeal. In his lead judgment Babalakin, J.C.A. (as he then was) held as follows: G

"I am satisfied that the appellant has established that she has locus standi to institute the action and I so hold."

After awarding N250.00 costs against the respondents, he stated: H
"However as the matters complained of in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out".

Akpata, J.C.A. (as he then was) and Awogu, J.C.A. concurred.

In his own judgment, Akpata, J.C.A. said:

“The question whether the appellant was likely to succeed in her action was not for consideration at that stage. It was therefore premature to advert to relevant sections of the Constitution, as learned counsel for the respondents did, which call for federal character and the promotion of national unity by ensuring predominance of persons from a few States or from a few ethnic or other sectional groups in the Government or any of its agencies.

It is obvious that the reliefs claimed in the court below have become stale. Even if this appeal was determined early last year the result would have been the same since successful candidates, on quota basis and on other parameter, had been granted admission for the 1989 school session.

I accordingly allow the appeal. The appellant’s action is however struck out having been over-taken by time.”

The applicant was dissatisfied with the consequential order made by the court below and appealed to this court. Only one ground of appeal was filed and from this ground of appeal, the appellant raised the following issues for determination:

“Whether the applicant ought to have been prevented from being able to obtain redress for the breach of her fundamental rights because the respondents had completed the acts complained of while her application was pending? Should the matter have been struck out summarily by the Court of Appeal?”

A subsidiary issue was also identified which according to Chief Ajayi, S.A.N., for the appellant should be addressed first, namely:

“Was there any basis for the Court of Appeal’s statement that the matters complained of had been completed? Had the case in fact been overtaken by events?”

The learned respondents’ counsel identified only one issue for determination in his brief of argument:

“Whether having held that the plaintiff has Locus Standi. the Court of Appeal should have sent back the matter to the lower court for determination. “

I would rather determine the appeal on the issues submitted by the appellant which cover the issue identified by the respondents.

Chief Ajayi, SAN submitted in his brief that there was no material before the court below upon which it could have based its conclusion that the matter being complained of had been overtaken by events. He further submitted that there was no suggestion or evidence before the Court of Appeal that the applicant could no longer be called for such interview.

On the main issue, he contended that the only issue for determination by the Court of Appeal was whether or not the applicant had locus standi and that the court below shut the appellant out from being heard

by striking out her case which was precisely what the trial court did.

He submitted further that the finding for the appellant by the court below that she had locus standi ought to have been the end of the matter i.e. the beginning of the determination of the question of the infraction of her right was guaranteed by the Constitution of the Federal Republic of Nigeria, 1979. He cited the case of *Ransome-Kuti v. Attorney-General of the Federation* (1985) 2 NWLR (Pt. 6) 211 and that the Constitution provides special machinery for the enforcement of such special rights in section 42(1) of the Constitution. I have cut short other legal arguments which I do not consider necessary for the determination of this appeal.

In reply, the respondents submitted in their brief as well as in C oral argument that the striking out of the suit instead of remitting it to the High Court for trial is not ultra vires the Court of Appeal because by section 16 of the Federal Court of Appeal Decree 1976, the Court of Appeal generally has full jurisdiction over the whole proceedings before it, as if the proceedings had been instituted in the Court of Appeal as a D Court of first instance.

It was further submitted that by virtue of Order 3 rule 23 of the Court of Appeal Rules, 1981 as amended, the Court of Appeal has power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs; E that the interview complained of was that of 1989 academic year which had been conducted and that by 1990 when the Court of Appeal gave its decision, there was nothing to enforce in the applicant's fundamental human rights with regards to the reliefs sought by her.

It was said that remitting the case to the trial Court for trial could only F have amounted to an academic exercise. The cases of *NNSC v. Sabana* (1988) 2 NWLR (Pt. 74) 23, *Ukejianya v. Uchendu* (1950)13 WACA 45 at 46 and *Ekpenyong & Ors. v. Nyong & Ors.* (1975) 2 SC. 71 at 80 were cited in support.

I fully endorse the first paragraph of the conclusions of Akpata, J.C.A. (as he then was) set out above. Infact, the Court of Appeal should have G adopted the posture it advocated in the said paragraph namely, the question whether the appellant was likely to succeed in her action was not for consideration at the stage when the Court held that she has locus standi.

After the mild admonition of the trial Court in the said first paragraph, the Court of Appeal fell into the same pit as the trial Court when it H struck out the action after declaring that the appellant has locus standi to institute the proceedings. That was not the relief claimed by the appellant in her notice of appeal. The issue before that Court was whether the appellant has IDE us standi to bring the action and having answered it in

the affirmative and allowed the appeal, it should have remitted the case to the High Court for trial by another Judge. Whether the appellant would succeed or not was irrelevant at that stage having regard to the reliefs sought in the High Court by the applicant.

Apart from the six relief claimed by the applicant, where she prayed
B the Court to direct and compel the respondents to invite her for interview for the purpose of admission into a Federal College which can be said to have been overtaken by events, the first five declaratory reliefs set out earlier in this judgment appear not to have been overtaken by any event.

The Court of Appeal with great respect, misapprehended the
C reliefs sought by the applicant in confining them to an invitation for an interview which had taken place before the appeal was heard and the candidates selected.

If the Court below had not confined itself to the question of
D interview as the only relief, it would not have struck out the action irre-
D spective of what decision would be in the High Court after a hearing on the merits. Remitting the case to the High Court for hearing on the merits is not an order which would be ineffective, unenforceable, impotent or abortive. See *Ukejianya v. Uchendu* (supra) and *Ekpenyong & Ors. v. Nyong & Ors.* (supra). Rather, the Court below appeared to have awarded
E that which was never claimed by either party in the appeal before it and assumed the role of a charitable institution.

The powers conferred on the Court of Appeal by section 16 of the Court of Appeal Act, (1976) (now Cap. 75 Laws of the Federation, 1990) and Order 1 rule 20(5) of the Court of Appeal (Amendment) Rules, 1984 wide as
F they may appear, do not empower that court to strike out a suit which was never heard on its merits. It is empowered to rehear a case on the evidence on the record of appeal and make any order which the Court of trial is entitled to make in order to determine on the merits the real issue in controversy between the parties. See *Imonikhe v. Attorney-General, Bendel State* (1992) 6 NWLR
G (Pt. 248) 396, *Chief Ejowhomu v. Edok-Eter Mandillas Ltd.* (1986) 5NWLR (Pt. 39) 1 and *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (pt. 16) 264. (The underlining is for emphasis only).

As the appellant was complaining of the breach of her fundamental right enshrined in the Constitution by the Federal Ministry of Edu-
H cation, the Court below also breached her constitutional right of fair hearing by not giving her a hearing before striking out her suit.

In view of the foregoing which I consider to be grave errors committed by the Court below, I have come to the conclusion that the consequential order striking out the appellant's suit was wrong and the

appropriate order to make is to remit the case to the High Court for hearing on the merits by another Judge.

For the above reasons, I am unable to agree with the lead judgment of my learned brother Kutigi, J.S.C. to which my learned brothers Mohammed and Onu, J.J.S.C. concurred, the preview which I had the privilege of reading in advance. Appeal dismissed.

B

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Kutigi, J.S.C., in the judgment just read. I have had the privilege of reading the judgment in draft. My learned brother has given the resume of the facts of the case and I do not intend to repeat those facts in my contribution to the lead judgment.

The contentious issue in the determination of this appeal is where the lower court, after declaring that the appellant has locus standi to institute the action she filed in the High Court, concluded its judgment D with the following findings:

“However as the matters complained of in this appeal had already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out”

E

Learned counsel for the appellant submitted that there was no material before the Court of Appeal upon which it could have based its conclusion that the matter being complained of had been overtaken by events. The applicant had complained that she had been discriminated against by not being called for interview for admission into Federal Government Colleges. There was no suggestion or evidence before the Court of Appeal that the applicant could no longer be called for such interview. The learned counsel further submitted that only where there had been positive evidence by the respondents that the applicant could not be called for interview after a specific date that the Court of Appeal would have been entitled to find that the appeal had been overtaken by events. Counsel argued that there was no such evidence whatsoever.

Chief G.O.K. Ajayi SAN., could not be right to say that there was no evidence before the Court of Appeal showing that the relief claimed by the appellant has become stale or already completed. It is an elementary principle of law that facts contained in an affidavit form part of documentary evidence before the court. Where an affidavit is filed deposing to certain facts, and the other party does not file a counter-affidavit or a reply to a counter-affidavit, the facts deposed to in the affidavit H

would be deemed unchallenged and undisputed - See Adekola Alagbe v. His Highness Samuel Abimbola and 2 Ors. (1978) 2 SC 39. Those paragraphs of the Further Counter-affidavit of the respondents which disclosed that the interview for admission into Federal Government Colleges had already taken place on 8th October, 1988 were not denied. They were therefore deemed admitted -

B See Agbaje v. Ibru Sea Foods Limited (1972) 5 SC 50.

In his submission before the High Court, learned counsel for the plaintiff, Mr. A. Olugbemi agreed that the interview which was the subject of the action had already taken place on 8/10/88. In these circumstances could the Court of Appeal be held to have erred when it suo C motu, without being invited to do so, looked into the evidence contained in the affidavits and declared that the relief claimed in the High court had been completed and that the subject matter had been overtaken by events?

The appellants case had been hinged on her application for an interim order restraining the respondents from conducting interviews for D admission into Federal Government Colleges throughout Nigeria on 8th October, 1988 and from marking the scripts of candidates or collating and releasing the results of interviews held throughout Nigeria. The Court of Appeal gave its judgment on 8th of January, 1990. It is a notorious fact which courts can take judicial notice of that every year in this country E Common Entrance Examinations are held for admissions into Federal Government Colleges, now called Unity Schools, and that interviews of successful candidates are held for the entrance into those schools.

Looking into those notorious facts and the evidence contained in the affidavits filed before the High Court, the Court of Appeal held that F the matter complained of had already taken place and that the relief claimed by the appellant had become stale. Learned Counsel for the appellant argued strongly that an applicant who complains that her fundamental right has been or is being contrived is entitled to have her complaint investigated by the Court. She is entitled to be heard. I will explain further G that the applicant is entitled to be heard if her action at the time of the judgment of the Court of Appeal was justiciable.

The application of the appellant for an interim order or injunction against the respondents was no more a remedy because it was against acts which had already been carried out. This Court was faced with H almost similar situation in the case of John Holt Nigeria Limited and Another v. Holts African Workers Union of Nigeria & Cameroons. (1963) 1 SCNLR 383; (1963) 1 All NLR 379. This Court held in that case thus:

“The second aspect is the insistence of learned Judge to continue the hearing of the application for interlocutory injunction when it

was so obvious from the facts before him that the object for which the injunction was asked for, namely, the introduction of a Reconstruction Plan to the defendant's company, had already been effected, and the Plan had been introduced before the application for the interim injunction was filed. In other words, an interlocutory injunction was no more a remedy for an act which had already been carried out."

I am of the opinion that it would amount to an abuse of the process of the Court for the Court of Appeal, which has power under S. 16 of the Court of Appeal Act, to send a case, whose foundation had collapsed during the process of appeal back to the High Court for trial. It would amount to a ridiculous technicality to direct the High Court to hear the application of the appellant for an interim order or injunction in order to stop the respondents from doing what they had already carried out. The Court of Appeal had not acted against the Constitution or procedure. In this court we dismiss or strike out motions in chambers after looking into affidavit evidence supporting those motions.

In an English case of *Domer v. Gulf Oil (Great Britain)*(1975) 119 SJ. 392 G it was held that where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure, they may be dismissed as being an abuse of the process of the Court - see *White Book*. 1991 Edition, Vol. 1, Order 18/19/17, at page 339. It has been the practice of this court not to exercise its discretion to take points suo motu unless it thinks in the circumstances of the case that justice demands it. See *Odiase and Anor v. Agho and others* (1972) 1 All NLR 170, and *Okorodudu v. Okoromadu* (1977) 3 SC 21. In the case in hand the Court of Appeal acted judiciously and did substantial justice by exercising its discretion suo motu to strike out a stale claim. The appellant was not stopped from refileing another action if she deems fit to do so.

In conclusion, I have to emphasize that the Court of Appeal had evidence before it, through the affidavits filed in the suit, to make the order of striking the action because the subject matter which the appellant sought the High Court to restrain the respondents from performing had already been carried out. This case is distinguishable from the case of *Shitta-Bey v. The Federal Public Service Commission* (1981) 1 SC 40; (1981) 12 NSCC 19. In that case the Federal Court of Appeal presumed, without evidence supporting its decision, that the post *Shitta-Bay* applied to be re-instated to had already been filed.

For these reasons and the fuller reasons given in the lead judgment this appeal is dismissed. I also award N1000.00 in favour of the respondents.

ONU JSC

I have been privileged to read in draft the judgment of my learned brother Kutigi, J.S.C. just delivered and I am of the same view with him that this appeal lacks merit and ought to fail.

It is pertinent for me to offer some words of mine in support of the reasons articulated therein, if only briefly, as follows:-

The appellant through her father and next friend brought a motion ex-parte dated the 29th day of September, 1988 pursuant to Order 1 rules 2(1), (3) (6) and of the Fundamental Human Rights (Enforcement Procedure) Rules 1979 asking for an order granting her leave to apply to the Court to enforce and secure her fundamental right to freedom from discrimination as enshrined in section 39(1) of the 1979 Constitution on a refusal to call her for interview at designated interview centres for admission into Junior Secondary 1 for the 1989 session in the Federal Government Colleges and an interim order restraining the respondents and/or agents, etc. from conducting an interview into the said Colleges until the final determination of the application. The High Court of Lagos State presided over by Akinboboye, J. granted her leave to apply on the 5th of October, 1988, but refused to make any order of injunction as sought.

The appellant on 17th October, 1988 filed a motion on Notice amending the motion ex-parte wherein she sought the following reliefs:-

- “(1) A declaration that the appellant is entitled to her freedom from discrimination on the basis of her state of origin with regards to the cut-off mark and marks scored by the applicant and the applicant’s eligibility to be called for interview for admission into Federal Government Colleges.
- (ii) A declaration that the decision of the respondents not to call the applicant for interview based on the criterion published by the respondents in both the *Daily Times* and *National Concord Newspapers* of September 16, 1988 which said criterion was adopted by the respondents in the selection of candidates for interview for admission to Secondary 1 in Federal Government Colleges in 1989 is discriminatory to the applicant, is faulty, irregular, unconstitutional, null and void.”

The learned trial Judge considered the arguments proffered before her by both sides and in a considered Ruling delivered on 4th November, 1988, dismissed the appellant’s application in the penultimate paragraph whereof she held:

“It is my considered opinion that the applicant had not been able to establish that she had suffered by the acts of the respondents, injuries greater than those suffered by all the other successful candidates who were not called for interview in the Common Entrance Examination.

I am therefore of the firm view that the applicant has no locus standi to bring this application."

It must be emphasized that the issue for determination in this appeal is whether or not the appellant has locus standi to bring the action at all. It is not whether on the merits that the appellant is entitled to the reliefs claimed."

Whereupon, the appellant being aggrieved appealed to the Court of Appeal (hereinafter referred to as, the court below), which after hearing arguments from the parties held (coram: Akpata and Babalakin, J.J.C.A. as they were then) and Awogu, J.C.A. as follows:

"I am satisfied that the applicant has established that she has locus standi to institute the action and I so hold.

The appeal is allowed."

The court below thereafter proceeded suo motu to strike out the case but not without giving the following reasons:-

"However as the matter complained of in this appeal has already been completed, the subject matter of the appeal has been overtaken by events and there is nothing more to be remitted to the lower court for further action. The action in the lower court is hereby struck out."

It is the latter consequential order that has given rise to the further appeal by the appellant to this court where the only issue submitted for our determination is "Whether, having held that the plaintiff has locus standi, the Court of Appeal should have sent back the matter to the lower Court for determination."

My answer to the issue is in the negative based on the following premises:

Whether Order ultra vires the Court of Appeal.

When the Court of Appeal which is a creation of the Constitution of the Federal Republic of Nigeria (hereinafter referred to as 'the Constitution ') performs its role or exercises its function in its appellate jurisdiction, it has powers to strike out a suit of which it is seised instead of remitting it to the High Court from which the appeal emanated. The power is enshrined in section 16 of the Court of Appeal Act, 1976 Cap. 75 Laws of the Federation of Nigeria, 1990 which, among other things, invests the court which

"generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the

case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."

(Underlining mine for comments). If as set out above the court below "generally shall have jurisdiction over the whole proceedings as if the proceedings had been instituted" in it as "Court of first instance" there are' with respect, no fetters on its powers to strike out the case. Furthermore, by virtue of Order 3 rule 23 Court of Appeal Rules, 1981 as amended.

"The Court shall have power to give any judgment or make any order that ought to have been made, and to make such further or other order as the case may require including any order as to costs. These powers may be exercised by the Court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision." (Underlining is also mine for comments)

From the Italicized excerpts above, it is my view, that the exercise of the powers vested in the court below to strike out the suit suo motu undoubtedly resides in it.

In practice and procedure in civil cases, it has been stated that an order for striking out takes place when the court makes an order to that effect either for the purpose of amendment or to compel one of the parties to do some act. If a defendant, for instance, fails to comply with an order for discovery he is liable to have his defence struck out and to be placed in the same position as if he had not defended the action. Thus, in *S.O. Naya v. Emmanuel A. Wey* (1961) 1 All NLR. 123 it was held that NON-SUIT was not the proper order in the case; non-suit is only ordered in cases of absence of proof. The proper order to make was, in that matter, held to be one of striking out the case with the order of non-suit being vacated. In effect, the order for striking out the case was substituted therefore. See also *Ugbodume v. Abiegbe* (1991) 8 NWLR (Pt. 209) 261.

What, one may ask, is a striking out? The learned authors of *Bullen & Leake and Jacobs Precedents of Pleading*, 12th Edition although they have not defined what a striking out is, have at pages 138, 139 and 140 thereof illustrated what the term connotes thus:

"The powers conferred by the rule (i.e. Order 18 rule 19(1) of the Rules of Supreme Court (England) provide as follows: The court may at any time of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b)

(c)

(d) B

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The power conferred by this rule is the sanction for compelling C parties to comply with the rules of pleading and the practice of the court relating thereto. The rule empowers the court:

(1) by summary process i.e. without a trial in the normal way, to stay or dismiss an action or to enter judgment against the defendant, where the action or defence is shown to be frivolous or vexatious or is otherwise an D abuse of the process of the court; and

(2) Strike out any pleading or endorsement or any matter contained therein, which does not conform with the overriding rule that a pleading must contain only material facts to support a party's claim or defence, and must not therefore be, or contain any matter which is scandalous, frivo- E lous or vexatious or which may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of the court.

Two important considerations arise concerning the exercise of the powers of the court, whether under Rule 19 or under the inherent jurisdiction of the court, namely, (1) the powers may be exercised by "summary process" F and (2) the court has power to order or grant leave to amend any pleading or indorsement, so as to cure and save the pleading or proceeding.

:The exercise of the court's power by "summary process" means that the court may exercise its jurisdiction without a trial i.e. without hearing the evidence of witnesses examined orally and in open court," so that by sum- G mary process, the court adopts a method of procedure which is different from the normal plenary trial procedure. The result is of course that where these powers are invoked, and the action is stayed or dismissed or judgment is entered against the defendant, the party affected may thereby be deprived of a plenary trial. but this is only because the court has concluded that the H proceedings should properly be terminated or disposed of without a trial. For these reasons, the court will exercise its coercive powers by summary process to terminate proceedings without a trial only with the greatest care and circumspection and only in the clearest case.

Because the powers under R.S.C. Order 18 r.19, are coercive in operation and are exercised by summary F process and because a party may thereby be deprived of his right to a plenary trial, the court exercises these powers only with the greatest care and circumspection and only in the clearest cases. As Fletcher-Moulton, L.J. said in Dyson v. Attorney-General (1911) 1 K.B. 410 at 419.

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat- in this way without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

The general principle has been thus stated by Lindley M.R. in Hubbuck & Sons Ltd. v. Wilkinson, Ileywood & Clark Ltd (1899) 1 Q.B. 86 at 91.

"The ..summary procedure (i.e under Rule 19) is only appropriate to cases which are plain and obvious, so that any master or Judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks."

The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it "obviously unsustainable" or where the case is clear beyond doubt or the case is unarguable. A pleading will not be struck out under this rule "unless it is demurrable and something worse than demurrable," such that no legitimate amendment can save it from being demurrable

The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading and a reasonable latitude must be given, for this rule was not intended to enable parties to bring forward special demurrers in a new shape." (Italics above is mine for emphasis).

In the case herein on appeal, a large body of affidavit evidence was adduced before the trial court by either side in justification or otherwise that the appellant's constitutional right in relation to admission into Federal Government Colleges for the 1989 Academic Year and the enforcement of the Federal character provision by the introduction of the criterion of the cut-off marks state-wise breached such her right as provided in section 39(1) of the Constitution of the Federal Republic of Nigeria, 1979 as amended which states that:-

"39(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by

reason only that he is such a person -

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions, or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions.”

Sequel to the production of such body of comprehensive evidence, the learned trial Judge gave his ruling dated 4th November, 1988 which eventually led to the appeal herein. Short of making an order for retrial or entering a non-suit, the court below on being seised of the appeal from the trial court, gave its judgment dated the 8th day of January, 1990 (coram: Akpata and Babalakin, J.J.C.A. as they then were and Awogu, J.C.A.) which has given rise to the appeal herein. There being, in my firm view, nothing new to be adduced or led by way of evidence by the appellant in the trial court after the effluxion of time, the appropriate order to make in the circumstances, in my view, is a striking out of what remained of the appellant's action. See *Oloriode v. Oyebe* (1984) 1 SCNLR 390; (1984) 5 SC I at pages 16, 21 and 28 and *Tika Tore Press Ltd. v. Umar* (1968) 2 All NLR 107, it being that a suit like an appeal struck out, is temporarily dead and can be resuscitated as it were, by an application to relist it or by filing a fresh action. In the instant case, it is common ground that the grievance being aired by the appellant having already been over and done with, a striking out which, in my view, extinguishes its life albeit temporarily is the most appropriate order to make in the circumstances. The court below was therefore justified, in my view, in the order for striking out it made as to hold otherwise, in my judgment, is to go into the realm of speculation or indulge in an academic exercise. *Dawodu v. Ologundudu* (1986) 4 NWLR (pt.33) 104 at 106 and *Macfoy v. U.A.C.* (1962) A.C. 152 at 153, where it was held that a striking out of a petition is ineffective if at the time of the striking out the law applicable thereto, unknown to the petitioner or to both petitioner and respondent, is extant. At all events, there is no known requirement of the law that parties must address the court before it exercises its inherent powers to strike out and I so hold.

Furthermore, it is apparent on the record before the court below that the interview complained of by the appellant was that of the 1989

academic year. See the appellant's application dated the 29th day of September, 1988 at pages 12-17 and a Motion on Notice dated the 17th day of October, 1988 at pages 41 and 42 thereof. This is borne out from the reliefs sought by her which on pain of repetition. I shall shortly set out to exemplify the point I am making. The interview complained of by the appellant was already conducted as rightly conceded by her. Thus, the question to be answered is, was the subject-matter of the appellant's appeal still subsisting when the Court of Appeal gave its decision and made the order of striking out on 8th January, 1990? I think not.

In further answer to the above question I have posed it is pertinent to ask another, to wit: by 1990 when the court below gave its decision, what could the trial court or the court below enforce in the appellant's fundamental human rights with regards to the reliefs sought by the appellant, then applicant, which were:-

"(i) A declaration that the applicant is entitled to her freedom from discrimination on the basis of her state of origin with regards to the cut-off mark and marks scored by the applicant and the applicant's eligibility to be called for interview for admission into Federal Government Colleges.

(ii) A declaration that the decision of the respondents not to call the applicant for interview based on the criterion published by the respondents in both the Daily Times and National Concord Newspaper of September 16, 1988 which said criterion was adopted by the respondents in the selection of candidates for interview for admission to Secondary I in Federal Government Colleges in 1989 is discriminatory to the applicant, is faulty, irregular, unconstitutional, null and void."

In view of the above reliefs which are declaratory in nature, by 1990, there was no longer a legal subject-matter before the trial court and none of the reliefs sought could be granted even if the appellant was successful. In saying this, I am not unmindful of the principle of law that in a declaratory action where the plaintiff does not allege that any of his rights has been infringed, it would be contrary to principle to make a declaration discretionary as it is in vacuo. See *Olawoyin v. Attorney-General of Northern Nigeria* (1961) 2 SCNLR 5; (1961) 1 All NLR (Pt 2) 269 at 271, 276. However, in the instant case, such a declaration would be valid and not made in vacuo had it not been for the effluxion of time. If by the provisions of section 16 of the Court of Appeal Act, Cap. 75 (ibid) and Order 3 Rule 23 of the Court of Appeal Rules the, court below is empowered to order, inter alia, that the case of which it is seised on appeal be re-heard by a court of competent jurisdiction or to give judg-

ment or make any order that ought to have been made or to make such further or other order as the case may require including even any order as to costs, then the court below is all the more invigorated in making the order herein challenged of striking out by that Court where, to have remitted it to the trial court wherein the reliefs being sought are discretionary, clear evidence would be required for the grant of such a declaratory order. See *Akindoyin Awomuti v. Alhaji Jimoh Salami & 3 ors.* (1978) 3 SC 105 at 113. The declaratory reliefs in the trial court being no longer legal subject-matters before that court and since none of them could be granted even if the appellant was successful by reason of the efflux ion of time, what the appellants are therefore asking for, namely, remitting the matter to the trial court for trial, would only have amounted to an academic exercise. See *Eperokun v. University of Lagos* (1986) 4 NWLR (Pl. 34) 162 at 167 and *Olaniyi v. Aroyehun* (1991) 5 NWLR (Pl. 194) 652; *Overseas Construction Co., Nigeria Ltd. v. Creek Enterprises (Nig.) Ltd. & anor* (1985) 3 NWLR (Pt. 13) 407; *Bakare v. A.C.B. Ltd.* (1986) 3 NWLR (pl. 26) 47 and the recent decision of this Court in *Sunil Kisinch and Bhojwani v. Nitu Sunil Bhojwani* (1996) 6 NWLR (Pt.457) 661. B C D

Moreover, it is trite law that the court does not make an order in vain. See *N.N.S.C. v. Sabana* (1988) 2 NWLR (Pt. 74) 23; *Ukejianya v. Uchendu* (1950) 13 WACA 45 at 86 and *Ekpenyong v. Nyong* (1975) 2 S.C. 71 at 80. The Court below, in my respectful view, could therefore not send the matter to the trial court when any decision made by that court would be rendered nugatory. See *Kigo v. Holman Bros* (1980) 5-7 SC 60; *Fawehinmi v. Akilu* (1988) 4 NWLR (Pt. 88) 367 and *Vaswani Trading Company v. Savalakh & Co.* (1972) 12 SC. 77; (1972) 1 All NLR (PL 2)483. It is also trite law that it is the duty of the court to see that an appeal if successful is not in vain. See *Chief Shodeinde v. Registered Trustees of Ahmadiyya Movement in Islam* (1980) 1-2 SC 163; (1980) NSCC 70. The court cannot shut its eyes to the truth unless there is reason to do so. Thus, in this appeal, the date of the entrance examination, the date of interview and the academic year of admission complained of being all in the court's record it could not close its eyes to those facts. See *A-G of Bendel State v. A-G Federation & ors.* (1982) 3 NCLR 1 (1981) 10 SC 1 at 59; (1981) 12 NSCC 314. Indeed, the court below did not need any further address to make a decision as to the completion of the events complained of and it is empowered by the Act establishing it as well as the rules made thereunder, which I have hereinbefore exemplified, to make the order of striking it out as it did. As between the parties, it was common knowledge that the court did not need any further address to come to a view that the academic year complained of was 1989; that the interview complained of had been conducted and E F G H

1660 Badejo v. Fed. Min. of Education (1996) 9 KLR Onu JSC

that 1990 was a new academic year. In my respectful view therefore, the order made striking out the action cannot be said to be ultra vires the court below.

For these reasons and those contained in the comprehensive ones set out in the leading judgment of my brother Kutigi, J.S.C. i too dismiss
B this appeal and confirm the decision of the court below. I abide by the consequential orders inclusive of those as to costs contained therein.

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