

SUPREME COURT OF NIGERIA

4TH JULY, 1997. SC. 32/1994

CORAM:- M. L. UWAISS CJN, A. B. WALL, M. E. OGUNDARE, E. O. OGWUEGBU, U. MOHAMMED, S. U. ONU, Y. O. ADIO, JJSC.

PRINCE J.S. ATOLAGBE & ANOR APPELLANTS
 AND
 1. ALHAJI AHMADU AWUNI RESPONDENTS
 2. THE ATTORNEY-GENERAL, KWARA STATE
 3. THE MILITARY GOVERNOR OF KWARA STATE

CHIEFTAINCY MATTERS - *Commencement of action - Provision under the Edict - That a nonrefundable fee of N10,000.00 must be paid before commencing a chieftaincy action - Is constitutional.*

COURT PROCESSES - *Fees - Chieftaincy matters - The fact that the fee enabling one to file action - Is increased in this category of cases - Does not render the fee unconstitutional.*

CONSTITUTIONAL LAW - *Promulgation of law - S. 239 of the 1979 Constitution - Was validly relied upon by Governor - In prescribing fees to be paid before one can institute a chieftaincy action.*

JUDICIAL PRECEDENT - *Criticism of a higher court's decision - By a lower court - Though excusable in law - The lower court is bound to apply the higher court's decision.*

LEGISLATION - *Power to enact - The Military Governor had the power - To enact the law in question.*

WORDS & PHRASES - *'Condition precedent' - Employed in the interpretation of a chieftaincy law - Is different in meaning from the word 'condition'.*

FACTS

Before the Kwara State High Court, the plaintiffs/appellants filed an action against the defendants/respondents claiming that the 1st plaintiff was the rightful person to receive the chieftaincy appointment that is in dispute. Some of the defendants vide a motion on notice sought to have the suit dismissed or struck out on the ground that the plaintiffs failed to deposit the mandatory nonrefundable fee of N10,000.00 before filing the suit contrary to s.

15(1) of the Chiefs Edict.

The trial court in dismissing the defendants' application, neglected to apply a Court of Appeal decision that was on all fours with this matter but rather applied a Supreme Court decision that was on a different issue. Defendants' appeal to the Court of Appeal was allowed. The plaintiffs have now appealed to the Supreme Court raising one issue.

ISSUE FOR DETERMINATION

"Whether Edict No. 3 of 1988 Kwara State making payment of N10,000.00 deposit a condition precedent for an aggrieved person in chieftaincy matters to challenge the government appointing authorities is not an infraction of Section 6 (6) (b) of 1979 Constitution of Federal Republic of Nigeria in that it creates an impediment to free access to court."

HELD (Dismissing the appeal per lead judgment of **UWAIS CJN**, Ogundare & Ogwuegbu JJSC dissenting)

Power to enact

1. The first point to be determined here is whether the law-maker, that is the Military Governor, had the power to make the enactment in question. This is not in issue, in this case. In any event this Court (Belgore, Wali, Kutigi, Onu and Iguh, JJ.S.C.) had decided in *Obaba's* case (supra) that the 1988 Edict was lawfully enacted and therefore that decision is binding on us. (p. 1361 E)

"Condition precedent"

2. From the foregoing it is clear that there is a difference between a "condition" and a "condition precedent." A careful reading of Section 15 of the 1988 Edict convinces me that the provisions thereof are not saying that the right to sue does not exist because they talk of a person that "intends to challenge the validity of an appointment" and "a person that has been aggrieved." The import of the provisions of the Section is that a right to sue exists but that the exercise of the right is dependent on the payment of a non-refundable deposit of N10,000.00. I will, therefore, refrain from referring to the condition imposed by the Edict as "condition precedent." (p.1362 C)

Commencement of chieftaincy action

3. In my view the provision for the payment of a non-refundable fee of N10,000.00 under the 1988 Edict before a suit on chieftaincy can be brought is constitutional since the legislation accords with the making of law for the peace, order and good government of Kwara State. (p. 1363 G)

Court processes - Fees

4. In our system of court administration it is not possible for a litigant to walk into our courts to institute a suit without paying fees. Such fees are being charged for the purpose of raising funds for public revenue. They are not being charged to punish the litigants for deciding to take advantage of the provisions of Section 6 subsection (6) of the 1979 Constitution. The fact that the fees payable are increased in certain categories of cases does not render the charging of the increased fees unconstitutional. It is not within the province of the courts to conjecture as to the reasons why the higher fees are being charged for as long as the 1988 Edict does not state the purpose for which the higher fees are being charged. The function of the Courts is to interpret the law but not to bring to bear extrinsic reasons as to why the law is made. For the same reason it will be wrong, in my opinion, for the courts to consider whether prospective litigants are in a position to pay the fee prescribed or not in determining whether the charging of the fee is constitutional. (p. 1364 B)

Promulgation of law - S. 239 of the 1979 Constitution

5. Finally I hold the view that the provisions of Section 239 of the 1979 Constitution enabled the Military Governor Kwara State to promulgate any law which applies to the practice and procedure of the High Court. As such the prescription of the fees to be paid in instituting any action based on chieftaincy dispute pertains to practice and procedure of the court and is, therefore, constitutional and valid. (p. 1364 E)

Criticism of a higher court's decision

6. It is now well settled that under the common law doctrine of precedent or stare decisis, the decision of a higher court may be criticized by the judge of a lower court but notwithstanding the criticism the judge of the lower court is bound to follow and apply such decision in the case before him. He has no right to disregard the decision or side-track it. What Orilonise, J. did in this case is to rely on the decision in Bakare's case to reject the decision in Gambari's case. As has been shown, the former is a decision on the constitutional validity of Petitions of Right Act, while the later is a decision directly on the constitutional validity of Section 15 of the 1988 Edict. The cases are, therefore, at variance and are not at all on all fours. It was quite wrong for the learned trial judge to prefer the decision in Bakare's case to that in Gambari's case since the decision in Bakare's case has no bearing on the facts of the case before him. (p. 1364 G)

NOTABLE POINTS OF INTEREST**WALI.JSC***1. Edict No. 3 is not an impediment to constitutional right*

Section 6(6)(b) of the Constitution of Nigeria is not a clog on the government to legislate for peace order and good government. Section 15(1) and (2) of the 1988 Edict No. 3 of Kwara State is not an impediment to a citizen's right guaranteed by section 6(6) (b) of the 1979 Constitution but an extension of procedural law for initiating civil action in category of matters stated in the said law. It is purely procedural, no more no less. (p. 1365 C)

OGUNDARE.JSC (Dissenting)*2. Imposition of N10,000 fee is repugnant to constitutional right*

It follows, therefore, that without paying the non-refundable sum of N10,000.00 to the state Accountant-General, an aggrieved person cannot, in chieftaincy matters, have access to the court for redress. A condition of this nature is repugnant to the right given to the citizen by section 6(6)(b) of the constitution as interpreted by this court in Bakare v. A-G of the Federation (supra) and Adediran v. Interland transport Ltd. (supra). An aggrieved person who is not rich enough to pay the levy is left without redress; access to the court is shut against him. He cannot exercise his constitutional right of seeking redress in court. This shows glaringly the repugnancy of the statute. And a condition repugnant can hardly be called a condition at all, because it is void. (p. 1378 H)

3. The N10,000 fee is a levy extracted in terrorem and not a court fee

It is suggested that the non-refundable sum of N10,000.00 is a fee. This view, with respect, cannot be correct. A court fee is paid, not to the State Accountant-General, but to the Registrar of the court and it is provided for in the rules of court. The non-refundable sum of N10,000.00 is nothing but a levy extracted in terrorem to frighten, terrify or discourage an aggrieved person from challenging an appointment he objects to. It is more disturbing when it is realized that the lawmaker is a potential defendant in an action challenging the appointment he has made. Apart from the provision being inconsistent with section 6(6) (b) of the Constitution, it is equally unjust for the reason I have just given. (p. 1379 D)

4. Giving notices by landlord to tenant is not similar to this issue

Another instance given is the requirement of the Common law for the giving of statutory notices by a landlord to a tenant before suing for possession. With respect to learned counsel, i think there is a misconception of the purpose of such notices. Such notices are required to terminate tenancies and

not a precondition for suing. For unless a tenancy is first determined, a landlord will not have a cause of action for possession, as a tenant is in lawful possession. The giving of the statutory notices and the non-compliance by the tenant is a condition precedent to the enforceability of the landlord's right to re-enter (per Vaughan Williams and Kennedy L. JJ in Jolly v. Brown (1914) 2 B KB 109 at pp. 129, 129. (p. 1380 H)

5. *Limitation statutes are not comparable to the Chiefs Edict*

Limitation statutes are laws that fix certain periods within which actions must be brought or proceedings taken. These laws are based on the principle C interest reipublicae ut sit finis litium, that is to say, it is in the public interest that there is an end to litigation. Such laws are of two kinds. There are those, such as the Limitation Law of Lagos State Cap 118, Laws of Lagos State 1994, where on the expiration of the time the remedy is barred, but not the right. For example, in the case of a simple contract debt which has remained unpaid and D unacknowledged for six years, the creditor's right to bring an action to recover it is gone (s. 8(1) of the Limitation Law of Lagos State) but the debt exists for other purposes. The creditor can exercise a right of lien to recover it, but cannot set-off or counterclaim, because this is in the nature of a cross-action (section 3). (p. 1381 C)

E

6. *S. 15 of the Edict is null and void for prescribing a constraint*

Sections 6(6) (b) and 17 (2) (e) provide for easy accessibility to the courts. "Access" means approach or the means of approach without constraint. Section 15 prescribes a constraint. To that extent, it is inconsistent with the F Constitution and it is, accordingly, null and void. (p. 1384 H)

7. *Trial judge was right in preferring Supreme Court's decision*

With such a view of the precondition in question in this appeal, their Lordships should have considered, and given effect to the two decisions of this G Court cited before them, that is Bakare and Adeniran in preference to Gambari v. Gambari. Rather than do so, they poured undeserved venom on the learned trial Judge who, rightly in my view, followed, as he must do, the decisions of this Court in preference to that of the court of Appeal. (p. 1389 E)

H **OGWUEGBU JSC (Dissenting)**

8. *S. 15 of the Edict imposes a fetter on constitutional right*

If the flooding of the courts of Kwara State with suits challenging appointments of chiefs by the Governor is the reason for the insertion of section 15 in Edict No. 3 of 1988, the constitutional legislative power of the State Govern-

ment to make laws for the peace, order and good government in the State was not properly exercised in this case because the courts have inherent power to prevent a litigant from abuse of the process of the court. An enactment which stipulates that no action shall be brought until a non-refundable fee of ten thousand naira is paid to the State Accountant-General will not be treated as merely procedural, it imposes a fetter on the constitutional right enshrined in section 6(6)(b) of the Constitution. (p. 1403 D)

REPRESENTATION

Chief P. A. O. Olorunnisola, SAN with S. O. Jimoh for the Appellant
 Chief Wole Olanipekun, SAN with A. Adelodun, O. Olanipekun, and M. Paul C (Miss) for the 1st Respondent
 Alhaji M.A. Sani, Attorney-General of Kwara State, with S. A. Mohammed Acting Director of Civil litigation, for the 2nd and 3rd Respondents.

CASES REFERRED TO

Attorney-General of Ogun State v. Egenti (1986) 3 N.W.L.R. (Part 28) 265 at pp. 275;
 R.E.A.N. Ltd. v. Aswani Textiles Ltd. (1991) 2 N.W.L.R. (Part 176) 639 at p. 672
 Madukolu v. Nkemdilim (1962) 1 All N.L.R (Part 11) 587
 Nigerian Cement Co. Ltd. v. Nigerian Railway Corporation (1992) 1 N.W.L.R. E (Part 220) 747
 Katsina Local Authority v. Makudawa 1971 N.M.L.R. 100
 Skenconsult Nig. Ltd. v. Ukey (1981) 12 N.S.C.C. 1 at p. 3
 Obaba v. Military Governor of Kwara State (1994) 6 KLR 114
 Ajanaku v. C.O.P. (1979) 3-4 S.C. 28 F
 Ransome-Kuti v. A-G of the Federation & Commissioner for Justice (1985) 2 N.S.C.C. 879 at p. 899
 Adegboyega v. Awu (1992) 7 NWLR 576
 Gambari v. Gambari (1990) 5 NWLR (Pt. 152) 572
 Military Governor Ondo State v. Adewunmi (1988) 3 NWLR (Pt. 82) 280 G
 University of Ibadan v. Adamolekun (1967) NSCC 210
 Rossek v. African Continental Bank Ltd. (1993) 12 KLR 97
 Afro-Continental (Nig.) Ltd. v. Ayantuyi (1995) 12 KLR 2127

STATUTES & RULES REFERRED TO

Petition of Rights Act Cap. 149 LFN & Lagos 1958
 Constitution of Nigeria 1979 ss. 6(b)(b), 239
 Electoral Act Cap. 105 LFN 1990 s. 125(1)
 Companies and Allied Matters Act Cap. 59 LFN 1990 s. 410 (2)

Chiefs (Appointment and Deposition) Amendment Edict No. 3 of 1988 s. 15(1) & (2)

Constitution (Suspension and Modification) Decree No. 1 of 1984 s. 2(2)

Local Government Election Petitions Rules 1966 schedule 4 Decree No. 107 of 1993 s. 1

B

LEAD JUDGMENT BY UWAIS CJN

In the High Court of Kwara State, the Appellants herein were plaintiffs and the Respondents herein and one other (The Commissioner for Chieftaincy Affairs, Kwara State) were defendants. The claim brought by the plaintiffs, which was based on chieftaincy dispute, was for the following declarations:-

"1. That the purported appointment of Alhaji Ahmadu Awuni as the Elese of Igbaja by the 3rd defendant is contrary to the Native Law and Custom of Irese land relating to the appointment of an Elese, contrary to the D Elese of Irese (Confirmation of Declaration) Edict, 1987 and contrary to all known laws relating to the selection and appointment of an Elese of Irese land and is therefore null and void.

2. That the 1st Plaintiff is the proper and rightful person to be appointed the Elese of Ireseland having been selected by the Abidolu Royal E Families, the Irese Kingmakers and in accordance with the Elese of Irese (Confirmation of Declaration) Edict, 1987.

3. A perpetual injunction restraining the 1st defendant from parading himself as the Elese of Ireseland or performing any acts appertaining to the office of Elese of Ireseland, and an injunction restraining the 2nd and F 3rd defendants from installing recognizing or in any way dealing with the 1st defendant as the Elese of Igbaja (Irese land)".

The 2nd, 3rd and 4th defendants brought a motion on notice in which they prayed for as follows -

"(a) An order dismissing/or striking out this suit on the ground G that the plaintiffs failed to deposit the sum of Ten Thousand Naira (N10,000.00) prior to instituting and/or filing this suit as required and/or enjoined by the mandatory provisions of section 15(1) of the Chiefs (Appointment and Deposition) (Amendment) Edict, No. 3 of 1988.

(b) And for such further order(s) as this honourable court might H deem fit to make in the circumstances of this case."

Paragraph 5 of the affidavit in support of the motion stated thus -

"(5) That the said Mr. S.O. Otu, the Director of Civil Litigation, Ministry of Justice, Ilorin, told me and I verily believed him that the plaintiffs herein did not pay the sum of N10,000.00 to the Kwara State Government

prior to instituting the suit before this honourable court."

The plaintiffs did not file a counter-affidavit challenging the assertion in paragraph 5 of the affidavit in support of the motion, which came before Orilonise J. for hearing on 20th November, 1990. In his ruling dismissing the application, the learned trial judge adverted to the following -

"In Gambari & Ors. v. Gambari (supra) (1990) 5 N.W.L.R. (Part B 152) 572) the court of Appeal has ruled in favour of the constitutionality of Section 15 (1) of the Chiefs (Appointment and Deposition) (Amendment) Edict, No. 3 of 1988. The Edict creates a condition precedent, the non-fulfillment of any suit challenging the appointment of a chief by the Military Governor or any appointing authority in Kwara State.

Even though the rulings of this court in Ifelodun/Ifelodun Traditional Council & Anor. v. Alhaji Garba Idirisu & Anor. in Suit No. KWS/OM/2/88 (judgment) delivered on 15th July, 1988 and in Atolagbe & anor. v. Ahmadu Awuni & 3 Ors. Suit No. KWS/OM/14/89 (judgment) delivered on 5th June, 1989 (both unreported) have not been set aside on appeal, I cannot remain indifferent to the decision of the court of Appeal in Gambari v. Gambari (supra). In that case, the Court of Appeal dismissed the Appellants' appeal to it and upheld the decision of the High Court in striking out the suit of the plaintiffs/appellants who had instituted a chieftaincy action without complying with Section 15(1) of Edict, No. 3 of 1988 which stipulates (sic stipulates) the deposit of N10,000.00 prior to the commencement of any such suit. I am bound by that decision the effect of which is that the imposition of a compulsory non-refundable deposit of N10,000.00 is a condition precedent which must be fulfilled in an action of this nature before the action can be competent and before the court can be vested with jurisdiction to adjudicate same."

The learned trial judge referred to the decision of this Court in Bakare v. Attorney-General of the Federation, (1990) 9 SCNJ 43, which considered the constitutionality of the provisions of Petition of Rights Act, Cap. 149 Laws of the Federation of Nigeria, and Lagos, 1958 vis-a-vis the provisions of Section 6 subsection (6) (b) of the Constitution of the Federal Republic of Nigeria, 1979. Disregarding the binding effect on him of the decision of the Court of Appeal in Gambar's case, the learned trial judge stated thus in following the decision of this Court in Bakare's case:-

"In the same vein, I respectfully hold the view that Section 15 (1) of H Edict, No. 3 of 1988 which requires a non-refundable N10,000.00 to the Government of Kwara state before that government can be challenged in a chieftaincy dispute in which the government has approved an appointment places an unnecessary embargo on a person's right of access to the court

..... Any legislation that abridges the right of any person of access to court is not in consonance with the provisions of the 1979 constitution. Section 15 (1) of Edict No. 3 of 1988 is a legislation which abridges the access to court by a person whose civil rights and obligations are for determination in a chieftaincy dispute."

B The learned trial judge concluded his ruling by holding that the application had no merit and, therefore, dismissed it. It is quite clear to me that the learned trial judge did not obviously agree with the decision of the Court of Appeal in Gambari's case (supra), and, therefore, did not allow the doctrine of stare decisis to guide him since he preferred the decision in Bakare's case. C Consequently, the 1st, 2nd and 3rd defendants decided to appeal against the ruling.

In allowing the appeal the Court below (Okunola, Oduwole and Mahmud Mohammed JJ.C.A.) was unhappy, per Oduwole, J.C.A., who wrote its leading judgment, with the failure of the learned trial judge to adhere to the D doctrine of stare decisis in not following the Court's decision in Gambari's case. It stated thus:

"It is apposite to say here that the whole theory of our system of judicial precedent is that the decision of a superior court is binding on an inferior court per *Opota J.S.C. in UTC Nigeria Ltd. v. Chief J.P. Patomei & 4 E Ors.*, (1989) 2 N.W.L.R. (Part 103) at 244 - 292 see also *Usman v. Umaru*, (1992) 7 NWLR (Part 254) at p. 377

Bearing in mind the sacrosanct principle in our courts of stare decisis (binding judicial precedent) which left the learned judge with no choice other than to acknowledge it and with reverence learn to live well F with it, it only remains to be seen whether the reasons given for deviating or back-sliding from the decision in Gambari's case which is on all fours with the case under review is sound or not

Now concerning the reasons proffered by the learned trial judge for not following the decision in Gambari's case, I would concede and infact G elementary (sic) that both the High court and the Court of Appeal should be bound by any decision of the Supreme Court, this notwithstanding the deviation from Gambari's case as regards the case in hand cannot on the same hypothesis be defended since the facts, issues and circumstances in Bakare's case that was used as a lever to by-pass Gambari's case are miles apart and H are not just the same. They are certainly not on all fours.

Both decisions in Gambari as well as Bakare are not in conflict and therefore still good law.

Put in another way, Gambar's case concerns the condition precedent to the competence of a court."

To stress the point further reference was made to the pronouncements in the cases of Attorney-General of Ogun State & anor. v. Egenti, (1986) 3 N.W.L.R. (Part 28) 265 at pp. 275; Nwonuma Ndiribe & Ors. v. Ogbogu & Ors. (1989) 5 N.W.L.R. (Part 123) 599 at pp. 618 and 622 and R.E.A.N. Ltd. v. Aswani Textiles Ltd., (1991) 2 N.W.L.R. (Part 176) 639 at p. 672. After considering the *rationes decidendi* in the cases of Gambari and Bakare respectively, the Court of Appeal came to the conclusion that the plaintiffs' suit in the High court was incompetent. It stated thus, as per the lead judgment:-

"I therefore hold that suit No. Kwas/OM/14/87 the subject matter of this appeal is incompetent. The respondents having failed and/or neglected to deposit the sum of ten thousand naira (N10,000.00) prior to instituting or filing then suit as stipulated in Section 15 (1) of the Chiefs (Appointments and Depositions) (Amendment) Edict. No. 3 of 1988 of Kwara State."

The plaintiffs now feel aggrieved and have appealed before us on two grounds of appeal. The parties filed briefs. Three sets of briefs have been filed. Apart from the Appellants' brief of argument, the 1st Respondent filed his brief separate from the joint brief of the 2nd and 3rd Respondents. Only one issue for determination is contained in the Appellants' brief and it reads:-

"Whether Edict No. 3 of 1988 Kwara State making payment of N10,000.00 deposit a condition precedent for an aggrieved person in chieftaincy matters to challenge the government appointing authorities is not an infraction of Section 6 (6) (b) of 1979 Constitution of Federal Republic of Nigeria in that it creates an impediment to free access to court."

For his part the 1st Respondent adopts as its own the issue stated by the Appellants, while the 2nd and 3rd Respondents jointly raised two questions for determination, viz:-

"I. Whether Section 15 of Edict No. 3 of 1988 abridges the right of a person in a Chieftaincy matter considering the Provision of Section 6 (6) (b) of 1979 Constitution.

2. Whether the decision in Bakare v. Attorney-General of the Federation, (1990) 9 SCNJ 43 is relevant and/or applicable to this case at all."

In addressing us, learned counsel for the Appellants, Chief Olorunnisola, Senior Advocate of Nigeria, referred to the authorities relied upon by the Court of Appeal to set aside the ruling of the High Court. These are Madukolu v. Nkemdilim, (1962) 1 All N.L.R. (Part 11) 587; Adegboyega v. Awu, (1992) 7 N.W.L.R. (Part 255) 588; Nigerian Cement Co. Ltd. v. Nigerian Railway Corporation & Anor., (1992) 1 N.W.L.R. (Part 220) 747; Katsina Local Authority v. Makudawa, 1971 N.M.L.R. 100. Learned Senior Advocate submitted that the case of Madukolu laid down general principles of law on the

jurisdiction of a court and was decided before the 1979 Constitution, in particular Section 6 subsection (6) (b) thereof, came into force. Therefore the principles do not apply to the provisions of Section 6 subsection (6) (b) of the 1979 Constitution. He argued that the cases of Katsina Local authority v. Makudawa and Nigerian Cement Co. Ltd. v. Nigerian Railway corporation & B Anor. apply to the giving of notice within a specified period to a prospective defendant before a suit can be instituted by a plaintiff. He submitted that the laws on which the decisions in them were given pre-dated the 1979 Constitution, therefore the decisions did not take into focus the provisions of Section 6 subsection (6) (b). If they had, he argued, the conditions precedent in the C cases would have been overridden by the provisions of the 1979 Constitution. With regard to Adegboyega's case, learned counsel contended that the receiver/manager that intended to sue was doing so not as the owner of the shares and was therefore not an aggrieved party whose civil right was infringed. He supported this contention with the case of Intercontractors v. D U.A.C. (1988) 2 N.W.L.R. (Part 76) 303 at p. 323. Furthermore, he argued, the receiver/manager was not denied access to court by an pre-condition even though he was required to obtain the leave of court as antecedent to suing. He cited the case of Adediran v. Interland Transport Ltd. (1991) 9 N.W.L.R.. (Part 214) 155 at p. 180 to contend that any law which imposes conditions for E the determination of rights and obligations of a person is inconsistent with the free and unrestricted exercise of that right and therefore it is void to the extent of the inconsistency. He finally urged upon us to hold that the decision in Gambari's case is wrong and so also the decision of the court of Appeal in the present case and that we should hold that our decision in Bakare's case F applied to this case.

On the decision in the case of Obaba v. Military Governor of Kwara State, (1994) 4 N.W.L.R. (Part 336) 26 [(1994) 6 KLR 113] cited in both the Respondents' briefs of argument, learned Senior Advocate submitted that this court did not decide that the condition stipulated by Section 15 of the Chiefs G (Appointment and Deposition) Edict No. 3 of 1988 was constitutionally valid.

In his reply, Chief Olanipekun, learned Senior Advocate of Nigeria for the 1st Respondent, relied heavily on our decision in Obaba's case (supra). He argued that this Court held in that case that the provisions of Section 15 of H the 1988 Edict merely laid a condition precedent for the institution of a suit in respect of a category of disputes; and that it is only when the condition precedent is duly complied with that the court gets conferred with the jurisdiction to hear the suit. He referred specifically to the dictum of Belgore, J.S.C. at p. 43 thereof and that of Iguh, J.S.C. at p. 47. Learned Senior Advocate argued

further that the provisions of Section 15 of the 1988 Edict did not in any way conflict with the provisions of Section 6 subsection (6) (b) of the 1979 Constitution. He stressed that the Edict is not saying that the court does not have the jurisdiction to hear chieftaincy disputes but rather that before a litigant can challenge the validity of any appointment made under the chiefs (Appointment and Deposition) Law, as amended, he has to deposit with the State Accountant-General a non-refundable sum of N10,000.00. He referred to the cases of Ajanaku v. C.O.P. (1979) 3-4 S.C. 28, Katsina Local authority v. Makudawa, (supra) Adegboyega v. Awu, (supra) and Nigerian Cement Co. Ltd. v. Nigeria Railway Corporation, (supra) and submitted that the provisions of Section 6 subsection (6) (b) do not in anyway preclude legislative bodies from inserting conditions precedent in any statute or law; nor does the section remove all the established or known conditions precedent before a suit is brought under common law. Learned Senior Advocate stated that the provisions of the 1988 Edict are merely procedural and not the same as those of Chiefs Edict. No. 11 of 1984 of Ondo State which ousted the jurisdiction of court as was interpreted in the case of Governor of Ondo State v. Adewunmi, (1985) 3 N.W.L.R. (Part 13) 493. He referred to the provisions of Section 125 (1) of the Electoral Act, Cap. 105 of the Laws of the Federation of Nigeria, 1990 and Section 410(2) of the Companies and Allied Matters Act, Cap. 59 of the Laws of the Federation of Nigeria, 1990 both of which state that security for costs must be given by a prospective petitioner before he can validly bring a petition. He cited cases decided by this Court since the 1979 Constitution came into operation which laid down that appropriate statutory notice must be given by a landlord to a tenant before he can recover his premises from the tenant. These include Sule v. Nigeria cotton Board, (1985) 2 N.W.L.R. (Part 5) F at pp. 36 - 37; and Eleja v. Bangudu, (1994) 3 N.W.L.R. (Part 334) 534 at p. 542. He submitted that the cases of Adediran (supra) and Bakare (supra) have no application to this case. He urged us to uphold the decision of the Court of Appeal in Gambari's case and the present case.

Learned Attorney-General of Kwara State, for the 2nd and 3rd Respondents, argued that the High Court was wrong in holding that Edict No. 3 of 1988 had shortened the right of a person to sue and submitted that the Edict had merely stipulated a condition to be met before an action can be instituted in court. He referred to a number of laws which stipulate conditions for instituting action. These include the three months limitation within which a person suing a public officer must bring the action; obtaining leave of court before a receiver/manager of a company can institute or defend an action (Adegboyega v. Awu, (supra)); the giving of a month's notice before a Local Government authority can be sued (Katsina Local Authority v. Makudawa,

(supra) and the giving of a written notice of three months before the commencement of or institution of any court process against the Nigerian Rly. Corporation (Nigerian Cement Co. Ltd. v. Nigerian Rly. Corporation, (supra). He likened the payment of N10,000.00 under the 1988 Edict to the payment of process fees before the filing of an action ordinarily. He then submitted, citing B the cases of Madukolu v. Nkedilim, (supra) and Skenconsult Nig. Ltd. v. Ukey, (1981) 12 N.S.C.C. 1 at p. 3 that a court can only be competent if among other things all the conditions precedent for its having jurisdiction are fulfilled. He contended that though courts are open to every person who feels aggrieved, some form of restraints are necessary to be introduced so that the courts may C not be ridiculed. In this direction, he argued, Kwara State Government has the power to decide on the policy applicable by legislating accordingly. Once the policy is formulated, he submitted, it is not the business of court to pass value judgment on the policy. He cited in support the case of A-G Lagos State v. Dosumu, (1989) 6 SCNJ 134.

D With regard to the provisions of Section 6 subsection (6) (b) of the 1979 Constitution, learned Attorney-General contended that Section 15 of the 1988 Edict does not contravene it, citing the case of Nwosu v. Imo State Environmental Sanitation authority, (1990) 4 SCJN 97 at p. 122 where it was stated thus:-

E *"Indeed, no court had the power to inquire why its jurisdiction had been ousted. All it could inquire into was, as I have stated, whether or not its jurisdiction had in fact been ousted."*

He referred to the case of Obaba v. Military Governor of Kwara State & Ors., (1994) 4 SCNJ 121 at pp. 129 where Belgore, J.S.C. observed as follows:-

G *"All that the payment of fee of N10,000.00 is for is to have access to court to be heard. No action can be filed without payment of a fee The Edict to my mind, was properly made by the Military Governor of Kwara State as by doing so he has not contravened any part of the Constitution."*
and urged us to hold accordingly.

H On the second issue for determination which he formulated in the joint brief of argument of the 2nd and 3rd Respondents, which is: "whether the decision in Bakare v. A-G of the Federation, (1990) 9 SCJN 43 is relevant and/ or applicable to this case at all"; learned Attorney-General argued that the decision of the Court of Appeal in Gambari's case (supra) is not in conflict with the decision of this Court in Bakare's case (supra). He submitted that the issue in Gambari's case concerned simply the interpretation and applicability of the provisions of Edict No. 3 of 1988 as regards the payment of non-refundable

deposit of N10,000.00, while the contention in Bakare's case (supra) is as to whether the word "may" in Section 3 of the Petitions of Right Act, Cap. 149 of the Laws of Federation and Lagos, 1958, gives a plaintiff the option whether to proceed under the Act or to initiate an action by a Writ of summons without seeking the consent of the attorney-General. To illustrate these he referred to my observation on p. 54 of Bakare's case (supra) and the dictum of Achike, B J.C.A. on p. 587 of Gambari's case (supra), and further submitted that a condition precedent in the context of the 1988 Edict is not the same as the granting of a fiat by the Attorney-General which depends on the whim and caprice of the Attorney-General.

Now Section 15 of the 1988 Edict No. 3 provides:

"15.(1) where the Military Governor or the appointing authority has approved the appointment of a person as a Chief, any person who intends to challenge the validity of such appointment shall first deposit with the State Accountant-General a non-refundable sum of ten thousand naira.

(2) Where the Military Governor or the appointing authority has not approved any appointment to a vacant chieftaincy stool, any aggrieved person who institutes any court action in connection with the vacant chieftaincy stool and join the State Government or any of its agencies as a party to any such court action shall first deposit with the State Accountant-General a non-refundable fee of ten thousand naira."

The first point to be determined here is whether the law-maker, that is the Military Governor, had the power to make the enactment in question. This is not in issue, in this case. In any event this Court (Belgore, Wali, Kutigi, Onu and Iguh, JJ.S.C.) had decided in Obaba's case (supra) that the 1988 Edict was lawfully enacted and therefore that decision is binding on us.

The next point is whether the provisions of Section 15 of the 1988 Edict is valid in the light of Section 6 subsection (6) (b) of the 1979 Constitution of the Federal Republic of Nigeria, Cap. 62 of the Laws of the Federation, 1990, which provides:-

"(6) The judicial powers vested in accordance with the foregoing G provisions of this Section -

(a)

(b) shall extend to all matters between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and H obligations of that person;"

It is common ground that by providing that a non-refundable sum of N10,000.00 should be deposited by a prospective plaintiff in a chieftaincy dispute in which the Government of Kwara State or any of its agencies is

intended to be a party, the Edict has impose a condition. All the parties in presenting their cases and also the courts below have regarded the condition as "condition precedent" which is a term of art. Both "condition" and "condition precedent" have been defined by Osborn's Concise Law Dictionary, 7th Edition as follows -

B *"Condition" - a provision which makes the existence of a right dependent on the happening of an event; the right is then conditional as opposed to an absolute right. A true condition is where the event on which the existence of the right depends is future and uncertain."*

"A condition precedent" is one which delays the vesting of a right until the C happening of an event;"

From the foregoing it is clear that there is a difference between a "condition" and a "condition precedent." A careful reading of Section 15 of the 1988 Edict convinces me that the provisions thereof are not saying that the right to sue does not exist because they talk of a person that "intends to D challenge the validity of an appointment" and " a person that has been aggrieved." The import of the provisions of the Section is that a right to sue exists but that the exercise of the right is dependent on the payment of a non-refundable deposit of N10,000.00. I will, therefore, refrain from referring to the condition imposed by the Edict as "condition precedent."

E It is settled that in instituting an action in court conditions are imposed either by the common law or a legislation. Such conditions include the giving of notice as in the case of bringing an action against government or government agency; the payment of security as in the case of filing an election petition; obtaining leave to sue as in the case of petition of right, relator F action by the Attorney-General, receiver and manager in liquidation under Companies and Allied Matters Act and enforcement of fundamental rights under Fundamental rights (Enforcement Procedure) Rules, 1980. Some of the conditions under the common law came up for consideration under the 1979 Constitution with reference to the provisions of Section 6 subsection (6) (b) G thereof. In Ransome-Kuti v. A-G of the Federation & commissioner for Justice & Ors. (1985) 2 N.S.C.C. 879 at p. 899 Eso, J.S.C. stated in the lead judgment, even though obiter, that by virtue of section 6 (6) (b) of the 1979 Constitution, the common law rule that Government cannot be sued for the torts of its employees or servants as contained in the Petitions of right Act, has been H removed. The same point was decided in Bakare's case (supra) with regard to a claim of rent on a property of the plaintiff occupied by government. Similarly in Adediran v. Interland Transport Ltd. (1991) 9 N.W.L.R. (Part 214) 155 it was held at p. 180E-F thereof that the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of Sec-

tion 6 (6) (b) of the 1979 Constitution.

It is significant that all the aforementioned decisions applied to common law rules or common law rule which had been embodied in a statute. I am unable to lay my hands on a similar decision based simply on a provision of a statute which charges fees for instituting a Suit. Perhaps this is the first case of its kind.

B

Now in my view the provisions of Section 15 of the 1988 Edict do not constitute substantive law but are procedural or adjectival.

The law applicable to practice and procedure of a court is an adjectival law. The payment of fee to institute an action is procedural. Section 239 of the 1979 as amended by Constitution (Suspension and Modification) Decree No. 1 of 1984, provides:-

C

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

D

As at the material time of the promulgation of the 1988 Edict by the Military Governor of Kwara State there was no House of Assembly in the State, it was Section 2 subsection (2) and Section 3 subsection (2) of the Constitution (Suspension and Modification) Decree, No. 1 of 1984 that vested the military Governor with the power to legislate on the practice and procedure of the High Court of Kwara State pursuant to Section 239 of the 1979 Constitution. Section 2 subsection (2) of the 1984 Decree States:-

E

"(3) Subject to subsection (2) above and to the Constitution of the Federal Republic of Nigeria 1979, the Military Governor of a State shall have power to make laws for the peace order and good government of that State."

while Section 3 subsection (2) provides -

"(2) The power of the military Governor of a State to make laws shall be exercised by means of Edicts signed by him."

G

In my view the provision for the payment of a non-refundable fee of N10,000.00 under the 1988 Edict before a suit on chieftaincy can be brought is constitutional since the legislation accords with the making of law for the peace, order and good government of Kwara State. I find support in the dictum of Iguh, J.S.C. in his concurring judgment in the case of Obaba v. Military Governor of Kwara State, (1994) 4 N.W.L.R. (Part 336) 26 at p.46F; even though it is obiter and therefore only persuasive. The learned Justice stated thus:-

"..... The payment of the said fee of N10,000.00 merely con-

ferred the appellants with access to the court for the purpose of the determination of their claims in accordance with the laws of the land and no more"

It has been contended that the payment of the fee is punitive and therefore constitutes an infraction on the provisions of Section 6 subsection B (6) (b) of the 1979 Constitution which provides unimpeded access to court. I am unable to accept this argument. **In our system of court administration it is not possible for a litigant to walk into our courts to institute a suit without paying fees. Such fees are being charged for the purpose of raising funds for public revenue. They are not being charged to punish the litigants for deciding to take advantage of the provisions of Section 6 subsection (6) of the 1979 Constitution. The fact that the fees payable are increased in certain categories of cases does not render the charging of the increased fees unconstitutional. It is not within the province of the courts to conjecture as to the reasons why the higher fees are being charged for as long as the 1988 Edict does not state the purpose for which the higher fees are being charged. The function of the Courts is to interpret the law but not to bring to bear extrinsic reasons as to why the law is made. For the same reason it will be wrong, in my opinion, for the courts to consider whether prospective litigants are in a position to pay the fee prescribed or not in determining whether the charging of the fee is constitutional. See Nwosu's case (supra).**

Finally I hold the view that the provisions of Section 239 of the 1979 Constitution enabled the Military Governor Kwara State to promulgate any law which applies to the practice and procedure of the High Court. As such the prescription of the fees to be paid in instituting any action based on chieftaincy dispute pertains to practice and procedure of the court and is, therefore, constitutional and valid.

With regard to the learned trial judge's refusal to follow the decision of the Court of Appeal in Gambari's case (supra) in preference to the decision of this Court in Bakare's case (supra), I am of the view that the learned trial judge's insubordination calls for deprecation.

It is now well settled that under the common law doctrine of precedent or stare decisis, the decision of a higher court may be criticized by the judge of a lower court but notwithstanding the criticism the judge of the lower court is bound to follow and apply such decision in the case before him. He has no right to disregard the decision or side-track it. What Orilonise, J. did in this case is to rely on the decision in Bakare's case to reject the decision in Gambari's case. As has been shown, the former is a decision on the constitutional validity of Petitions of Right Act, while the later is a decision directly on the constitutional validity of Section 15 of the 1988 Edict.

The cases are, therefore, at variance and are not at all on all fours. It was quite wrong for the learned trial judge to prefer the decision in Bakare's case to that in Gambari's case since the decision in Bakare's case has no bearing on the facts of the case before him.

On the whole this appeal fails and it is hereby dismissed with N1,000.00 costs to each set of Respondents.

B

WALI JSC

I am privileged to have read before now, the lead judgment of my learned brother Uwais CJN with which I hereby entirely agree.

C

Section 6(6)(b) of the Constitution of Nigeria is not a clog on the government to legislate for peace order and good government. Section 15(1) and (2) of the 1988 Edict No. 3 of Kwara State is not an impediment to a citizen's right guaranteed by section 6(6) (b) of the 1979 Constitution but an extension of procedural law for initiating civil action in category of matters stated in the said law. It is purely procedural, no more no less.

D

The Military Governor of the State at the time the 1988 Edict No. 3 was enacted, was by virtue of section 2(2) and section 3(2) of the Constitution (Suspension and Modification) Decree 1 of 1984 vested with the power in place of the desolved House of Assembly to legislate on practice and procedure of High court of Kwara State pursuant to Section 239 of the 1979 constitution. Nothing could have stopped the Military Governor from amending the kwara State High Court (Civil Procedure) Rules to reflect the provision of section 15(1) and (2) of Edict No. 3 of 1988.

E

The decision in Bakare v. Attorney-General of the Federation is not apposite since the facts in that case are far a part from the facts in the present case.

F

While in Bakare's case which was dealing with the Law on Petitions of Right, the Attorney General could exercise his discretion to refuse the applicant his fiat to exercise his civil right guaranteed by section 6(6) (b) of the 1979 Constitution, neither the governor, the Attorney General of the State and any other person or authority for that matter, possesses the right to deny a citizen wanting to challenge the appointment of a chief under section 15(2) and (3) of the edict once the prescribed fee of N10,000.00 (non refundable) is paid to the Accountant-General of the State The amount prescribed is an additional revenue that accrues to the state I cannot therefore see any thing unconstitutional in the demand for payment of the N10,000.00 additional fees in these type of cases.

G

H

The decision in Gambari & Ors. v. Gambari by the court of Appeal,

Kaduna an reported in 1990) 5 NWLR (Pt 152) 572 is binding on the learned trial judge even if it is wrongly decided until same is set aside by the Supreme court. The action of the judge is not only wrong but amounts to arrogance and judicial irresponsibility which must be deprecated.

It is for these and the more elaborate reasons in the lead judgment of my learned brother, Uwais, CJN which I endorse as mine, that I also hereby dismiss the appeal with N1,000.00 costs to each set of the respondents.

OGUNDARE.JSC (DISSENTING)

The narrow question that calls for determination in this appeal is whether section 15 of the chiefs (Appointment and Deposition) (Amendment) Edict No. 3 of 1988 of Kwara State (hereinafter referred to simply as the Edict) is inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria 1979 (hereinafter referred to as the Constitution simpliciter) particularly section 6(6) (b) thereof, and is consequently void. The section reads:

"15. (1) where the Military Governor or the appointing authority has approved the appointment of a person as a Chief, any person who intends to challenge the validity of such appointment shall first deposit with the State Accountant-General a nonrefundable sum of ten thousand Naira.

(2) Where the Military Governor or the appointing authority has not approved any appointment to a vacant chieftaincy stool, any aggrieved person who institutes any court action in connection with the vacant chieftaincy stool and joins the State Government or any of its agency as a party to any such court action shall first deposit with the State Accountant-General a non-refundable fee of ten thousand Naira." (underlining is mine)

I would have thought that with the principles of law laid down by this Court and upon which the decisions of the Court were based in Alhaji Chief A. B. Bakare v. The Attorney-General of the Federation & 2 Others (1990) 5 NWLR 616 and J.A. Adediran & Anor. v. Interland Transport Ltd. (1991) 9 NWLR 155, the answer to the question presents no difficulty. But this, regrettably, is not to be. For the reasons I shall presently give, I find myself unable to subscribe to the views of, and conclusion reached by, some of my learned brethren, who constitute the majority, in their respective judgments.

The Plaintiffs (now Appellants) had, in 1989, sued the four Defendants (now Respondents) claiming, as per their writ of summons -

"1. That the purported appointment of Alhaji Ahmadu Awuni as the Elese of Igbaja by the 3rd defendant is contrary to the Native Law and Custom of Irese land relating to the appointment of an Elese, contrary to the Elese of Irese (confirmation of Declaration) Edict 1987) and contrary to all

known laws relating to the selection and appointment of an Elese of Irese land and is therefore null and void.

2. That the 1st Plaintiff is the proper and rightful person to be appointed the Elese of Ireseland having been selected by the Abidolu Royal Families, the Irese Kingmakers and in accordance with the Elese of Irese and in accordance with the Elese of Irese (Confirmation of Declaration) B Edict 1987.

A perpetual injunction restraining the 1st defendant from parading himself as the Elese of Ireseland or performing any acts appertaining to the office of Elese of Ireseland, and an injunction restraining the 2nd and 3rd defendants from installing recognizing or in any way dealing with the 1st C defendant as the Elese of Igbaja (Ireseland)."

Following the service of the Writ on the Defendants, the 2nd, 3rd and 4th Defendants, through their learned counsel, filed before the trial High Court of Kwara State, Omu-Aran Judicial Division, a motion praying essentially for an order

"..... dismissing and/or striking out this suit on the ground that the plaintiffs failed to deposit the sum of ten thousand Naira (N10,000.00) prior to instituting and/or filing this suit as required and/or enjoined by the mandatory provisions of section 15(1) of the Chief (Appointment and Deposition) (Amendment) Edict No. 3 of 1988."

It was not, and it is still not, in dispute that the Plaintiffs did not, before instituting the action (or anytime thereafter), pay to the Accountant-General of Kwara State the sum of N10,000.00 (ten thousand Naira) as provided in section 15 of the Edict.

The motion was argued and in a reserved ruling delivered at Ilorin F the learned trial Judge (Orilonise, J) dismissed it and directed that the hearing of the substantive case be proceeded with at Omu-Aran. But the Defendants were unhappy with the ruling and they appealed against it to the Court of Appeal (Kaduna Division) which, in a unanimous decision, allowed the appeal, set aside the decision of Orilonise, J and struck out the action, in limine, G with costs.

Being dissatisfied with the judgment of the Court of Appeal, the Plaintiffs have now appealed to this Court upon two grounds of appeal which read:

"(i) The Court of Appeal erred in law by holding that section 15(1) H of Edict No. 3 of 1988 Kwara State is not in conflict with section 6(6) (b) of the 1979 Constitution.

PARTICULARS

(a) The provisions of section 6(6)(b) of the 1979 Constitution pro-

vides free access to court.

(b) section 15(1) of 1988 Kwara State Edict No. 3 provides a payment of non-refundable sum of N10,000.00 by any person who challenges the government or its agencies in any chieftaincy appointment.

(c) The provisions of the Edict No. 3 of 1988 section 15 is not made B as a rule of court.

(ii) The court of Appeal erred in refusing to hold that the cases of Bakare v. Attorney-General (1990) 9 SCNJ 43 and Adediran v. Interland Transport Ltd., (1991) 9 NWLR (Pt. 214) Page 155 are good authority for revisiting and upturning its decision in Gambari (1990) 5 NWLR 572.

C PARTICULARS

(a) The cases of Bakare and Adediran (supra) contain sufficient statement of the law on interpretation of section 6(6)(b) of 1979 Constitution to enable the Court of Appeal agree that Gambari v. Gambrai (supra) was reached *per in curiam*.

D (b) The legislations referred to by the Court of Appeal e.g. notice of one month to Local Government before instituting action against it is (with due deference to the justices) not on the same footing with requirement of payment of large sum of money to the adversary.

(c) In addition the legislations cited by the Court of Appeal were E made prior to the 1979 Constitution and their constitutionality vis-a-vis the 1979 Constitution has not been challenged or pronounced upon by the Supreme or any Court."

The parties (*id est*, the Plaintiffs, 1st Defendant and 2nd - 4th Defendants) filed their respective briefs of argument. The Plaintiffs, in their written brief of F argument. The Plaintiffs, in their Written brief of argument, proffer the following issue as calling for determination in this appeal, to wit:

"Whether Edict No. 3 of 1988 Kwara State making payment of N10,000.00 deposit a condition precedent for an aggrieved person in Chief- G taincy matters to challenge the government appointing authorities is not an infraction of section 6(6)(b) of 1979 Constitution of Federal Republic of Nigeria in that it creates an impediment to free access to court."

The 1st Defendant adopts this issue in his brief but the 2nd - 4th Defendants raise two issues thus:

"1. Whether section 15 of Edict No. 3 of 1988 abridges the right of H a person in a Chieftaincy matter considering the Provision of section 6(6)(b) of 1979 constitution.

2. Whether the decision in Bakare v. Attorney-General of the Federation (1990) 9 SCNJ 43 is relevant and/or applicable to this case at all."

The issues, as formulated by the parties, amount to the same question, issue

(2) in the brief of the 2nd-4th Defendants is an argument to be canvassed in the determination of their issue (1).

I shall now proceed to consider this appeal on the basis of the issue as raised by the Plaintiffs. Chief Olorunnisola, SAN, learned leading counsel for the Plaintiffs, submits, both in his brief and in oral argument, that the authorities relied on by the Court of Appeal in coming to its decision are not apposite to the issue under consideration. He submits that Gambari v. Gambari (1990) 5 NWLR 572 was wrongly decided. It is learned senior Advocate's view that Bakare v. Attorney-General of the Federation (supra) applies and that by that decision, the Court should hold that the Edict is an infraction of section 6(6)(b) of the Constitution and, therefore, null and void. Learned Senior Advocate further submits that the Limitation Laws relied upon by the Court below are not conditions precedent, rather they are laws that accelerate or make an aggrieved person initiate action quickly. He submits that Madukolu v. Nkemdilim (1962) 1 All NLR 587; (1962) ANLR 581 states general principles of law and was decided on the position of the law prior to the enactment of the Constitution. He states that the present case should be decided in the light of the constitution which protects unabridged access to court. He further submits that the various laws that prescribe the giving of notices to corporations and local governments before action is taken have not been examined in the light of the Constitution and cases decided on them are, therefore, not applicable to the case on hand. For the interpretation of the Edict learned counsel relies on Adediran v. Interland Transport Ltd. (supra). He urges the Court to allow the appeal and restore the decision of the trial High Court.

Chief Olanipekun, SAN, learned leading counsel for the 1st Defendant, argues to the contrary. Both in his brief and in oral argument, learned Senior Advocate relies on the decision of this Court in Obaba v. Military Governor of Kwara State (1994) 4 NWLR 26 and submits that that decision which stated that the Edict provided a condition precedent for the institution of the category of disputes covered by the Edict, is conclusive. He submits that the Edict has not taken away the jurisdiction of the court to entertain chieftaincy matters but merely provides for deposit with the State Account-General a non-refundable sum of N10,000.00 before an aggrieved person can challenge the validity of my appointment made under the Chiefs (Appointment and Deposition) Law. Learned Senior Advocate relies on the definition of "condition precedent" in Black's Law Dictionary. He also relies on the decisions of this Court in Madukolu v. Nkemdilim (supra), Ajanaku v. C.O.P (1979) 3-4 SC 28 and Katsina Local Authority v. Makudawa (1971) NWLR 100 at 105-106 (per Coker, JSC). Chief Olanipekun argues:

"The judgment of the Court of Appeal which had been appealed

against is very sound in law and logic. The references to the Limitation Law within which a public officer must be sued for any wrong doing; taking leave by Receiver/Manager as in *ADEGBOYEGA V. AWU* (1992) 7 NWLR (Pt. 255) 588, giving of three months notice before suing the Railway Corporation as in the case of *NIGERIA CEMENT COMPANY LIMITED V. NIGERIA RAILWAY B CORPORATION* (1992) 1 NWLR (Pt. 220) Pg. 747: giving of statutory notice by a landlord to the tenant etc made by the lower court are all subsisting conditions precedent both under the common law and the various statutes. The appellants' counsel in his Brief tried to explain away all these references or whittle down their effects by holding tenaciously to the provision of C section 6(6) (b) of the 1979 constitution, which according to him is novel. With due respect, section 6(6)(b) of the 1979 Constitution does not in any way whatsoever preclude the appropriate legislative bodies from inserting conditions precedent into statutes or laws. The same section of the Constitution does not also pretend to wipe off all the established or known conditions precedent which a litigant must fulfil before approaching the court under the common law. With much respect further to the appellants' counsel, Section 6(6)(b) of the 1979 Constitution does not in anyway howeversoever help his case. There is a difference between a law saying that the jurisdiction of a court is completely ousted as contained in the chiefs Edict No. 11 of E 1984 (*Ondo State*) leading to the decision of this court in *GOVERNOR OF ONDO STATE V. ADEWUNMI* (1985) 3 NWLR (PT. 13) Pg. 493 AND a law like Edict No. 3 of 1988 (*Kwara State*) which is merely procedural and stipulates a condition precedent which a litigant must fulfil before coming to court for redress."

F He observes that since the promulgation of the Constitution in 1979 various statutes have been enacted in which are incorporated conditions precedent before a prospective litigant can approach the court for any relief or redress and cites, as examples, the Electoral Act, cap. 105 Laws of the Federation of Nigeria 1990, Section 125(1) and the Companies and Allied Matters Act, Cap. G 59 section 410(2)(C). He also cites *Sule v. Nigerian Cotton Board* (1985) 2 NWLR 17 at 36-37 SC and *Eleja v. Bangudu* (1994) 3 NWLR 534 at 524 CA, upholding what learned Senior advocate calls, condition precedent to suing in landlord and tenant cases. Chief Olanipekun submits that *Adediran v. Interland Transport Ltd.* (supra) and *Bakare v. Attorney-General of the Fed-* H *eration* (supra) are irrelevant to the present case. Learned Senior Advocate refers to section 239 of the constitution and argues thus:

"It should be pointed out that the Military Governor of Kwara State under a Military dispensation combines together the functions of both the Executive and the Legislature. Under and by virtue of section 239 of the

Government (Crown). This Court held that prior to the 1979 Constitution none of the earlier Nigerian constitutions, including the 1963 Republican Constitution, contained provisions which could be construed as annulling. The Common law principle of the State immunity from tortious liability. However, section 6(6) of the 1979 Constitution (though not applicable in the case) which vests judicial power of the State in the Courts has removed and abolished the Common Law doctrine of State immunity from tortious liability in Nigeria. Eso, JSC delivering the lead judgment of the Court (with which the other Justices agreed) observed at pages 236-237:

"By virtue of the Interpretation Act (Cap 89) Laws of the Federation of Nigeria and Lagos 1959, section 45(1) which provides -

'Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.'

has preserved this ancient and royal doctrine of immunity of the state in our laws.

But that is not all. By Ordinance No. 19 of 1915, the Petitions of rights Ordinance was passed. This Ordinance was subsequently amended, the last amendment being made in 1964 (see Laws of the Federation and Lagos 1958 Cap 149). This last amendment could have been an opportunity to repeal a law which preserved immunity in the state. But it is remarkable that, though in 1947, England, 'The Earth of Majesty', which introduced the doctrine into the common law and which has historic justification for such introduction has passed the Crown Proceedings Act, s. 2 of which provides -

'Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity it would be subject

thus bringing to an end the immunity of the Crown, in that year 1964, years after Great Britain had passed their Crown Proceedings Act, and a year after this country became a Republic thus shedding off the last vestige of colonialism, the Petitions of rights Act Cap 149 was amended, but such that the position as it was in pre-1947 England be retained in Nigeria, in so far as tort is concerned! Leaving this country to be more royal than 'Royalty itself'

I have checked all our Constitutions prior to 1979 and regrettably

I am not able to find any provision which one could apply, even remotely but rightly, in an annulment of this doctrine. The court is to administer law as it is, and not as it ought to be.

This immunity attaching to the State in this country is sad. For the learned trial judge who took evidence described the scene that day as 'hell let loose' and this he had set out in his analysis of the evidence. He said - B

'It is beyond dispute, of course, that many soldiers, a witness gave the figure of 1,000, surrounded the entire buildings, hawling stones and broken bottles. Many of them got inside the building, set fire to it as well as the generator in the compound.'

This is bad. It should not be right that once the actual perpetrators C could not be determined, the State, whose soldiers these perpetrators are could not be made liable. But then as I said the immunity of the State persisted at the time of the incident.

As it is the 1963 constitution that governs this case I have made special study of the provisions that I believe may be applied to exclude this D immunity. S. 22 is the closest but then it deals only with determination of rights and talks about fair hearing being within a reasonable time. The complaint here is not that the appellants did not have fair hearing. No provisions has helped.

Happily for the country, but this does not affect the instant case, E section 6 of the 1979 Constitution which vests the judicial Powers of the country in the court has to my mind removed this anachronism.

Sub-section (6) of the section provides -

'(6) The judicial powers vested in accordance with the provisions of this section - F

.....

(b) shall extend to all matters between persons, or between govern- ment or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any questions as to the civil rights and obligations of that person.' G

There is no equivalent of this provision in previous Constitutions. For if it had been, the importation of the expression 'unknown soldier' which expres- sion is normally revered all over the world, be it East or West, and which expression has now been turned into a joke and infelicitousness as a result of an enquiry into the identity of the vandalizes that day, would not have H excused the State from liability."

This above view of section 6(6)(b) of the Constitution, though obiter, was accepted and followed in the next two cases I shall now consider.

I refer next to Bakare v. Attorney-General of the Federation & Ors.

(supra) where the Full Court considered the issue whether the Petitions of right Act, Cap 149 of the Laws of the Federation and Lagos 1958 still applied in Nigeria having regard to the Constitution. The Petitions of right Act provided for the procedure to be followed when property of any kind, including money or damages, was to be recovered from the Government and laid down as a precondition for instituting an action against Government, the obtaining of the consent of the Attorney-General. This Court held that the Act was unconstitutional. The rationes decidendi are:

(1) the intendment of section 6(6)(b) of the Constitution is to confer general jurisdiction on the courts established by the 1979 constitution and at the same time to provide access to the courts, so established, to persons who may have any contention on all matters as between them and the government or any authority of any person.

(2) the provisions of the Petitions of Right Act to the extent that they purport to prevent an aggrieved party from taking direct action in court are inconsistent with section 6(6)(b) of the Constitution and consequently as from 1979 the Act became null and void by virtue of section 1(3) of the Constitution.

These rationes decidendi can be deduced from the judgments of their Lordships that sat on that case. I will refer only to some of them.

Uwais, JSC (as he then was), after quoting section 6(6)(b) of the Constitution, observed at page 535:

"The intendment of these provisions is to confer general jurisdiction on the courts established by the 1979 Constitution and at the same time to provide access to the courts, so established, to persons who may have any contention on 'all matters' as between them and government or any authority or any person. In contrast to this the provisions of sections 3 and 4 of the Petitions of Right Act, Cap. 149, which inhibit the taking out of a Writ of summons against the Attorney-General intended, to some extent, to deny direct access to the Courts. It is only when the fiat is granted that access to the courts becomes unimpeded. It is, therefore, obvious that the provisions of section 3 and 4 of the Petitions of Right Act are inconsistent with the provisions of section 6 subsection (6)(b) of the 1979 constitution".....
(underlining are mine)

Wali, JSC, after quoting the relevant provisions of the Act and the Constitution, held at page 540 of the Report:

"The provisions of sub-section (6)(b) of section 6 and sub-section (1) of section 33 of the 1979 Constitution read together, vest in a person an unabridged right of access to a court established under Section 4 of the Constitution or any tribunal, having jurisdiction in the matter, for the deter-

mination of any question as to his civil rights or obligations arising between him and any government within the Federation or any authority or any other person. Section 33(1) of the Constitution in particular nullifies any law that accords to any government, be in Federal, State or local government, or any person exercising authority or power on behalf of any of them, the power to abridge the right of any person of access to the court to sue such a government or person without a fiat first being sought and obtained. The Constitution is the supreme law and supersedes any other legislation which is contrary to it. To that extent the constitutional provision shall prevail. Section 277(1) of the Constitution in which 'government' is defined includes the Federal Government.

It is therefore my conclusion that the procedural of Petitions of right as contained in the Petitions of Right Act, CAP. 149 Laws of the Federation of Nigeria and Lagos, 1958 is inconsistent with Sections 6(6)(b) and 33(1) of the 1979 Constitution and to that extent, null and void." (underlining are mine)

Olatawura, JSC in his own contribution, observed at page 543:

"Sections 6(6)(b) and 236 of the 1979 Constitution have removed the clog which the Petitions of right Law placed in the way of a litigant with regard to access to the court. The inhibitive provisions in the Petitions of right Law have denied justice to those who had a cause of action against the State. This apparent injustice is implicit in the provision of section 4(2) which gives a discretion to a proposed defendant (the 1st respondent in this appeal) to refuse or give his consent to an action before it could be filed. It is a fetter on administration of justice. The Constitution i.e. Section 6(6) (b) which gives unrestricted access to the courts provides:

'6. The judicial powers vested in accordance with the provisions of this section:

(b) shall extend to 'all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of ANY question as to the civil rights and obligations of that person.'

I refer lastly to Adediran & Anor v. Interland Transport Ltd. (supra) where one of the issues that called for determination was whether the rule of practice and procedure in English common law which restricts the right of individuals to sue for damages for public nuisance is in accord with the Constitution. At the English common law the procedure to sue for public nuisance, known as relator action, is at the suit of or by consent of the Attorney-General. This court held that the procedure was inconsistent with section 6(6)(b) of the constitution. Again, the ratio decidendi in that case is that by

virtue of section 6(6)(b) the courts are vested with the powers for the determination of any question as to the civil rights and obligations between persons, or between government or authority and any person in Nigeria. Accordingly, where the determination of the civil rights and obligation of a person is in issue, any law which imposes conditions is inconsistent with the free and unrestrained exercise of that right and is void to the extent of such inconsistency.

Karibi-Whyte, JSC in his lead judgment (with which the other Justices agreed) at pages 178-179, discussed the private individual's right to sue for nuisance. He said:

"The tort of nuisance is one of the many common law actions still available in this country. The common law of England which applies in this country, recognizes that nuisance may either be a public nuisance or a private nuisance. A public nuisance is one which inflicts damage, injury or inconvenience to the generality of the population, or upon all of a class who come within its ambit. A private individual has a right of action for public nuisance if he can establish that he has sustained particular damage other than any beyond the general inconvenience and injury suffered by the public and that the particular damage is direct and substantial - See Ejowhomu v. Edok-eter Ltd. (1986) 5 NLWR (Pt. 39) 1.

On the other hand a private nuisance is one which interferes with a person's use as an enjoyment of land or of some right, such as an easement, connected with land. See Ipadeola v. Oshowole (1987) 3 NWLR (Pt. 59) 18. The distinction between public and private nuisance is of critical importance at common law because of the consideration of the proper person to initiate proceedings.

The general rule is that a private individual can only take proceedings in his own name in respect of an injury sustained from public nuisance, where he has suffered some particular, direct and substantial damage over and above those sustained by the public at large; or when the interference with the public right involves a violation of some private right of his own, or threat of damage to his property. He can also exercise such a right of action if conferred on him by statute. In any case the nuisance must be a cause of the injury - See Dymond v. Pearce (11972) 1 ALL ER 1142. In all other cases, known as relator actions, proceedings must be brought with the sanction and in the name of the Attorney-general. In this case also the private individual who has sustained some special injury, and consequently has a valid right of action on his own account, joins the proceedings of the Attorney-General and claims in respect of that injury. - See A-G v. Logan (1891) 2 QB. 100; A-G v. St. Inves R.D.C. (1960) 1 QB. 312."

Relating the common law procedure to the provisions of the Constitution, the learned Justice of the Supreme Court observed, at page 180:

"It is well settled that a nuisance whether public or private is an injury which confers on the person affected a right of brings action as the relation of the Attorney-General, he must disclose a right of action on his own account. The Attorney-General is merely a nominal party. In reality it is the civil rights and obligations of the person who has sustained the injury that is in issue. Hence in certain circumstances, even an injury to the public may also constitute injury to the individual. The burden is on the individual establish his injury. The indiviual who suffers injury has a right of action because of the cause of action.

The Constitution has vested the Courts with the powers for the determination of any question as to the civil rights and obligations between government or authority and any person in Nigeria - See s.6(6)(b). Accordingly, where the determination of the civil rights and obligations of a person is in issue, any law which imposes conditions, is inconsistent with the free and unrestrained exercise of that right, is void to the extent of such inconsistency. Thus the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.

I think the high constitutional policy involved in section 6(6)(b) is the removal of the obstacles erected by common law requirements against individuals bringing actions before the court against the government and its institutions, and the preconditions of the requirement of the consent of the Attorney-General. This becomes the more important when the provisions are procedural encrustments designed to protect peculiar social or political situations." (underlining are mine)

Later in the judgment at page 181, he added:

"In the circumstances of this country, and considering the social and political considerations preceding it seems obvious that the Constitution did not intend to interposes any substantive precondition to the exercise of a right of action. Hence, except provided by rules of court, where a party can show that his Civil rights and obligations are in issue the judicial powers of the Constitution for the determination of such civil rights and obligations have been vested in our courts. To observe the common law distinction in instituting actions in tort of nuisance is to invoke and impose a common law provision inconsistent with the Constitution. It is to deprive the citizen of the right of action conferred on him by the Constitution. The constitution of this country has vested in every person the right to bring actions before the Courts for the determination of his civil

rights and obligations. No other law can take away the exercise of such right. (underlinings are mine for emphasis)

The ratio decidendi that runs through all these cases is that any pre-
condition that inhibits or constrains any person in the exercise of his un-
doubted constitutional right of access to the court in the determination of his
B civil rights or obligations is inconsistent with section 6(6) (b) of the Constitu-
tion and is, to that extent, null and void. These cases are binding on this Court
and we have not been called upon, in this appeal, to depart from them. Nor do
I see any justification for not following them. The submission of learned
counsel for the Defendants that these cases, particularly the last two, are
C irrelevant to the question to be determined in this case is, with profound
respect to learned counsel, wrong. As I shall show later in this judgment, they
are not only relevant, they are apposite and in my respectful view, they deter-
mine the appeal on hand.

I now turn to the case on hand. Is section 15 of the Chiefs (appoint-
D ment and Deposition) Law of Kwara State (as amended by Edict No. 3 of 1988)
constitutional and valid? That is the question to be determined and an answer
provided. It is generally accepted, and I agree with learned counsel on this,
that the law provides for a condition precedent to the institution of an action
by a person aggrieved by a decision of the governor (now military administra-
E tor) or other appointing authority in a chieftaincy matter where an appoint-
ment of a chief has been made. The aggrieved person cannot challenge the
appointment made in court unless and until he has first paid to the State
Accountant-General a non-refundable sum of N10,000.00 (ten thousand naira).
The pith and substance of section 15 is to deny to an aggrieved party who is
F unable to afford the payment of the non-refundable sum of N10,000.00 access
to the Court. He cannot sue to redress his grievance.

What is a "condition"? It is

*"a restrain or bridle annexed and joined to a thing, so that by the
not performance or not doing thereof the partie to the condition shall re-
G ceive prejudice and lose, and, by the performance and doing of the same,
commoditie and advantage" (*Termes de la Ley*) (Underlining are mine)*

The word is defined in the dictionary of English Law by Earl Jowitt as meaning

*"A declaration or provision which makes the existence of a right
H dependent on the happening of an event; the right is then called condi-
tional, as opposed to an absolute right." (underlining are mine)*

A condition precedent is a sine qua non to getting the thing to which it is
annexed. It follows, therefore, that without paying the non-refundable sum of
N10,000.00 to the state Accountant-General, an aggrieved person cannot, in

chieftaincy matters, have access to the court for redress. A condition of this nature is repugnant to the right given to the citizen by section 6(6)(b) of the constitution as interpreted by this court in Bakare v. A-G of the Federation (supra) and Adediran v. Interland transport Ltd. (supra). An aggrieved person who is not rich enough to pay the levy is left without redress; access to the court is shut against him. He cannot exercise his constitutional right of seeking redress in court. This shows glaringly the repugnancy of the statute. And a condition repugnant can hardly be called a condition at all, because it is void - See; Bradley v. Peixoto, 3 Ves 324; 30 ER 1034; Re Dugdale, 38 Ch D 176. And it is because a condition abridges a right that made this Court, per Karibi-Whyte JSC, declare in Adediran v. Interland Transport Ltd. (supra) at p. 180: C

"..... where the determination of the civil rights and obligations of a person is in issue, any law which imposes conditions, is inconsistent with the free and unrestrained exercise of that right, (and it) is void to the extent of such inconsistency." D

It is suggested that the non-refundable sum of N10,000.00 is a fee. This view, with respect, cannot be correct. A court fee is paid, not to the State Accountant-General, but to the Registrar of the court and it is provided for in the rules of court. The non-refundable sum of N10,000.00 is nothing but a levy extracted in terrorem to frighten, terrify or discourage an aggrieved person from challenging an appointment he objects to. It is more disturbing when it is realized that the lawmaker is a potential defendant in an action challenging the appointment he has made. Apart from the provision being inconsistent with section 6(6) (b) of the Constitution, it is equally unjust for the reason I have just given. F

It is submitted by chief Olanipekun that the Military Governor, as the legislative authority in the State, has constitutional power to make, by law, rules for the High court of the State and relies on section 239 of the constitution for this submission. I do not doubt that under the present dispensation a Military Governor (or Administrator) has power to prescribe the practice and procedure of the High Court of his State. But the exercise of the power given him by section 239 is subject to the limitation imposed by section 17(2)(e) of the Constitution. Section 13 and subsections (1) and (2) of section 17 in chapter 11 of the Constitution provide: G

"13. It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to observe and apply the provisions of this Chapter of this Constitution." H

"17. (1) The State social order is founded on ideals of Freedom, Equality

and Justice.

(2) *In furtherance of the social order -*

(a) *every citizen shall have equality of rights, obligations and opportunities before the law;*

(b) *the sanctity of the human person shall be recognized and human dignity shall be maintained and enhanced;*

(c) *governmental actions shall be humane;*

(d) *exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented; and*

(e) *the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.*" (underlining is mine)

A military governor (now administrator) cannot, in exercise of his legislative powers, enact any law that takes away the right of the citizen to easy accessibility to, or impairs the independence, impartiality and integrity of, the courts. Any such legislation will be inconsistent with the Constitution and will be null and void. By imposing a non-refundable levy of N10,000.00 to be paid by a suitor before he can institute his action, the Edict is also in conflict with section 17(2)(e) of the Constitution, and to that extent, it is null and void.

It is submitted by both the learned Attorney-General of Kwara State and chief Olanipekun - and this submission found favour with the court below - that it is not unusual to find legislations prescribing conditions to be fulfilled before any action is taken and such legislations have always been upheld by the courts. Instances are given of legislations, like the Nigerian Railway Corporation Act, and the Local authority Law of Northern Nigeria that require notice to be given by a plaintiff before suing. With respect to learned counsel, they appear to lose sight of the fact that these legislations were enacted prior to the 1979 Constitution and the validity of such provisions have not been questioned since the Constitution came into force. Such legislations cannot be said to be punitive as in this case. But as I have not had the benefit of arguments on their validity, I express no opinion. Such legislations are in line with the Petitions of right Act which, though, was valid before the 1979 Constitution - see Ransome-Kuti v. A-G. of the Federation (supra) but has since been declared invalid being inconsistent with section 6(6)(b) of the Constitution - see Bakare v. A-G. of the Federation (supra). Cases decided on the operation of such legislations prior to the 1979 Constitution or in which their validity has not been challenged, are not helpful in resolving the question we are considering in this appeal.

Another instance given is the requirement of the Common law for the

giving of statutory notices by a landlord to a tenant before suing for possession. With respect to learned counsel, I think there is a misconception of the purpose of such notices. Such notices are required to terminate tenancies and not a precondition for suing. For unless a tenancy is first determined, a landlord will not have a cause of action for possession, as a tenant is in lawful possession. The giving of the statutory notices and the non-compliance by the tenant is a condition precedent to the enforceability of the landlord's right to re-enter (per Vaughan Williams and Kennedy L. JJ in Jolly v. Brown (1914) 2 KB 109 at pp. 129, 129.

Another argument that has been proffered is that limitation laws are examples of conditions precedent which the courts have always upheld. With profound respect, I think this argument is without any merit. To describe limitation provisions as conditions precedent shows lack of knowledge of the nature of such provisions. Limitation statutes are laws that fix certain periods within which actions must be brought or proceedings taken. These laws are based on the principle interest reipublicae ut sit finis litium, that is to say, it is in the public interest that there is an end to litigation.

Such laws are of two kinds. There are those, such as the Limitation Law of Lagos State Cap 118, Laws of Lagos State 1994, where on the expiration of the time the remedy is barred, but not the right. For example, in the case of a simple contract debt which has remained unpaid and unacknowledged for six years, the creditor's right to bring an action to recover it is gone (s. 8(1) of the Limitation Law of Lagos State) but the debt exists for other purposes. The creditor can exercise a right of lien to recover it, but cannot set-off or counter-claim, because this is in the nature of a cross-action (section 3). It is in this category that section 1 of the Ondo State Approval of Appointment of an Oba and Presentation of Instrument of Appointment and staff of Office Edict, 1991 which provides:

"Any person who is aggrieved by the appointment of another person as an Oba shall within seven days of the date of such appointment institute action in the High court challenging the appointment."

falls - see Akinnuoye v. Military Administrator of Ondo State & Ors. (1997) (Pt. 483) page 564.

The second category consists of laws which, on the expiration of the time prescribed the right itself is barred. Examples of this are sections 15 and 22 of the Limitation Law of Lagos state which extinguish the title of the person who has been out of possession of chattel or land for the period of limitation prescribed in the law. It is immaterial that he may be ignorant that another is in possession - see Rains v. Buxton (1880) 14 Ch. D 537.

An important feature of the limitation law is that it does not affect the

competence of an action. And no advantage can be taken of it in an action unless an issue thereon is raised by the pleadings.

Before proceeding further, I think this is an appropriate stage to comment on three cases cited to us and relied upon by the Defendants. (i) Adegboyega v. Awu (1992) 7 NWLR 576 where the Court of Appeal (Kaduna B Division) following the decision of this Court in Intercontractors Nig. Limited v. U.A.C. (1988) 2 NWLR (pt. 76) 303 at 323 (per Karibi-Whyte, JSC) held that where a receiver/manager wished to commence or defend an action in the name of the owner of the goods, it is mandatory that he seeks leave of court before doing so. Where such leave is not obtained, the proceedings are void. C Explaining the need for such leave and the procedure, Karibi-Whyte JSC in the U.A.C. case, observed:

"I think it is necessary to seek leave of the Court where the Receiver/Manager intends to bring or defend an action in the name of the owner of the goods since he has no legal title to the property in the debenture and the Receiver/manager cannot claim any title in respect there. The application should be by summons stating the name of the person having title to the goods as Plaintiff or Defendant as the case may be, and seeking an order for the receiver/Manager appointed by the Instrument made under the debenture Deed, for liberty to commence/continue/defend an action in the name of the Plaintiff as the agent of the Debenture-holder - until judgment, and etc. In the case of defending an action, the substance of the claim in the action should be set out." (underlining is mine)

I do not see how anyone can equate this to the type of condition precedent that we are discussing in the appeal on hand. The two are not just apposite. F (ii) Madukolu v. Nkemdilim (supra); The oft quoted dictum of Bairamian, FJ (as he then was) at page 595 of the Report is again relied on here. Bairamian, FJ had said:

"..... a court is competent when -
 (1) *it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and*
 (2) *the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and*
 H (3) *the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.*

Any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided: the defect is extrinsic to the adjudication."

The phrase "any condition precedent to the exercise of jurisdiction" used in condition (3) of the above statement can only mean any lawful condition precedent. The condition precedent that came for discussion in the Nkemdilim case was a District Officer's Order which initiated the rehearing in the case. Surely, it cannot mean that any and every condition precedent, regardless of its validity, must be fulfilled. Indeed, the validity of the District officer's order was examined in that case and was found to be valid. (iii) Ajanaku v. C.O.P (1979) 3-4 SC 28. By an amendment to the 1963 Constitution made in 1976 following the creation of the court of Appeal, the certificate of the Attorney-General of the Federation authorizing further appeal was required before an appeal could be lodged to this Court from the Court of Appeal. This was not done and this Court held the appeal incompetent. True enough, the certificate is a precondition but it was a constitutional requirement that could not be said to have infringed any other constitutional provision. Moreover, a right of appeal is a creation of statute; it whittles down the jurisdiction of the court from which the appeal comes and enlarges that to which the appeal goes. There is not the equivalent of sections 17(2)(e) and 6(6)(b) in any of our previous Constitutions in this country.

I do not, therefor, see how any or all of the above cases could be of assistance to the Defendants in this appeal.

Another argument proffered by learned counsel for the two sets of Defendants is that the levy imposed by the Edict should be seen as security in the same sense that security is enjoined to be deposited by such statutes as the Electoral Act Cap 105 and the Companies and allied Matters Act, Cap 59. In my respectful view, there is another misconception here. There is a world of difference between the levy imposed in the Edict under consideration and the security provided for in those statutes. Section 125 of the Electoral Act, provides:

"125. (1) At the time of filing the petition or within such extended time as may be allowed by the Court, the petitioner shall give security for an amount fixed by the Court and as directed by the court; the petitioner shall deposit the amount in any Treasury or give security by recognizance for the amount.

(2) a recognizance may be entered into by any number of sureties not exceeding two, none of whom shall be the petitioner or any of the petitioners and such recognizance shall contain the name and usual place of abode of each surety, with such sufficient description as shall enable him to be found or ascertained."

See also rule 3 of the Local Government election Petitions rules, Schedule 4 of the Local Government Election Decree, No. 5 of 1996 which, also, provides:

"3. -(1) *At the time of presenting an election petition the petitioner shall give security for all costs which may become payable by him to any witness summoned on his behalf or to any respondent.*

(2) *The security shall be of such amount not exceeding N500 as the Tribunal may order and shall be given by depositing the amount with the B Tribunal.*

(3) *Where two or more persons join in the election petition, a deposit of the said amount shall be sufficient.*

(4) *If on security is given as required by this section there shall be no further proceedings on the election petition."*

C Section 410(2)(c) of the Companies and Allied Matters Act reads:

"(c) *the court shall not hear a winding-up petition presented by a contingent or prospective creditor until sufficient security for costs has been given, and a prima facie case for winding-up has been established to its satisfaction;*" (underlining is mine)

D It can be noticed -

(a) that the giving of security in these states is not a precondition to instituting the proceedings therein mentioned;

(b) the security is determined by the court in the exercise of its judicial power;

E (c) sanction for failure to give the security is the staying of the hearing of the matter;

(d) the security given is refundable where the party that gives it wins and where he loses, only the costs awarded against him are deducted and the balance, if any, is paid to him.

F There are provisions in the various rules of court prescribing for the giving of security for costs with the same incidents as stated above. In the case of the Edict, it provides for payment of a non-refundable sum, the purpose of which is not stated. Having regard to the language of the Edict, the payment can only be, as stated earlier in this judgment, to frighten or discourage the aggrieved party from suing. It is nothing but a levy imposed in terrorem; it is nothing but a penalty. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party - see: Clydebank Engineering & Ship building co. v. Don Jose Ramoz Yzquierdo of Castanceda (1905) AC. 6 at p.19 (per Lord Robertson); Dunlop Pneumatic Tyre Co. Ltd. v. New Garage H and Motor Co. Ltd. (1915) AC 79 at 86 per Lord Dunedin). Sections 6(6) (b) and 17 (2) (e) provide for easy accessibility to the courts. "Access" means approach or the means of approach without constraint. Section 15 prescribes a constraint. To that extent, it is inconsistent with the Constitution and it is, accordingly, null and void.

Both the Court below and learned counsel for the Defendants relied heavily on Gambari v. Gambari (1990) 5 NWLR (Pt. 152) 572, - a case on all fours with the appeal on hand. There the Court of Appeal (Kaduna Division), held that section 15(1) of the Chiefs (Appointment and Deposition) Law, as amended by Edict No. 3 of 1988 is constitutional and valid. Achike, JCA in his lead judgment observed at page 587:

"The law is familiar with stipulations termed 'a condition precedent' or 'condition subsequent. It is the former that concerns us in the appeal. A condition precedent may provide for the happening of some event or performance of an act before, for example, a contract can take off and become binding. Until the happening of that event or the performance of the act, the agreement remains inchoate. Such stipulation, unless contrary to public policy, have never been disallowed nor regarded as illegal. The statute books are replete with such stipulations, so also are the law reports. Thus where there is a non-compliance with a stipulated pre-condition for setting the legal process in motion, any suit instituted in contravention of the pre-condition is incompetent and the court is equally incompetent to entertain the suit. This principle has been lucidly enunciated in that locus classicus, Madukolu v. Nkemdilim (1962) 1 All NLR (pt. 4) 587."

After quoting the famous dictum in that case, the learned Justice continued on page 588:

"The pervasive and extensive nature of judicial powers and the so-called 'unlimited jurisdiction' of State High court in adjudications are familiar areas of the 1979 constitution; see sections 6, 236(1) and 274(3) of the 1979 Constitution. And, no doubt, it is a truism that a citizen's unfettered access to court is as old as the establishment of the courts themselves. Indeed, it can hardly be otherwise. Learned counsel for 5th respondent has sought to explain the validity of Edict No. 3 of 1988 by reference to its aim or purpose through its preamble. To my mind, such reference is absolutely unnecessary and I disregard it because the construction of section 15(1) of the said Edict has not been shown to present any difficulty or ambiguity to necessitate craving any aid to interpret it. Reading section 15 closely and carefully as I have done I find it extremely difficult to appreciate in what way it curtails, fetters, inhibits or prevents access to the High Court of Kwara State to any person who intends to challenge the appointment, selection, nomination or approval of a chief in any chieftaincy tussle merely because the State Military Governor, in exercise of his constitutional legislative functions, and within the confines of his constitutional legislative powers, in his wisdom, and for good governance and maintenance of peace and order within the State, has stipulated a condition precedent for challenging the

appointment of a person as a chief or refusal or failure to approve such appointment in the case of vacant chieftaincy stool in court where the military governor or the appointing authority or any of its agency is made a party to any such court action. Except for the *ipse dixit* of learned appellants' counsel, he has not, in terms of specifics, pointed out to any provisions of a Decree or existing law or unsuspended part of the 1979 Constitution that are violated by section 15 of Edict No. 3 of 1988 save that it is submitted in very broad general terms that the said section 15 inhibits or violates the constitutional right of action guaranteed by section 6(6) (b), 33(1) and 236(1) of the 1979 Constitution. I, myself, am unable to discover any such violations, fetters or inconsistency. The courts and the legislature are familiar with legislative stipulations which must be performed or fulfilled as conditions precedent for institution of action in a court of law. I shall now make a few random exemplifications of such pre-conditions known to the law."

He referred to some legislations - I have commented upon these earlier in this judgment, and concluded at pages 589-590:

"From the foregoing, I am unable to appreciate why the provisions for such preconditions under section 15(1) of Edict No. 6 of 1988 can properly be said to constitute fetters and an undue inhibition of a citizen's access to court or right of action of a prospective plaintiff as to violate sections 6(6)(b), 33(1) and 236(1) of the 1979 Constitution.

Learned appellants' counsel also submits that section 15(1) of Edict No. 3 of 1988 is punitive and penal and/or a fine in that it imposes a non-refundable sum of N10,000.00 on the appellant. These assertions are yet to be substantiated by the appellants. Where the legislature in exercise of its legislative powers, and within the ambit of those powers, stipulates the fulfillment of an act, such as payment of money, as a pre-condition for the institution of action - the stipulation being motivated by policy consideration - the court has responsibility to give effect to the legislative provisions; it cannot question or refuse to give effect to such unambiguous provisions of the law promulgated within powers allocated to the legislature. Section 15(1) of Edict No. 3 of 1988 is not a bar to right to institute an action nor can it, by any stretch of reasonable imagination, be said to cut down or oust the jurisdiction of the court to hear and determine any chieftaincy dispute such as in the case of *The Military Governor, Ondo State and anor. v. Victor Adegoke Adewumi* (supra) where section 11(7) of the chiefs Edict No. 11 of 1984 of Ondo State openly interfered with the extensive powers of the High Court under section (236(1) of the Constitution to entertain such matters.

The view I have formed of section 15(1) of Edict No. 3 of 1988 is that

it merely provides an alteration in procedure in relation to certain chieftaincy matters. A litigant has no vested right in any existing procedure applicable to a particular court. Consequently, where the procedural law is amended or completely repealed any person who seeks redress in a court is obliged to comply with such modifications in procedure. It is of no moment that the altered procedure stiffens or lightens the previous procedure nor that the procedural amendment is expressly or impliedly made to operate retrospectively - See Ojokolobo & Ors. v. Alamu & ors. (1987) 7 SCNJ 98 at p. 145; (1987) 3 NWLR (Pt. 61) 377 and A-G v. Vernazza (1960) A.C. 965. I have not been persuaded that section 15(1) delimits or curtails the extensive unlimited' jurisdiction conferred on a State High Court by section 236(1) of the 1979 Constitution."

Mohammed, J.C.A. (as he then was) in his own judgment in the case, observed at page 593 of the Report:

"I see nothing wrong in the imposition of N10,000.00 as a condition precedent to challenging the appointment of any Chief made by the Military Governor or any appointing authority in Kwara State. The Kwara State Government must have observed, what I equally have observed through the appeals coming to this court, that the courts in their State have been flooded with suits challenging the appointments of chiefs made by the Government and other appointing authorities, Thus the government, quite rightly, in my view, imposed a fee of N10,000.00 as a condition precedent to instituting any of such suits in Court.

A 'Condition Precedent' is defined in the English supreme Court Practice (The white Book) 1979 Edition, Order 18/7/10 as follows:

'Cases constantly occur in which, although everything has happened which would at common law *prima facie* entitle a man to a certain sum of money, or Vest in him a certain right of action, there is yet something more which must be done or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law.'

It is not unconstitutional to direct that as a condition precedent to challenging the appointment of any chief in Kwara state the plaintiff must deposit with the State Accountant General a non-refundable sum of ten thousand Naira. In the case of Ajanaku v. C.O.P. (1979) 3-4 SC. 28 the Supreme Court held that where there is a condition precedent to the exercise of jurisdiction e.g. issuance of a certificate by Attorney-General before

an appeal is filed, the courts jurisdiction is ousted if the condition is not fulfilled. The Edict of Kwara State putting a condition precedent to filing any challenge to chieftaincy appointments is like all those statutory enactments ordering for performance of an act before the suit is filed."

It must be noted that Gambari v. Gambari was decided in July 1990 before the decision of this Court in Bakare v. A-G of the Federation was given in September 1990. The Court below, therefore, did not have the benefit of the views of this Court in the latter case. In view of the rationes decidendi in that latter case, and in Adediran v. Interland Transport Ltd. (supra) it is my respectful view that Gambari v. Gambari must be held to be wrongly decided. I have earlier in this judgment commented on Ajanaku v. C.O.P relied on in the judgments of their Lordship of the Court of Appeal; I need not belabour that issue again. It is the reasons given by Mohammed JCA that, perhaps, raise some eyebrow and call for comment. A pre-condition in a statute which imposes financial hurdle in the way of a litigant thus preventing him from seeking his legitimate redress from the court is not such a pre-condition that is referred to in the passage in the White Book quoted by Mohammed JCA.

The learned Justice observed, and I quote once again:

"The Kwara State Government must have observed, what I equally observed through the appeals coming to this court, that the courts in their State have been flooded with suits challenging the appointments of chiefs made by the Government and other appointing authorities. Thus the Government, quite rightly, in my view, imposed a fee of N10,000.00 as a condition precedent to instituting any of such suits in Court."

If anything, this observation reinforces the view that section 15 is designed to inhibit, abridge and constrain the right of access to the court. In the 1963 Constitution, the jurisdiction of the courts in chieftaincy matters was expressly ousted. The framers of the 1979 Constitution, in their wisdom, removed this clog to the citizen's right of access to the courts. Attempts by some States to once again restore, by edicts, ouster of court's jurisdiction in chieftaincy matters were resisted by the Courts (including this Court) who struck down such State legislations as being unconstitutional - see Military Governor, Ondo State & Anor v. Victor Adegoke Adewunmi (1988) 3 NWLR (Pt. 82) 280; (1988) 6 SCNJ 151. It would appear that following the decision in that case a new subterfuge was designed to impose, by legislation, a non-refundable levy which would have the effect of scaring away citizens from enforcing their rights by action in chieftaincy matters, thereby damming the avalanche of such cases, according to Mohammed JCA. The requirement of payment of a non-refundable sum before action is taken is, in my respectful view, not only oppressive but it is an attempt to stifle what otherwise might have been a genu-

ine claim. It is inconsistent with the "truism" spoken of by Achike J.C.A. At page 588 "that a citizen's unfettered access to court is as old as the establishment of the courts themselves." Of course, motive is irrelevant in the interpretation of statutes. I have only made the above comments in view of Mohammed JCA's observation.

The plank on which the Court below based its judgment in the appeal on hand having collapsed in the light of the decisions of this Court in Bakare v. A-G of the Federation and Adediran v. Interland Transport Ltd., its judgment can therefore, not stand. The court below, in fairness to it, expressed its concern about such preconditions as contained in section 15. For Oduwole JCA who read the lead judgment sounded a note of warning. He said:

"I think I should not conclude this judgment without a word of caution that care should however be taken to see that no harsh or bogus condition precedent is imposed to impede or block the fundamental free access of a citizen to seek redress in court. If this happens and I hope not, the rationale for imposing the condition precedent as the one in question must have come to nought and justice will no longer be seen to be done. Doubtless, such immoderate action will be contrary to the spirit of our Constitution of being versed to interposition of substantive pre-condition to the exercise of right of action."

With such a view of the precondition in question in this appeal, their Lordships should have considered, and given effect to the two decisions of this Court cited before them, that is Bakare and Adeniran in preference to Gambari v. Gambari. Rather than do so, they poured undeserved venom on the learned trial Judge who, rightly in my view, followed, as he must do, the decisions of this Court in preference to that of the court of Appeal.

Chief Olanipekun, SAN has also cited to us Obaba v. Military Governor of Kwara State (1984) 4 NWLR (Pt. 336) 26. The validity of section 15 was not an issue in the case in that the plaintiff therein paid the non-refundable levy. Nor did the Court make any pronouncement on it. The case is therefore, irrelevant to the determination of the question being considered in this appeal. The view that section 15 imposes a condition precedent is not in dispute. It is the validity of that condition that is in issue in this appeal but was not in issue in that case.

It is now settled law that where an edict, as opposed to a decree is inconsistent with any decree or the unsuspended provisions of the Constitution, the edict is, to the extent of such inconsistency, void and the court can so pronounce on the edict - See: University of Ibadan v. Adamolekun (1967) NSCC 210; (1967) ANLR 225; Peenok Ltd. v. Hotel Presidential Ltd. (1982) 12 SC. 1; Agrip (Nig.) Ltd. v. Attorney-General Lagos State (1977) 11-12 SC. 33.

Finally, it is best to remember that

:the due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities;"

B Per Lord Diplock in A-G Times Newspapers (1974) AC 289, 309. To employ the words of Uwais JSC (as he then was) in Bakare v. A-G of the Federation & Ors. (supra), section 15, by its provision, inhibits the taking out of a writ of summons in a chieftaincy matter against the Military Governor or other appointing authority and thereby denies direct access to the Courts. For it is only when C the non-refundable sum of N10,000.00 is paid to the State Accountant-General that access to the courts becomes unimpeded. This, undoubtedly, is a hindrance to access to the courts. And it offends against the letter and spirit of sections 6(6)(b) and 17(2)(e) of the Constitution. Section 15, therefore, is inconsistent with those sections of the constitution. It is, accordingly null D and void.

Consequently, this appeal, in my respectful view, succeeds and I allow it. I set aside the judgment of the Court below and restore that of the trial High court. The Plaintiffs are entitled to their costs both in the Court below and in this Court which I assess at N500.00 and N1,000.00 respectively against E each set of Defendants.

OGWUEGBU JSC (DISSENTING)

The main question in this appeal is whether section 15 of the Chiefs F (appointment and Deposition) (Amendment) Edict No. 3 of 1988 of Kwara State is in conflict with section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1979 and therefore null and void. The said section 15 provides.

"(1) Where the Military Governor or the appointing authority has G approved the appointment of a person as a Chief, any person who intends to challenge the validity of such appointment shall first deposit with the State Accountant-General a non-refundable sum of ten thousand Naira.

(2) Where the Military Governor or the appointing authority has H not approved any appointment to a vacant chieftaincy stool, any aggrieved person who institutes any court action in chieftaincy stool and joins the State Government or any of its agency as a party to any such court action shall first deposit with the State Accountant-General a non-refundable fee of ten thousand Naira."

The appellants as plaintiffs in the High Court of Kwara State, Omu-

Aran Judicial division claimed the following reliefs against the defendants:

"A declaration:

1. *That the purported appointment of Alhaji Ahmadu Awuni as Elese of Igbaja by the 3rd defendant is contrary to the Native Law and Custom of Irese land relating to the appointment of an elese contrary to the Elese of Irese (Confirmation of Declaration) Edict, 1987 and contrary to all known B laws relating to the selection and appointment of an Elese of Irese land and is therefore void.*

2. *That the 1st Plaintiff is the proper and rightful person to be appointed the Elese of Irese land having been selected by Abidolu Royal Families, the Ire Kingmakers and in accordance with the Elese of Irese C (Confirmation of Declaration) Edict, 1987.*

3. *A perpetual injunction restraining the 1st defendant from parading himself as the Elese of Irese land or performing any acts appertaining to the office of Elese of Irese land, and an injunction restraining the 2nd and 3rd defendants from installing, recognizing or in any way dealing with the D 1st defendant as the elese of Igbaja (Irese land)."*

Upon the service of the Writ of Summons, the 2nd, 3rd and 4th defendants filed an application in the High Court praying the court for:

"An order dismissing and/or striking out this suit on the ground that the plaintiffs failed to deposit the sum of Ten thousand Naira (N10,000.00) E prior to instituting and/or filing this suit as required and/or enjoined by the mandatory provisions of section 15(1) of the Chiefs (Appointment and Deposition) (Amendment) Edict No. 3 of 1988."

After hearing arguments on the motion, Orilonise, J. in a reserved ruling, dismissed the application. The defendants who were not satisfied with F the ruling, appealed to the Court of Appeal, kaduna division. Their appeal was allowed by the court below hence this further appeal by the plaintiffs. The plaintiffs filed two grounds of appeal which I need not reproduce in the judgment having regard to the fact that written briefs of argument were filed and issues for determination arising from the grounds of appeal are set out in the G briefs.

In the opinion of the appellants, the issue for determination reads:

"Whether Edict No. 3 of 1988 Kwara state making payment of N10,000.00 deposit a condition precedent for an aggrieved person in chieftaincy matters to challenge the government appointing authorities is not an H infraction of section 6(6)(b) of 1979 Constitution of Federal republic of Nigeria in that it creates an impediment to free access to court."

The 1st respondent adopted the issue identified by the appellants but the 2nd and 3rd respondents formulated the following issues:

"1. Whether section 15 of Edict No. 3 of 1988 abridges the right of a person in a Chieftaincy matter considering the provision of section 6(6)(b) of 1979 Constitution.

2. Whether the decision in Bakare vs. Attorney-General of the Federation (1990) 9 SCNJ 43 is relevant and/or applicable to this case at all."

B Chief Olorunnisola, S.A.N. adopted and relied on the appellants' brief filed on 4:3:94. He submitted that the following cases: Gambari v. Gambari (1990) 5 N.W.L.R. (Pt. 152) 572, Madukolu v. Nkemdilim (1962) 1 All N.L.R. (Pt. 4) 587, Adegboyega v. Awu (1992) 7 N.W.L.R. (Pt. 255) 588 and Nigerian Cement Co. Ltd. v. Nigeria Railway Corporation & Or. (1992) 1 N.W.L.R. (Pt. 220) C 747 relied upon by the court below are not apposite. He also argued that the Limitation Laws are not conditions precedent and that Madukolu v. Nkemdilim (supra) decided the position of the law before the enactment of section 6(6)(b) of the 1979 Constitution of the Federal Republic of Nigeria.

He argued that the rationalization by the court below does not accord with the interpretation of section 6(6)(b) of the Constitution in Adediran v. Interland Transport Ltd. (1991) 9 N.W.L.R. (Pt. 214) 155 by this court. We were urged to hold that the decision in Gambari v. Gambari (supra) is bad law and that the ratio decidendi in Bakare v. Attorney-General of the Federation (1990) 5 N.W.L.R. (Pt. 152) 516 applies to this case. The learned S.A.N. finally E urged the court to allow the appeal and declare the Kwara State Edict No. 3 of 1988 unconstitutional, null and void.

Chief Olanipekun, S.A.N. for the 1st respondent referred to the case of Obaba v. Military Governor of Kwara State (1994) 4 N.W.L.R. (Pt. 336) 26. He argued that in that case this court considered the provisions of Edict No. F 3 of 1988 of Kwara State and held that the payment of the deposit is merely a condition precedent and that it is only when the condition is duly complied with that the court gets conferred with jurisdiction to entertain any suit arising under or in connection with the Edict. He further submitted that section 15 of the Edict does not in any way conflict with the provisions of section 6(6) (b) of G the 1979 Constitution because it does not stipulate that the court does not have jurisdiction to entertain chieftaincy matters but merely states that before a litigant can challenge the validity of any appointment made under the Chiefs (Appointments and Deposition) Law as amended, he has to deposit with the State Accountant-General a non-refundable sum of N10,000.00.

H He referred to Blacks Law Dictionary for the definition of "condition precedent" and submitted that conditions precedent have always been inserted into the provisions of different laws, either substantive or procedural, the fulfillment of which entitles a litigant to come to court or take some benefits under the said laws. He referred to the cases of Madukolu v. Nkemdilim

(supra), Ajanaku v. C.O.P (1979) 3-4 S.C. 28, Katsina Local Authority v. Makudawa (1971) N.M.L.R. 100 at 105-106, Adegboyega v. Awu (supra) and Nigeria Cement Company Ltd. v. Nigeria Railway corporation (supra).

Learned S.A.N. drew a distinction between a law which says that the jurisdiction of a court is completely ousted as contained in the Chiefs Edict No. 11 of 1984 (Ondo State) which gave rise to the decision of this court in Governor of Ondo State v. Adewunmi (1985) 3 N.W.L.R. (Pt. 13) 493 and a law such as edict 3 of 1988 (Kwara State) which is merely procedural and stipulates a condition precedent. He also referred to section 125(1) of the Electoral Act Cap. 105 Laws of the Federation of Nigeria, 1990 and section 410(2)(c) of the companies and allied Matters Act Cap. 59 Laws of the Federation of Nigeria, 1990.

The Senior Advocate further submitted that the cases of Adediran v. Interland Transport Ltd. (supra) and Bakare v. Attorney-General of the Federation (supra) cited by the learned appellants' counsel are irrelevant. He submitted that the Military Governor of Kwara State combines the functions of both the Executive and the Legislature and by virtue of section 239 of the Constitution, the State High Court is to exercise jurisdiction vested in it by the Constitution or by any law in accordance with the practice and procedure from time to time prescribed by the House of Assembly of the State and that under this provision of the constitution, the State Military Governor did not exceed his bounds by enacting Edict No. 3 of 1988.

He finally submitted that the power to enact edict No. 3 of 1988 of Kwara State was derived from section 2(3) of Decree No. 1 of 1984 and that the case of Gambari v. Gambari (supra) decided by the Court of Appeal should be affirmed by this court. Chief Sanni, Honourable Attorney-General and commissioner For Justice, kwara State appearing for the 2nd and 3rd respondents took the same stand as chief Olanipekun, S.A.N. who appeared for the 1st respondent. He concluded in the brief of argument of the 2nd and 3rd respondents that section 15 of Edict No.3 of 1988 is not an abridgment of the right of a citizen and does not contradict the provisions of section 6(6) (b) of the 1979 Constitution. He submitted that the case of Gambari v. Gambari (supra) is on all fours with the present case and that the ratio in Bakare v. Attorney-General of the Federation (supra) is not applicable to the case in hand.

In Madukolu v. Nkemdilim (supra) this court held that any defect in the competence of a court renders the proceedings before it a nullity and that a court is competent when:

- (1) It is properly constituted with respect to the number and qualification of its members;
- (2) The subject matter of the action is within its jurisdiction;

(3) the action is initiated by due process of law; and

(4) Any condition precedent to the exercise of its jurisdiction has been fulfilled.

The respondents wrongly relief on the fourth classification, namely that the appellants' failure to deposit the non-refundable fee of ten thousand Baira with the State Accountant-General before instituting the action as provided in section 15 of Kwara State Edict No. 3 of 1988, robbed the High Court of the jurisdiction to hear and determine the claim.

It is the contention of the appellants that this is an infraction of section 6(6)(b) of the 1979 Constitution of the federal Republic of Nigeria C which provides:

"6(6) The judicial powers vested in accordance with the foregoing provisions of this section -

(a).....

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

This court has on various occasions interpreted the above provision and some of those decisions have been referred to us by both learned counsel E in their written submissions and oral arguments. These pronouncements will be a guide in my consideration of section 15 of Edict No. 3 of 1988 of Kwara State in relation to section 6(6)(b) of the Constitution. Those decisions and the statutory provisions cited and relied upon by the parties in their briefs fall into three classes and I will start with first class.

F In the case of Bakare v. Attorney-General of the Federation & Ors. (supra), the issue for determination was whether the Petitions of right Act, Cap. 149, Laws of the Federation, 1958 still applies having regard to the Constitution of the Federal Republic of Nigeria, 1979; in other words, what is the effect of the Petitions of right Act Cap. 149 vis-a-vis the relevant provisions of G the 1979 constitution? Sections 3 and 4 of the Petitions of right Act which were relevant in the determination of that case provide:

"3. All claims against the Government of the Federation or against any Ministry or department thereof, being of the same nature as claims which before the commencement of the Crown Proceedings Act, 1947 of the Parliament of the United Kingdom might in England have been preferred against the Crown by petition, manifestation or plea of right may, with the consent of the Attorney-General of the Federation, be preferred in a High Court having original jurisdiction in respect thereof or if the supreme Court has such jurisdiction, in that Court, in a suit instituted by the claimant as plaintiff

against such person as the said Attorney-General may designate, as defendant, for the purpose.

4.(1) The claimant shall not issue a Writ of summons, but the suit shall be commenced by the filing of a statement of claim in the court and the delivering of 2 copies thereof at the office of the Attorney-General of the Federation and no fee shall be payable on filing or delivering such statement.

(2) The decision of the Attorney-General of the Federation shall be conclusive and, if he gives his consent, one copy of the statement of claim with his fiat endorsed shall be returned to the court having original jurisdiction; and the claim shall be prosecuted in that court."

In his contribution to the lead judgment of Eso, J.S.C. Uwais, J.S.C. (as he then was) said at p. 534:

"It seems to me that the real question for determination in this appeal is: what is the effect of the Petitions of right Act, 149 Vis-a-vis the relevant provisions of the 1979 Constitution?"

He continued at p. 535:

"I now turn to the question which I have posed for determination. Section 6 subsection 6(b) of the 1979 Constitution provides:

(6) The judicial powers vested in accordance with the foregoing provisions of this Section"

(b) shall extend to all matters between persons, or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The intendment of these provisions is to confer general jurisdiction on the courts established by the 1979 Constitution and at the same time to provide access to the courts, so established, to persons who may have any contention on "all matters" as between them and government or any other authority or any person. In contrast to this the provisions of sections 3 and 4 of the Petitions of right Act, Cap. 149, which inhibit the taking out of a Writ of summons against the Attorney-General intended, to some extent, to deny direct access to the Courts. It is only when the fiat is granted that access to the courts becomes unimpeded. It is, therefore, obvious that the provisions of sections 3 and 4 of the Petitions of right Act are inconsistent with the provisions of section 6 sub-section 6(b) of the 1979 Constitution and the Court of Appeal was right when it so held." (Underlining are for emphasis).

Wali, J.S.C. in his own contribution stated as follows at p. 540:

"The provisions of sub-section 6(b) of section 6 and sub-section (1) of section 33 of the 1979 Constitution read together, vest in a person an un-

abridged right of access to a court established under section 4 of the Constitution or any tribunal, having jurisdiction in the matter, for the determination of any question as to his civil rights or obligations arising between him and any government within the Federation or any authority or any other person. Section 33(1) of the Constitution in particular nullifies any law that accords to any government, be it Federal, State or local government, or any person exercising authority or power on behalf of any of them, the power to abridge the right of any person of access to the court to sue such a government or person without a fiat being sought and obtained. The Constitution is the supreme law and supersedes any other legislation which is contrary to it. (Underlining are for emphasis).

Next is the case of Adeniran & Or. v. Interland Transport Ltd. (supra). That was an action where the representatives of the residents of Ire-Akari Housing Estate, Isolo brought an action as plaintiffs, on behalf of themselves and all other members of the Housing Estate Association against the defendant, a limited liability company, for injunction and damages for nuisance. The defendant company was found liable by the trial judge for the tort of nuisance and injunction was also granted. On appeal by the defendant, the court below set aside the decision of the High Court and the plaintiffs appealed to this court.

The third issue canvassed by the appellant in that case which in my opinion is relevant to the consideration of the present appeal is:

"Whether a common law rule that denies or restrains the right of access to the court is not void having regard to the provision of sections 6 and 33 of the Constitution of the Federal Republic of Nigeria 1979."

In his lead judgment in that case, karibi-Whyte, J.S.C. while considering the common law rule vis-a-vis section 6 (6)(b) of the 1979 Constitution said at p. 180:

"The Constitution has vested the Courts with powers for the determination of any question as to the civil rights and obligations between government or authority and any person in Nigeria - See s.6(6)(b). Accordingly, where the determination of the civil rights and obligations of a person is in issue, any law which imposes conditions, is inconsistent with the free and unrestrained exercise of that right is void to the extent of such inconsistency. Thus the restriction imposed at common law on the right of action in public nuisance is inconsistent with the provisions of section 6(6)(b) of the Constitution, 1979 and to that extent is void.

I think the high constitutional policy involved in section 6(6) (b) is the removal of the obstacles erected by common law requirements against individuals bringing actions before the court against the government and

its institutions, and the pre-conditions of the requirement of the consent of the Attorney-General. This becomes the more important when the provisions are procedural encrustments designed to protect peculiar social or political situations." (Underlining is for emphasis)

Referring to a similar obstacle, namely, the immunity of the sovereign from suits, in Ransome-Kuti v. Attorney-General for the Federation (1985) 2 N.W.L.R. B (Pt. 6) 211 at p. 237, Eso, J.S.C. said;

"Happily for this country, but this does not affect the instant case, section 6 of the Constitution which vests the judicial powers of the country in the court has to my mind removed this anachronism."

..... C
In the circumstances of this country, and considering the social and political considerations proceeding it seems obvious that the Constitution did not intend to interpose any substantive precondition to the exercise of a right of action. To observe the common law distinction in instituting actions in tort of nuisance is to invoke and impose a common law provision inconsistent with the constitution, it is to deprive the citizen of the right conferred on him by the constitution." (Underlining is for emphasis) D

The case of Obaba & Ors. v. Military Governor of Kwara State & Ors. (Supra) and Gambari & Ors. v. Gambari & Ors. (supra) fall within the second class. The former is a decision of this court while the latter is a decision of the Court of Appeal. In the former, the question of conflict of section 15 of Edict No. 3 of 1988 of Kwara State with section 6(6)(b) of the Constitution was not directly in issue. E

The main complaint of the appellants therein was that their payment of the non-refundable fee of N10,000.00 vested the court with jurisdiction to F invalidate or set aside the Kwara State Edict No. 2 of 1988. The court observed that such payment is a precondition which gave the appellants access to the court.

Belgore, J.S.C. who delivered the lead judgment of the court observed as follows: G

"All that the payment of fee (sic) N10,000.00 is for is to have access to the court to be heard. It is a different thing if once the access is thus procured for the court to have jurisdiction to look into the cause of action. No action could be filed without payment of a fee and it is after an action is filed that the preliminary issue of jurisdiction can be raised." H

This court held that the payment of the N10,000.00 non-refundable fee is a precondition. The court did not hold that the payment is inconsistent with section 6(6)(b) of the 1979 constitution. That point did not arise in the case.

The case of Gambari v. Gambari (supra) is on all fours with the present appeal. On section 15(1) of Edict No. 3 of 1988, Achike, J.C.A. who wrote the lead judgment of the court observed:

"Reading section 15 as closely and carefully as I have done I find it extremely difficult to appreciate in what way it curtails, fetters, inhibits or prevents access to the High Court of Kwara State to any person who intends to challenge the appointment, selection, nomination or approval of a chief in any chieftaincy tussle merely because the State Military Governor, in exercise of his constitutional legislative functions, and within the confines of his constitutional legislative powers, in his wisdom, and for good governance and maintenance of peace and order within the State, has stipulated a condition precedent for challenging the appointment of a person as a chief or refusal or failure to approve such appointment in the case of vacant chieftaincy stool in court where the military governor or the appointing authority or any of its agency is made a party to any such court action. Except for the ipse dixit of learned appellants' counsel, he has not, in terms of specifics, pointed out to any provisions of a Decree or existing law or unsuspended part of the 1979 Constitution that are violated by section 15 of Edict No. 3 of 1988 save that it is submitted in very broad general terms that the said section 15 inhibits or violates the constitutional right of action guaranteed by section 6(6)(b), 33(1) and 236(1) of the 1979 Constitution. I, myself, am unable to discover any such violations, fetters or inconsistency. The courts and the legislature are familiar with legislative stipulations which must be performed or fulfilled as conditions precedent for institution of action in a court of law."

In his concurring opinion, Mohammed, J.C.A. (as he then was) said:

"I see nothing wrong in the imposition of N10,000.00 as a condition precedent to challenging the appointment of any Chief made by the Military Governor of (sic) appointing authority in Kwara State. The Kwara State Government must have observed through the appeals coming to this court, that the courts in their State have been flooded with suits challenging the appointments of chiefs made by the Government and other appointing authorities. Thus the Government, quite rightly, in my view, imposed a fee of N10,000.00 as a condition precedent to instituting any action of such suits in Court. It is not unconstitutional to direct that as a condition precedent to challenging the appointment of any chief in Kwara State the plaintiff must deposit with the State Accountant-General a non-refundable sum of ten thousand Naira. In the case of Ajanaku v. C. O. P. (1979) 3-4 S.C. 28. The Supreme Court held that where there is a condition precedent to the exercise of jurisdiction e.g. issuance of a certificate by Attorney-Gen-

eral before an appeal is filed, the courts jurisdiction is ousted if the condition is not fulfilled. The Edict of Kwara State putting a condition precedent to filing any challenge to chieftaincy appointments is like all those statutory enactments ordering for performance of an act before the suit is filed." (Underlining is for emphasis)

The third class are the Limitation Laws which relate to institution of B actions against Local Government authorities, Nigerian Railway Corporation, Landlord and Tenant in Recovery of Premises Law, payment of security in Election Petitions and winding up of companies, to name but a few. The following cases were referred to us:

Ajanaku v. C.O.P. (supra), Katsina Local Authority v. Makudawa (1971) C N.M.L.R. 100 and Nigerian Cement Company Ltd. v. Nigeria Railway Corporation (1992) 1 N.W.L.R. (Pt. 220) 747.

In Katsina Local Authority v. Makudawa (supra), this court held (i) that the proceedings do not come within the type of action described in section 116(1) of the Katsina Local Authority Law Cap. 77 and as such, the competency of the proceedings cannot be challenged on that score; (ii) that in regard to section 116(2), it is settled law that where a party intends to rely upon a condition precedent, it must be specifically pleaded and (iii) that section 116(2) of the Local Authority Law prescribed a condition precedent to competence of any action commenced against a Local Authority. E

Section 116 of the Katsina Local authority Law, Cap. 77 provides:

"116(1) when any suit is commenced against any local authority for any act done in pursuance, or execution, or intended execution of any Act or Law, or of any public duties or authority, or in respect of any alleged neglect or default in the execution of any such Act, Law, duty or authority, F such suit shall not lie or be instituted in any court unless it is commenced within six months next after the act neglect or default complained of, or in case of a continuance of damage or injury, within six months, next after the ceasing thereof:

Provided that if the suit be at the instance of any person for cause G arising while such person was a convicted prisoner, it may be commenced within three months after the discharge of that person from prison.

(2) No suit shall be commenced against a local authority until one month at least after written notice of intention to commence the same shall have been served upon the local authority by the intending plaintiff or his H agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims."

Ajanaku v. Commissioner of Police (supra) this case involved an application for leave to appeal to this court from the decision of the Court of

appeal given on appeal from an appellate decision of the High Court. The applicant did not previously obtain the Certificate of the Attorney-General authorizing further appeal to this court. This court held that it had no jurisdiction to entertain the application. See section 3(c) of Decree No. 43 and section 117(5) of Decree No. 42 of 1976 respectively.

B Nigerian Cement Company Ltd. v. Nigerian Railway corporation & Or. (supra). This was decision of the Court of Appeal, Port Harcourt Division. One of the issues for determination was whether the application before the court below was competent by virtue of the provisions of section 83(2) of the Nigerian Railway Corporation Act Cap. 139, Laws of the Federation of Nigeria.

C Section 83(2) provides:

"83(2) No suit shall be commenced against the Corporation until three months at least after written notice of intention have been served upon the corporation by the intending plaintiff or his agent; and such notice shall clearly and explicitly state the cause of action, the particulars of claim, the D name and the place of abode of the intending plaintiff and the relief which he claims."

The trial court held that the application was not competent for non-compliance with section 83(2) of the Act and this decision was affirmed by the Court of Appeal.

E The following are among the statutory provisions referred to:

(a) Section 179(1) of the Local Government Edict No. 8 of Kwara State which reads:

"No suit shall be commenced against a Local Government until one month at least after a written notice of intention to commence the same has F been served upon the Local Government by the intending plaintiff or its agents."

(b) Section 410(2) of the companies and Allied Matters Act Cap. 59 Laws of the Federation of Nigeria, 1990 which provides:

"410(2)(c) the court shall not hear a winding up petition presented by a contingent or prospective creditor until sufficient security for costs has been given, and a prima facie case for winding up has been established to its satisfaction;"

(c) Local Government (Basic Constitutional and Transitional Provisions) Decree No. 7 of 1997: (Procedure For Election Petition) Rule 3(1) and (2) H in Schedule 5 to the Decree which reads:

"3(1) At the time of presenting an election petition, the petitioner shall give security for costs which may become payable by him to a witness summoned on his behalf or to any respondent.

(2) The security shall be of such amount not exceeding N500 as the

Election Tribunal may order and shall be given by depositing the amount with the Election Tribunal.

(3)....."

(d) section 125 of Electoral Act Cap. 105 Laws of the Federation of Nigeria, 1990 reads:

"125(1) At the time of filing the petition or within such extended B time as may be allowed by the Court, the petitioner shall give security for an amount fixed by the Court and as directed by the Court; The petitioner shall deposit the amount in any Treasury or give security by recognizance for the amount.

(2).....

C

(3)....."

I have summarized some of the decided cases and statutory provisions touching on conditions precedent to the initiation of legal proceedings against the Government or its agencies by the citizens. I will now apply those cases and enactments to section 15 of Edict No. 3 of 1988 of Kwara State and D determine whether it is infact in conflict with section 6(6)(b) of the 1979 Constitution or not.

By section 15 of the said Edict, any person who intends to challenge the validity of an appointment approved by the Military Governor (Administrator) or the appointing authority shall first pay a non-refundable fee of ten E thousand naira to the state Accountant-General. The same non-refundable fee shall also be paid where the Governor or the appointing authority has not approved the appointment to a vacant chieftaincy stool and the aggrieved F person institutes a court action and joins the state Government or any of its agencies as a party to the action. The appellants maintain that this requirement is a condition which inhibits, abridges or denies their right of free access F to the courts and therefore inconsistent with section 6(6) (b) of the Constitution. It is contended on behalf of the respondents that such a precondition is normal, that it gives the aggrieved party (the appellants) access to the court and gives the court jurisdiction to look into the case of action and without the G payment, no action can be filed.

The term "condition" has been defined as:

"A provision which makes the existence of a right dependent on the happening of an event; the right is then conditional, as opposed to absolute right. A true condition is where the event on which the existence of the right depends is future or uncertain. A condition precedent is one which delays the vesting of a right until the happening of an event. (See Osborn's Concise Law Dictionary 8th Edition,) (Underlining is for emphasis).

The pronouncements of the eminent Justices of this court on "conditions precedent" or "preconditions" in Bakare v. The Attorney-General of the Federation & Or. (supra) ad Adediran & Or. v. Interland Transport Ltd. (supra) are authoritative legal principles which are binding on this court until overruled.

B Whether the right of action is for the enforcement or vindication of any legal right or for obtaining any relief against the government or against any of its agencies, the subjection of such a right to the grant of a fiat by the Attorney-General by petition of right has unequivocally been held to be a precondition and an obstacle erected to deprive the citizen of the free and unrestrained exercise of the right conferred on him by the Constitution. So also is the delay in exercising the right until the payment of a non-refundable fee of N10,00.00 to the state Accountant-General and if the payment is not made, particularly in the case of a person who cannot afford it, the right is denied. See section 6(6) (b) of the Constitution. It is inconsistent with it and therefore void to the extent of such inconsistency. Similarly, the common law rule that actions in respect of public nuisance can only be instituted by the Attorney-General by himself, or in his normal capacity as a relator to those affected has also been held to be a precondition to the exercise of a right of a citizen and therefore in conflict with section 6(6)(b) of the constitution.

E Section 6 of the constitution vests the judicial powers of this country in the courts and having regard to the social and political considerations preceding it, any law which imposes conditions to the free and unrestrained exercise of that right is void to the extent of the inconsistency.

F Even though sections 13 and 17 (2)(e) of the constitution fall within the Fundamental Objectives and Directive Principles of State Policy which are not justiciable, they supplement section 6 of the Constitution. They provide as follows:

G *"13. It shall be the duty and responsibility of all organs of government, and of all authorities and persons, exercising legislative, executive or judicial powers to conform to, observe and apply the provisions of this Chapter of the Constitution."*

"17(2) In furtherance of the social order -
(e) *The independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.*" (Underlining is for emphasis).

Having regard to the above provisions, section 15 of Edict No. 3 of 1988 does not in my opinion have a constitutionally authorized objective. Its end is not legitimate.

I have not the least doubt that the principles of law stated in Bakare

v. Attorney-General of the Federation (supra) and Adediran v. Interland Transport Ltd. (supra) are sound, authoritative and binding on this court and it is only this court which can say that these cases were wrongly decided and it has not so far said so. The proper use of authorities or decided cases is the establishment of some principles which the judge can follow in deciding cases before him. The principles decided in the two cases apply to the present case. B See In re Hallott's (1879/80)13 Ch.D. 696 at 712.

In Obaba & Ors. v. Military Governor of Kwara State and Ors. (supra), this court was not asked to determine whether there is inconsistency between section 15 of edict No. 3 of 1988 of Kwara State and section 6(6)(b) of the Constitution and it did not express an opinion either way. C

With great respect to the Justices of the Court of appeal, Gambari v. Gambari (supra) was wrongly decided and the cases of Bakare v. Attorney-General of the Federation (supra) and Adediran v. Interland Transport Ltd. were decided after Gambari v. Gambari was decided by the Court of Appeal. I agree with chief Olorunnisola, S.A.N. that it is bad law. D

If the flooding of the courts of Kwara State with suits challenging appointments of chiefs by the Governor is the reason for the insertion of section 15 in Edict No. 3 of 1988, the constitutional legislative power of the State Government to make laws for the peace, order and good government in the State was not properly exercised in this case because the courts have E inherent power to prevent a litigant from abuse of the process of the court. An enactment which stipulates that no action shall be brought until a non-refundable fee of ten thousand naira is paid to the State Accountant-General will not be treated as merely procedural, it imposes a fetter on the constitutional right enshrined in section 6(6)(b) of the Constitution. F

Learned counsel for the respondents have also sought refuge in the Limitation Laws which relate to institution of actions against Local Government authorities and other Government Agencies such as the Nigerian Railway Corporation.

The requirement of notice to the authority is mainly to give it sufficient notice of the claim against it so that it is not taken by surprise and to give it adequate time to prepare to deal with the matter in its defence. The notice is not meant to put any obstacle in the way of bringing litigation against the authority as section 15(1) of Edict No. 3 of 1988 has done in chieftaincy matters. G H

Another aspect of the obnoxious nature of section 15 of the Edict is that the ten thousand naira non-refundable fee is payable to the defendant which is the Government that enacted the Edict. This is a departure from the normal rule of court where the High Court is given a discretionary power to

order security for costs on the application of the defendant or in an election petition, where a petitioner is required to give security for costs to be fixed by the court or the amount is fixed in the relevant Electoral Law. This security is usually for the payment of witnesses summoned on behalf of the petitioner or to any respondent, See Local Government (Basic Constitutional and Transitional Provisions) Decree No. 7 of 1997. (Procedure For Election Petition) rule 3(1) and (2), section 125 of the Electoral Act, Cap. 105, Laws of the Federation of Nigeria, 1990 and section 410 (2) (c) of the companies and allied Matters Act Cap. 59, Laws of the Federation of Nigeria, 1990. At the end of the day, any balance left is refunded to the petitioner. Those enactments cannot be equated with the levy imposed by section 15 of the Edict. I am unable to find any distinction between the fiat of the attorney-General under the Petitions of right Act and section 15 of Edict No. 3 of 1988. The right of access to the courts is enshrined in sections 6(6)(b) and 17(2)(e) of the Constitution. Any subtle attempt to circumvent, abridge or whittle it down will be inconsistent with it.

As has been shown in this judgment, the provision in the Edict for the payment of a non-refundable fee of ten thousand naira by an aggrieved citizen is not the type of condition precedent within the contemplation of the court when it decided the case of Madukolu v. Nkemdilim (supra). The reliance on that decision by the respondents is misplaced.

The hierarchy of laws in this country was restated in the case of the Government of Ondo State v. Adewunmi (1988) 2 N.W.L.R. (Pt. 82) 280. The respondent in that case who was the plaintiff at the High Court brought an action challenging the validity of an Edict made by the Military Governor of Ondo State ousting the jurisdiction of the High Court of Ondo State to entertain disputes relating to chieftaincy matters which jurisdiction, the Constitution of 1979 assigned to the High Court. The issue of superiority of laws arose in the case. This court declared the particular Edict null and void as being in conflict with the provision of the Constitution.

In a unanimous decision, it held that the unsuspended sections of the Constitution are superior to Edicts of the Military Governors. Nnaemeka-Agu, J.S.C. who read the lead judgment observed as follows:-

"In my opinion, the answer to this question depends upon two other questions, namely:

(i) *What is the organic law (grundnorm) of Nigeria as under decree No. 1 of 1984; and*

(ii) *what is the limit, if any, to the legislative power of the Military Governor of a State as contemplated by Decree No. 1 of 1984 or any other relevant Decree?*

Now it is provided in section 1(1) and (2) of Decree No. 1 of 1984 - as follows:

"1. (1) The provisions of the Constitution of the Federal Republic of Nigeria 1979 mentioned in Schedule 1 to this Decree are hereby suspended.

(2) Subject to this and any other Decree, the provisions of the said B Constitution which are not suspended by subsection (1) above shall have effect subject to the modifications specified in Schedule 2 to this Decree."

It appears clear to me that by these provisions it is the intendment of Decree No. 1 of 1984 that the organic law of Nigeria shall be:

- (i) Decree No. 1 of 1984 or any other Decree; and C
- (ii) Unsuspended sections of the Constitution of the Federation.

It follows from this that whatever is in accord with the above provision is intended by the Decree, but whatever is in conflict with it is unconstitutional under the Decree and void.

The answer to the second question is provided by section 2(2) (a) D and (b) and (3) and (4) of Decree No. 1 of 1984 which state:

"2(2) The Military Governor of a State -

(a) shall not have power to make laws with respect to any matter included in the Exclusive Legislative List; and

(b) except with the prior consent of the federal Military Govern- E ment shall not make any law with respect to any matter in the Concurrent Legislative List relating to Federal Legislative Powers set out in the second column of part II of the second Schedule to the Constitution.

(3) subject to subsection (2) above and to the Constitution of the Federal Republic of Nigeria 1979, the Military Governor of a State shall F have power to make laws for the peace, order and good government of that State.

(4) If any law -

(a) enacted before 31st December 1983 by the House of assembly of a State or having effect as is so enacted; or G

(b) made by the Federal Military Government on or after that date, the law made as mentioned in sub-paragraph (i) or (ii) above shall prevail and the State law shall, to the extent of the inconsistency, be void."

See also section 1 of the Constitution (Suspension And Modification) Decree H No. 107 of 1993.

Thus, the superiority of laws in Nigeria are as follows:

1. Decrees of the Federal Military Government,
2. Unsuspended provisions of the constitution,
3. Existing Laws of the National Assembly,

4. Edicts of Military Governors,

5. Existing laws of the State.

section 6 of the Constitution of the Federal Republic of Nigeria, 1979 was not suspended by either Decree No. 1 of 1984 or Decree No. 107 of 1993. The pronouncements of the Justices of this court, particularly in Bakare v. Attorney-General of the Federation (supra) and Adediran v. Interland Transport Ltd. (supra) are to the effect that where the determination of the civil rights and obligations of any person is in issue, any law which imposes conditions to the free and unrestrained exercise of that right is inconsistent with it and void to the extent of such inconsistency.

C In conclusion, I hold that section 15 of the Edict No. 3 of 1988 creates an impediment to the free and unrestrained access to the court, it is in conflict with sections 6(6)(b) and 17 (2)(e) of the 1979 Constitution and therefore null and void. The appeal is allowed by me. The judgment of the Court of Appeal dated 31:3:93 is set aside and I hereby restore the ruling of the learned trial D judge, Orilonise, J. The appellants are entitled to costs which I assess at N1,000.00.

MOHAMMED JSC

E I entirely agree with the opinion of my learned brother, Uwais, the Chief Justice of Nigeria, in the judgment just read. I agree with him that this appeal has no merit and ought to be dismissed.

F Facts from which this case arose have been described in detail in the judgment of the Chief Justice and I have no desire to reiterate them. I will therefore make only a few brief observations of my own.

The question which Chief Olorunnisola, learned Senior Advocate of Nigeria, formulated for our determination is:

G *"Whether Edict No. 3 of 1988 Kwara State making payment of N10,000. deposit a condition precedent for an aggrieved person in chieftaincy matters to challenge the government appointing authorities is not an infraction of section 6.(6)(b) of 1979 Constitution of Federal Republic of Nigeria in that it creates an impediment to free access to court."*

H This matter had been dealt with and decided by this court in the case of Obaba v. Military Governor of Kwara State (1994) 4 N.W.L.R. (Pt. 336) 26. In that appeal this court dealt with one of the issues raised which questioned the validity of section 15 of the Chiefs (Appointment and Deposition) (Amendments) Edict No. 3 of 1988. In a unanimous decision, this court, in that case held:

"The provisions of section 15 of the Chiefs (appointment and Depo-

sition) (Amendment) Edict No. 3 of 1988 to the effect that any person who intends to challenge the validity of the appointment of a person as a chief shall first deposit a non-refundable sum of N10,000.00 with the state Accountant-General is a condition precedent for litigating on Chieftaincy matters in Kwara State and relates only to fees to be paid."

Since this matter had been raised before, in this court, and a decision B had been handed down, under the doctrine of stare decisis we are bound by that decision. The only way this court could be made to reconsider that decision is by an application for the overruling of that decision.. Since the matter is the same question of law we can not make a contrary decision to that C which was given before, in order to deprive the earlier opinion of authority as a precedent. Chief Olorunnisola, SAN has not asked this court to overrule it's earlier decision in Obaba's case (supra) although his attention had been drawn to the existence of that decision in the Respondent's brief, filed by Chief Olanipekun, SAN. On this issue alone this appeal will fail.

Be that as it may, I will say right away that the appeal lacks merit on D the lone issue raised for it's determination. Section 15 of Edict No. 3 of 1988 does not curtail the right of a person to sue in a chieftaincy matter as enshrined in the provision of section 6(6) (b) of 1979 constitution. Condition precedent has been defined in the English Supreme Court Practice (White Book) 1991 Edition, in Order 18/7/10 thus: E

"Cases constantly occur in which, although everything has happened which would at common law prima facie entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must be done, or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law." F

Condition precedent ordered to be done before a litigant is entitled G to sue, by reason of the provisions of some statute is not an ouster clause and not a device adopted by the Government to prohibit a judicial review. It is an additional formality and unless proved to be enacted with a view to inhibiting citizens from having access to the courts, it is not contrary to Section 6 (6) (b) of 1979 Constitution. See Madukolu v. Nkemdilim (1964) All NLR (Part 2) 587. H

I would like to emphasis that all rules of Court directing payment of Fees before a party could file his case in court must be approved by the Executive before having a force of Law. Therefore all fees whether in the rules of Courts or through Decrees or Edicts are made by Executive. Fees paid in

court before an action is filed are part of revenue drive by the Government which has been enshrined in Section 40 of 1979 Constitution. Fees or deposits made payable before actions are filed are not and have never been the same. Some fees are high and some are very low, depending on what the Government sees is reasonable, taking into consideration the type of case B being filed in Court. For example, fees paid for filing an ordinary suit are not the same as fees paid for proceedings under the Companies and allied Matters Act, or fees taken in matrimonial proceedings or the non-contentious probate fees.

In election petition cases, two sets of fees were ordered to be paid C before the hearing of an election petition. N200 were made payable on presentation of election petition, and before the trial N500 had to be paid again. See section 31 of the National Assembly (Basic Constitution and Transitional Provisions) Decree No. 18 of 1992. There are also limitations of actions. If a party wishes to sue a public servant for wrong committed in pursuance or D execution of public duties he must file his suit within 3 months. There are many other limitations to filing actions in court. All these are conditions precedent to filing suit in court.

Chieftaincy disputes are by their nature a rich peoples' contest. If the Government of Kwara State, in its wisdom, sees that it could gain revenue E through the ever unending disputes in chieftaincy matters, in Kwara State, in my respectful view, I do not see any infraction of Section 6 (6) (b) of 1979 Constitution if it imposes a fee of ten thousand Naira as a condition precedent to filing a challenge to the validity of the appointment or refusal to appoint any chief in Kwara state. The courts are open to parties wishing to sue F provided that they pay revenue in the way of fees which the Constitution permits the State Government to raise for the administration of the State. In the same manner, if you want to obtain or reseal a Letter of Administration in which millions of Naira are involved you have to be ready to pay large sums of money as fees before your Letter of Administration could be issued or re- G sealed. It is not like any ordinary court fee and is not contrary to the Constitution.

I agree entirely that orlonise J, by refusing to abide by the decision of a superior court, had committed an abominable act, contrary to the ethics of his appointment. Such a behaviour should not be condoned. Even if he H disagrees with the decision of the Court of Appeal, under the doctrine of stare decisis, he is bound to follow it.

For these reasons and the fuller reasons in the judgment of my learned brother Uwais, the Chief Justice of Nigeria, this appeal fails and it is dismissed. I abide by all consequential orders made in the lead judgment, including the

assessment of costs.

ONUJSC

This appeal in a chieftaincy matter emanates from the High Court of Kwara State sitting at Omuaran wherein the 2nd and 3rd defendants/applicants thereat prayed in limine pursuant to Order 8 Rules 1(1), 2(1) of the High Court (Civil Procedure) rules 1989 and under Section 15(1) of the chiefs appointment and Deposition (Amendment) Edict, (Edict No. 3 of 1988), to dismiss or strike out the plaintiffs/respondents' suit for failure by the respondents to deposit a non-refundable sum of N10,000.00 prior to instituting the suit and questioning the competence of the Suit as well as the jurisdiction of the court. The motion was argued and in his ruling delivered on 26th February, 1991, the learned trial Judge found no merit in the respondents' application which he duly dismissed.

Dissatisfied with the trial court's ruling, the respondents appealed to the Court of Appeal, kaduna Division (hereinafter referred to as the court below) which on 31st of March, 1993, in a considered judgment allowed the appeal and set aside the order made by orilonise, J. in his ruling dated the 26th of February, 1991.

In setting aside the trial court's ruling, the court below held inter alia as follows:-

"Now concerning the reasons proffered by the judge for not following the decision in Gambari's case I would concede and in fact it is elementary that both the High Court and the Court of Appeal should be bound by any decision of the Supreme Court, this notwithstanding the deviation from Gambari's case as regards the case in hand cannot on the same hypothesis be defended since the facts, issues and circumstances in Bakare's case that was used as a lever to by-pass Gambari's case are miles apart and are not just the same. They are certainly not on all fours.

Both decisions in Gambari as well as Bakare are not in conflict and therefore still good law. The issue in the former concerns simpliciter interpretation and application of Edict No. 3 of 1988 of Kwara State re-non refundable deposit of N10,000.00 in similar circumstance as the case now on appeal. The contention in the latter as rightly put by the learned appellants' counsel for the 2nd to 4th appellants was whether the use of the word "may" in Section 3 of the Petition of Right Act Cap. 149 Laws of the Federation 1958 gives a plaintiff option to either proceed under the act or initiate an action by a Writ of summons without seeking the consent of the Attorney-General."

Aggrieved by this decision, the appellants have appealed to this

court on one ground. The parties herein exchanged briefs of argument in accordance with the rules of court. A lone issue has been submitted as arising by the appellants (1st respondent adopted the appellants' issue while the two formulated by 2nd and 3rd respondents amount to much the same thing in their brief for the determination of this court. It complains;

B *"Whether Edict No. 3 of the 1988 Kwara State making payment of N10,000.00 deposit a condition precedent for an aggrieved person in chieftaincy matters to challenge the Government appointing authorities is not an infraction of section 6(6)(b) of the 1979 Constitution of the Federal Republic of Nigeria in that it creates an impediment to free access to court."*

C At the hearing of this appeal on 7th April, 1997, learned Senior Advocate for the appellants after adopting his brief, made the following oral submissions in addition.

It was his contention firstly, that Obaba v. Military Governor of Kwara State (1994) 4 NWLR (Part 336) 26 is distinguishable from the case in hand. Secondly, that the edict is in breach or infringement of the fundamental rights of the appellants. He relied for his proposition on the case of Adediran v. Interland Transport Ltd. (1991) 9 NWLR (part 214) 155 (per Karibi-Whyte, JSC). Thirdly, he contended, that the law they are challenging is a substantive law, not a procedural law. When it was pointed out to the learned Senior Advocate that the case of Obaba he relied on was one seeking first the Attorney-General's sanction and not a challenge to a State's powers to make laws by means of an Edict, he replied that there was in Obaba's case no contest over whether the N10,000.00 fees was not paid and that moreover the decision thereon was obiter. When it was further pointed out to learned Senior Advocate that arguments were proffered and an opinion given by this Court on Edict No. 15 of 1988, he referred us to the case of Bakare v. Attorney-General of the Federation (1990) 9 SCNJ 43 (per Uwais, JSC as he then was). Question about election petitions in which such fees are paid, learned Senior Advocate contended that in such cases fees paid are refundable adding that the 1988 Edict is inconsistent with or contradictory to the Constitution of the country whereby you pay fees to your opponent in order to challenge him.

In their written brief the appellants have made the following submissions:

1. That the court below is being haunted by the decision in Gambari v. Gambari (1990) 5 NWLR (Part 152) 572 which it tenaciously defends in spite of arguments to the contrary.

2. That the court below agrees that the payment of N10,000.00 is a "condition precedent before a suit can be initiated, which condition precedent their Lordships of the court below held must be fulfilled and they justified this

by relying on the authority of Madukolu v. Nkemdilim (1962) 1 All NLR (part 4) 587. The case of Adegboyega v. Awu (1992) 7 NWLR (Part 255) 588 on the operation of Limitation Law within which a public officer must be sued for wrongdoing; taking leave by receiver/manager; the giving of one months notice to a Local Government before instituting action against it and the giving of 3 months notice before suing the Railway corporation as in Nigeria B Cement Co. Ltd. v. Nigeria Railway Corporation & Anor. (1992) 1 NWLR (Part 220) 747.

It is further contended that the laws and cases cited are not apposite in that the Limitation laws (supra) are not conditions precedent but rather are laws to accelerate or make an aggrieved person initiate action quickly. The law, in addition it is maintained, did not say permission must be taken somewhere or certain acts needed to be done before initiating action in court. Madukolu v. Nkemdilim (supra) a case decided before the 1979 Constitution came into force, it is argued, states general principles of law and the case on appeal ought to have been scrutinized more closely vis a vis section 6(6)(b) of the 1979 Constitution. In further demonstrating that the case of Adegboyega v. Awu (supra) has two glaring distinctions with the case in hand, it was further submitted that -

(i) In the case or receiver/manager who intends to sue, he is not the owner and therefore he is not a person aggrieved or one whose civil right is infringed. Reliance was placed on the case of Intercontractors v. U.A.C. (1988) 2 NWLR (PART 76) 303 AT PAGE 323 (per Karibi-Whyte, JSC).

(ii) The receiver/manager is not denied access to court by any precondition. The law empowers him to initiate action in Court by filing papers (howbeit for leave) in court without seeking leave from a party or paying money to another party, particularly an opponent. In other words, the fact that the receiver can seek leave in court shows that the aggrieved person has a direct and unimpeded right of access to court.

On the giving of various months' notices to authorities such as the Local Governments and the Railway Corporation, it was contended that -

(I) In the case of Katsina Local Authority v. Makudawa (1971) NMLR 100 relied upon by the court below, it was submitted that in as much as the case preceded the 1979 Constitution, it was not considered on the basis of the provisions of that Constitution and that in any case, the Katsina Local Authority cannot override the 1979 Constitution. There is therefore an error in law, it is argued, for the court below to rely on that case to decide the case on appeal.

(ii) The decision in the Nigeria Cement co. Ltd. case, it was maintained, was decided without regard to the provisions of section 6(6)(b) of the

1979 constitution which overrides the condition precedent set out in the Railway Law and which must perforce be void and unconstitutional.

After our attention was adverted to an extract in the judgment of Uthman Mohammed, JCA (as he then was) in the case of Gambari v. Gambari (supra), it was submitted that the Public policy of Nigeria is the one enacted in Section 6(6)(b) of the 1979 of the Constitution and stipulation such as is required under Kwara State Edict No. 3 of 1988 is null and void as it is contrary to public policy. Further reference was made to Justice Mohammed's reason for justifying the abridgment of a citizen's right by the Kwara State Government when he stated at page 593 of the Report in Gambari's case (supra) thus:

"I see nothing wrong in the imposition of N10,000.00 as a condition precedent to challenging the appointment to any Chief made by the Military Governor or any appointing authority in Kwara State. The Kwara State Government must have observed what I have equally observed through the appeals coming to this court, that the courts in their State have been flooded with suits challenging the appointments of chiefs made by the Government and by other appointing authorities. Thus the Government quite rightly in my view imposed a fee of N10,000.00 as a condition precedent to instituting any of such suits in court."

This, learned Senior Advocate argued, is precisely what section 6(6)(b) seeks to remedy - a provision which is novel and different from the previous Constitutions. The rationalization by the Court of Appeal, it was further contended, does not accord with the interpretation of section 6(6)(b) of the 1979 constitution by this court which in Adediran v. Interland Transport Ltd. (supra) held at page 180 (per Karibi-Whyte, JSC) as follows:-

"By virtue of section 6(6)(b) of the 1979 Constitution the courts are vested with the powers for the determination of any question as to the civil rights and obligations between persons or between Government or authority and any person in Nigeria Accordingly, where the determination of the civil rights and obligation of a person is in issue, any law which imposes condition inconsistent with the free and unrestrained exercise of that right is void to the extent of such inconsistency." (Underlining for emphasis.)

And further down in his judgment, His Lordship was shown at page 181 of the report as saying:

"In the circumstances of this country, and considering the social and political considerations preceding it seems obvious that the Constitution did not intend to interpose any substantive pre-condition to the exercise of a right of action."

It was thereafter argued that none of these interpretations this court states

that flooding of court can justify enactment of law stipulating precondition of access to court, adding that the court below is not unaware of the illegality of the Kwara State Edict No. 3 of 1988 but having upheld it in Gambari's case, the court is shy of nullifying the law. That this is apparent, it was further maintained, can be found in the pronouncement of Oduwole, JCA in his lead judgment in the penultimate concluding paragraph wherein he stated:

"I think I should not conclude this judgment without a word of caution that care should however be taken to see that no harsh or bogus condition precedent is imposed to impede or block fundamental free access of a citizen to seek redress in court. If this happens, and I hope not, the rational for imposing the condition precedent as the one in question must have come to nought and justice will no longer be seen to be done. Doubtless, such immoderate action will be contrary to the spirit of our Constitution being aversed to interposition of substantive pre-condition to the exercise of right of action."

After posing the question as to what constitutes "bogus or harsh condition" it was submitted that the decision in Gambari's case and consequently in the case now on appeal, is bad law. After our attention had been drawn to the case of Bakare (supra) and that the appeal be allowed, being unconstitutional null and void for requiring the payment of N10,000.00 deposit before instituting action to challenge appointment in chieftaincy matters.

With profound respect to the learned Senior Advocate, I am unable to share his views canvassed in the case in hand. In the first place, this court in Obaba v. Military Governor of Kwara State (1994) 4 NWLR (Part 336) 26 had in a unanimous judgment after considering the provisions of the Chiefs (Appointment and Deposition) (Amendment) Edict, No. 3 of 1988, held that the Edict merely makes provisions prescribing for the institution of the category of disputes covered (i.e. chieftaincy) under the said Edict. In other words, that it is only when the provision is duly complied with that the court gets conferred with jurisdiction to entertain any suit arising under or by virtue of the said Edict. As Belgore, JSC at page 43 of the Report put it succinctly:

"Even though the Edict No. 2 (supra) has not got ouster provisions, by the nature of the exercise of his powers therein, just as in Edict No. 3 (supra), the Edicts are within the ambit of law, order and good government that the Military Governor can make laws for. Governor of Ondo State and Anor. v. Adewunmi is not on all fours with this."

Iguh, JSC in his contribution pointed out (albeit obiter) at page 47 of the Report thus:

"The Military Governor by Decree No. 1 of 1984 as amended also has powers to enact or promulgate an Edict. Edicts numbers 2 and 3 were

lawfully enacted into law by the Military Governor of Kwara State and I endorse the views of the courts below that both Edicts not being in conflict or inconsistent with any Decree or the unsuspended sections of the Constitution or any Act of the National Assembly are unquestionably valid and unquestionable."

B In this respect, it is pertinent to refer to section 239 of the Constitution (ibid) which provides as follows:

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

As the powers of the legislature (House of Assembly) to make laws in a State are presently vested in the executive arm of government (the Military Governor or Military Administrator), it would appear clear that Edict No. 3 of 1988 D represents the present state of the law on this particular subject, thus rendering irrelevant all the authorities cited and relied upon by the appellants. For purposes of emphasis, section 15 of Edict No. 3 of 1988 is no more than a condition incorporated into the law to be fulfilled, or complied with by any litigant before he or she can challenge any action of Government and/or its E agents made pursuant to the said Edict or in respect of chieftaincy matters on which the Government and/or its accredited agents have taken a decision. For purposes of clarity section 15 of Edict No. 3 (ibid) provides as follows:-

"15 (i) Where the Military Governor or the appointing authority has approved the appointment of a person as chief, any person who intends F to challenge the validity of such appointment shall first deposit with the State Accountant-General a non-refundable sum of ten thousand Naira.

(2) Where the Military Governor or the appointing authority has not approved any appointment to a vacant chieftaincy stool, any aggrieved G person who institutes any court action in connection with the vacant chieftaincy stool and join the State Government or any of its agency as a party to any such court action shall first deposit with the State Accountant-General a nonrefundable fee of ten thousand Naira."

The word 'shall' (underlined above) in the statute as to payment of fees which is, in my view, mandatory. See Madukolu v. Nkemdilim (1964) 1 All NLR (part 4) H 587 at 595 and Ifedenu v. Igende (1986) 1 NWLR (Part 16) 296, 301.

From the wordings of section 15 of Edict NO. 3 (ibid) it can clearly be discerned that the section in no way conflicts with the provisions of section 6(6)(b) of the 1979 Constitution. For the avoidance of doubt, the latter section provides:-

"6 (6) *The judicial powers vested in accordance with the foregoing provisions of this section- (b) shall extend to all matters between person or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.*"

What, in effect the law is saying is not that the court does not have jurisdiction to entertain chieftaincy matters such as was contained in the 1963 Constitution of the Regions of the Federation vide section 165 Constitution of Northern Nigeria, 1963 and Onyejekwe v. Enwezor (1964) NSCC (Vol. 3) 9, but merely that before a litigant can challenge the validity of any appointment made under the Chiefs (Appointments and Deposition) Law as amended, he has to deposit with the state Accountant-General a non-refundable sum of N10,000.00. In this regard, there is a line of demarcation between the recent decision by this Court of landlord and tenant (Ihenacho v. Uzochukwu (1997) 2 NWLR (Part 487) 275) and the case in hand. In the latter case, it was held, following Shittu v. Solicitor-General of Kwara State (1984) 5 NCLR 661, that the right to approach the courts for redress against a legally recognized wrong belongs to all and every citizen and any person who alleges an infringement of any of his legal rights may seek redress in any court of law.

To exemplify that the Shittu v. Solicitor-General of Kwara State case above has not overruled the other category of cases to which I shall come shortly, I wish to first of all pose the question: What is a condition precedent?

Black Law Dictionary defines a condition precedent as one

"Which must happen or be performed before the estate to which it is annexed can vest or be enlarged; or it is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed."

Wharton's Law Lexicon, Fourteenth Edition by A.S. Oppe defines conditions precedent thus:

"In their primary meaning, conditions precedent are events, but for the happening of which rights will not arise."

Condition or conditions precedent have from time out of memory always been inserted into the provisions of different laws, either substantive or procedural, the fulfillment of which only entitles a litigant or a party to come to court or to take some benefits or gain some advantage under the said laws. It is a result of this that this court said emphatically in Madukolu v. Nkemdilim (1964) 1 All NLR (part 2) 587 (per Bairamian, FJ) as follows:-

"Put briefly, a court is competent when:

(1)

(2)

(3) *The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.*" (Underlining supplied).

In Ajanaku v. C.O.P (1979) 3-4 SC. 28 this court held on a point not dissimilar from the one under consideration herein that where there is a condition precedent to the exercise of jurisdiction, for instance, issuance of a certificate by the Attorney-General before an appeal is filed, the court's jurisdiction is ousted if the condition is not fulfilled. In Akinuoye v. Military Administrator of Ondo State and ors. (1997) 1 NWLR (Part 483) 564, the Court of appeal in dismissing the Appellant's appeal where the single issue for determination in the chieftaincy matter was whether the learned trial Judge was right in declining jurisdiction in the case and struck out the entire action of the appellant, gave clear interpretation to the provisions of sections 1 and 2 of the Approval of appointment of an Oba and presentation of Instrument of Appointment and Staff of Office Edict, 1991 of Ondo State, on a piece of legislation in pari materia to the Chiefs (Appointment and Deposition) (Amendment) Edict No. 3 of 1988 in section 15 at pages 572 of the Report paragraphs B - D read as follows:-

"I have carefully considered all the arguments canvassed above by learned counsel for all the parties, and must uphold the submission of learned counsel for the 1st, 2nd and 7th respondents that there is a world of difference between non-compliance with condition precedent, and lack of "Locus standi." Traditionally an objection on locus standi is usually brought after a plaintiff has filed his statement of claim but an objection on ground of not complying with condition precedent can be brought immediately a Writ of summons is filed. If a plaintiff is supposed to obtain approval of court before instituting an action in a representative capacity, he is supposed to attach the said court's approval to his Writ of summons to show that such authority has been obtained. If it can be shown that no such approval has been obtained there is no law stopping the court from striking out the suit "in limine" for want of jurisdiction or non-compliance with condition precedent. In the instant case, there is no doubt that the appropriate Edict as set out above requires:

"1. Any person who is aggrieved by the appointment of another person as an Oba shall within seven days of the date of such appointment institute action in the High Court challenging the appointment."

Further on pre-condition, in the case of Katsina Local Authority v. Makudawa (1971) NMLR 100 Coker, JSC at pages 105-106 ad this to say:

"We are clearly of the view that Section 116(2) of the Local authority Law prescribes a condition precedent to the competence of any action commenced against a Local Authority and that compliance with the subsec-

tion is a pre-condition of such competence. The subsection requires such notice as it therein prescribed to be served on the Local Authority and stipulates that at least one month shall expire before the suit can be legally commenced. It follows therefore, in our view, that where it is established that no such notice was served or that the subsection is otherwise complied with, any suit commenced in contravention of the provisions of the sub-section is B wrongly commenced and should not be entertained by any court."

See also section 179(1) of the Local Government Edict No. 8 of 1976 (kwara State) which provided that:

"No suit shall be commenced against a Local Government until one month at least after a written notice of intention to commence the same has been served upon the Local Government by the intending plaintiff or its agents." C

Sub-section 2 of section 87 of the Local Government (Basic Constitutional and Transitional Provisions) Decree, 1997 No. 7 states:

"(2) An election petition shall be presented within one month from the date on which the election is held." See also this Court' recent decision number SC. 288/1991: His Highness Isaac Boyi Mukoro & ors. v. Nigeria Ports authority & Anor. delivered on 9/5/97 (unreported). D

It is from the foregoing that I am of the firm view that the judgment of the court below which has been appealed against is very sound in law and E logic. Thus, the references to the Limitation Law within which a public officer must be sued for any wrong-doing; taking leave by Receiver Manager as in Adegboyega v. Awu (supra); the giving of three months notice before suing the Railway corporation as in the case of Nigerian Cement Company Limited v. Nigerian Railway corporation (supra); the giving of statutory notice by a F landlord to the tenant etc. made by the lower court are all subsisting conditions precedent both under the common law and the various statutes. The learned counsel for the appellants has strenuously endeavoured to explain away all the impregnable points spun out above or whittle down their effects by holding tenaciously to the provision of section 6(6)(b) of the 1979 Consti- G tution, which according to him is novel. With due respect, section 6(6)(b) (ibid) does not in any way preclude the appropriate legislative bodies from inserting conditions or conditions precedent into statutes or laws. Nor does the section pretend to wipe off all the established or known conditions prece- H dent which a litigant must fulfil before approaching the law courts under the common law. Section 6(6)(b), in my view, does not held the appellants' case, moreso that there is a difference between a law providing that the jurisdiction of a court is completely ousted as contained in the Chiefs edict No. 11 of 1984 (Ondo State) leading to the decision of this court in Governor of Ondo State v.

Adewunmi (1985) 3 NWLR (Part 13) 493 and a law like Edict No. 3 of 1988 (Kwara State) which is merely procedural or adjectival and stipulates a condition precedent which a litigant must fulfil before coming to court for redress. See Victor J. Rossek & 2 ors. v. African Continental Bank Ltd. & 2 ors. (1993) 8 NWLR (Part 312) 382 at 475. It is pertinent at this juncture to point out that the distinction between substantive law and procedural can be quite difficult at times. Broadly speaking, however, procedural or adjectival law relates to practice and procedure, that is, the rules according to which the substantive law is administered. It prescribes the method for enforcement of rights and duties and obtaining redress for wrongful invasion of those rights as well as the enforcement of obligations or duties. On the other hand, substantive law is concerned with the creation, definition, limitation of obligation. See Gafari v. Johnson (1986) 5 NWLR (Part 39) 66 at 71. After the 1979 Constitution came into force on 1st of October, 1979, various laws have been passed in which conditions precedent before a prospective litigant can approach the law courts for any relief or redress were incorporated. Two examples that readily come to mind are (a) section 125(1) of the Electoral Act, Cap. 105 Laws of the Federation of Nigeria 1990 which enjoins a petitioner to give security for an amount fixed by the court and/or the depositing such an amount in any treasury before his petition can be heard and (b) section 410(2)(c) of the Companies and Allied Matters Act, Cap. 59 Laws of Nigeria, 1990 which states that:

"The Court shall not hear a winding up petition presented by a contingent or prospective creditor until sufficient security for costs has been given."

Apart from these statutory provisions on conditions precedent, some decisions of this court after the coming into force of the 1979 Constitution have given force of law to the position at common law to the effect that valid statutory notices must be given by a landlord to a tenant before the landlord's premises can be recovered from the tenant. See Sule v. Nigeria Cotton Board (1985) 2 NWLR (Part 5) 17 at 36 - 37 followed by Eleja v. Bangudu (1994) 3 NWLR (Part 334) 534 and recently this court's decision in Ihenacho v. Uzochukwu (supra) wherein it held, inter alia at pages 269 to 270 (paragraphs H-A):

"A landlord desiring to recover possession of premises let to his tenant shall firstly: unless the tenancy has already expired, determine the tenancy by service on the defendant of an appropriate notice to quit. On the determination of the tenancy, he shall serve the tenant with the statutory 7 days' notice of his intention to apply to the court to recover possession of the premises. Thereafter the landlord shall file his action in court and may only proceed to recover possession of the premises according to law in terms of

the judgment of court in the action."

The case of Adediran v. Interland Transport Limited (supra) cited by the appellants in respect of the applicability or otherwise of section 6(6)(b) of the 1979 Constitution (ibid) is, in my respectful view, inappropriate to the circumstances of the case in hand and so, irrelevant. It is a case relating to nuisance. It has nothing to do with the insertion of a condition precedent into any law or statute. So also is the case of Bakare v. Attorney-General of the Federation (supra) relied on by the learned counsel for the appellants since the ratio decidendi in that case is materially different and distinguishable from the present case.

When it is borne in mind that the Military Governor (now Military Administrator) of Kwara State under a military dispensation combines and performs the functions of both the Executive and the Legislature, under and by virtue of section 239 of the 1979 Constitution earlier considered, the State High Court may be empowered to exercise jurisdiction vested in it by the Constitution or by any law in accordance with the practice and procedure from time to time prescribed by the House of Assembly of the State. Moreover, although we are not told why Edict No. 3 of 1988 in a State where chieftaincy wrangles have become second nature and litigation therein has become 'an industrial pursuit capable of, flooding the courts' the Military Governor of Military Administrator whose duty it is to legislate for the peace order and good government therein, will be failing in the performance of that duty to fold his hands and watch helplessly thereby without stemming the onslaught. I am therefore satisfied from the foregoing that the Kwara State Governor did not exceed his bound by enacting Edict No. 3 of 1988 for smooth judicial administration and for effective collection of revenue. In so far as the Edict is not in conflict with the provisions of any decree or any provision of the unsuspended part of the 1979 constitution, it is valid and proper. The power to make such law or Edict was at the time it was enacted derived from the provision of section 2(3) of Decree No. 1 of 1984 otherwise known as The Constitution (Suspension and Modification) Decree. Similar, the decision herein as well as the Gambari's case (supra), are in my firm view, valid in that they create neither an impediment nor hindrance or an abridgment of free and unimpeded access to the law courts. On the principle of stare decisis the Gambrai case constituted a binding precedent on the trial Judge. See Adesokan v. Adetunji (1994) 5 NWLR (Part 346) 540; Ishola v. Ajiboye (1994) 6 NWLR (Part 352) 506 and Afro-Continental (Nig.) Ltd. v. Ayantuyi (1995) 9 NWLR (Part 420) 411. The learned trial Judge was therefore guilty of judicial impertinence and insubordination to say he was not bound.

What is more, in saying all this, one should bear in mind the immortal

words of Lord Bacon in his essay on the Judicature to the effect that: the office of a Judge is jus dicere, and not Jus dare - to state the law, not to give law. By interpreting the law in the instant case as made by the law maker, I cannot see the court or Judge being required to play the role of a 'judicial legislator' which role ill-befits it or him. See Okumagba v. Egbe (1965) 1 All NLR 62 at 65 and Magor & St. Mellons Rural District Council v. Newport corporation (1952) AC (H.L) 189 at 191.

For the above reasons and the fuller ones contained in the leading judgment of my learned brother Uwais, Chief Justice of Nigeria a preview of which I had before now, I, too, dismiss the appeal with the same consequential C orders inclusive of those as to costs contained therein.

ADIO JSC

I have had a preview of the lead judgment just read by my learned D brother, Uwais, the Hon. Chief Justice of Nigeria. I am in full agreement with him and do not wish to add anything more. The appeal fails and accordingly I too dismiss it and I abide by the order for costs.

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