

SUPREME COURT OF NIGERIA
15TH MAY, 1998. SC. 224/1991
CORAM:- S. M. A. BELGORE, I.L. KUTIGI, M. E.
OGUNDARE, S. U. ONU, A. I. IGUH, JJSC

FAWEHINMI CONSTRUCTION COMPANY LTD APPELLANT
AND
OBAFEMI AWOLOWO UNIVERSITY RESPONDENT

COURTS - Record of Proceedings - Presumption of regularity - Where the record is complete but did not show that the parties applied for or consented to a hearing date - The presumption is not applicable.

JUDICIAL PRECEDENTS - Statutory provisions - The decision in *N.P.A. v. Constructioni Generali & Anor* - Where the statutory provision relied on in that case is not in *pari materia* with the statutory provision in the present case - The Court of Appeal was right in refusing to follow the decision.

PRACTICE & PROCEDURE - Adjournment - The views of the parties or their counsel on the issue must be recorded - And where an Order is challenged as incompetent because the parties never addressed on it - That order must be set aside.

WAIVER - Demurrer - Appearance by way of demurrer - Is not enough to amount to a waiver - Since waiver must be clear and unambiguous.

FACTS

The plaintiff/appellant took out a writ claiming damages for breach of contract it entered into with the defendant/respondent, damages for wrongful detention of its plants, machineries and equipment and an order for the plaintiff to be paid "such other sums of money as the court may find to have been lost" as a result of continued detention of the plaintiff's plants, equipment and machineries. Also prayed for, is the

order for the defendant to release to the plaintiff the plants, machineries and equipment detained by it on the site where the execution of the contract between them was being carried out. On the day the plaintiff filed its writ it also filed a motion for Order of mandatory injunction to compel the defendant to release the plaintiff's plants, machineries, etc. aforementioned. The defendant on being served with the writ and motion entered an unconditional appearance and filed a motion seeking for stay of proceedings under s. 5 Arbitration Act until the parties submitted their dispute to an arbitration as stipulated by clause 35 of the contract between the parties.

Both applications of the parties were heard on the 23rd June 1987 and both of them were dismissed in a considered ruling given by the learned trial judge on 6th July, 1987. Without any evidence in support on the record, after the ruling, learned trial judge entered as follows. "At the instance of both counsel and their agreement" "the case is adjourned to 23rd, 24th and 25th September, 1987 for hearing."

Pursuant to the Order of the court the Plaintiff filed a statement of claim. The defendant rather than file a statement of defence, brought an application praying the court for an order striking out the action on the ground that the suit was not properly before the Court since s. 46 of University of Ife now Obafemi Awolowo University Edict which provides for a pre-action notice was not complied with. After the application was argued the Court ruled that the defendant had taken some steps amounting to waiver of its rights under s. 46 of the Edict and that it was too late to raise the issue of lack of notice or that the court had no jurisdiction to hear the case as the said notice was not given before instituting the action. Against this ruling the defendant University appealed to the Court of Appeal, which court allowed the appeal. The plaintiff being dissatisfied has now appealed against the decision to the Supreme Court raising four issues which was adopted by the defendant. Issue (4) was never taken up in the two courts below and as no leave was sought or obtained to raise it as a new point, it was accordingly struck out, thus leaving 3 issues.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the agreement to proceed with the case as recorded by the trial judge was extracted from the counsel for the parties.

2. Whether the Court of Appeal was right in law in holding that the respondent could not be said to have taken a step in the proceedings and as such waived its right to raise the issue as to the failure of the appellant to give the statutory notice of intention to sue the respondent.

3. Whether the court of Appeal was right in law in refusing to follow the decision of the Supreme Court of Nigerian Ports Authority V. Construzioni Generali & Anor. 1974 12 SC. 81."

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

Adjournment

1. The record of the superior courts must be full especially at first instance as to leave no important matter out or to conjecture. The rules of courts always provide for adjournment from time to time and the record must bear out the events as they occur in court. In the trial court, where parties appear and more especially with their counsel present, their views must be recorded at every stage on relevant matters like issue of adjournment or costs or non-suit. Where a trial judge, without anything on the record supporting it, makes an order and that order is challenged as incompetent because the parties never addressed on it, in my view, that order must be set aside. It seems the trial court was rushing the case and I believe that prompted the court of Appeal to use the word "extracted" for there is no reason why immediately the ruling was read, counsel were not asked any more questions. At any rate, before the Court of Appeal, respondent counsel denied ever consenting to a date for hearing. Adjournment⁵ from time to time is an important matter where parties are present in court and their submissions or views on it must be properly recorded to avoid a situation we find in this case. (p. 1180 C)

⁵ See other recent cases on adjournment - Salu v. Egeibon (1994) 11 KLR 68; Olumesan v. Ogundepo (1996) 2 KLR (pt 38) 315

Record of proceedings

2. Section 149(1) of Evidence Act [now s. 150 (1)] that was adverted to in the appellant's brief does not apply to this case. The section reads:

"150 (1) *When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with"*

Record of proceedings is the only indication of what took place in court; it is not like minutes of a meeting, it is always the final reference of events, step by step, that took place in court. The counsel never applied for a date for hearing as the record never shows it. They never consented to a date fixed for hearing as no part of the record other than what the learned judge wrote (which is denied) showed the dates. There is nothing here to presume regularity upon. On its facts the case of Ogbuanyiya vs Okudo (No.2.) (1990)4 NWLR (pt 146) 551 is not on all fours with the present case. The parties are not saying the record is not complete whereby they can be allowed to supply the missing parts following the usual procedure. What they allege is that the written record is complete as the judge wrote it, that is , the correct record of proceedings is before the court. But the complaint is that the defendant said it never agreed to a hearing date being fixed. (p. 1180 H)

Waiver - Appearance by way of demurrer

3. When parties enter into agreement and there is an arbitration clause whereby the parties must first go for arbitration before trial in court it is natural for the defendant in a case where the other party has filed a suit to ask for stay of proceedings pending arbitration. That does not amount to submission to trial. In the case where such application is refused the next step is to invoke a statutory right where it exists If that right will make the suit incompetent. In the present case, S 46(1) of the Edict (supra) was invoked by the defendant and the learned trial judge held it was too late and that the defendant had waived its right. The right under S.46 (1) is very wide. Waiver is not all that simple, appearance by way of demurrer is not enough to amount to waiver. When a party has a right whether by way of agreement or under a statute he can exercise it at the earliest

time and can equally waive it if the statutory right is not absolute and mandatory. The waiver⁶ must be clear and unambiguous like allowing all evidence to be taken or even decision given before challenging the hearing. It will then be shown that the party deliberately refused to take advantage of the right when it availed him. Such failure to take advantage of a right must be so clear that there will be no other reasonable presumption than that the right is let to go. The preliminary skirmishes in this case at the trial court could not by any imagination be presumed to be a waiver. (p. 1181 H)

Judicial precedents - Statutory provisions

4. Section 46(1) of the Edict is certainly not the same with S. 97 of Ports Act relied upon in Nigerian Ports Authority vs Constructioni Generali & Anor. (1974) 12 S.C 81,95. The Court of Appeal was right to distinguish between the statutory provisions. Ports Act in section 97 is restrictive in its application whereas S.46(1) of the Edict is wide and covered a lot of grounds. I find no substance in this issue. (p. 1182 H)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Waiver - Filing of statement of defence

The defendant had not filed his statement of defence and service of the statement of claim on it is certainly not a waiver by it. Had it filed a statement of defence but with indication that a preliminary objection would be raised that the suit was not properly before the court, it would not have been a waiver; this would have distinguished the dictum in Kano State Urban Development Board vs. Fanz Construction Ltd. (1990)4 NWLR 142. It is therefore clear that the defendant had not taken any step in having the case heard by the trial court and had not waived its right under S. 46(1) of the Edict. (p. 1182 E)

⁶ For more cases on waiver see Arubo v. Aiyeleru (1993) 2 KLR 23; National Bank Ltd v. Guthire Ltd (1993) 4 KLR; Alfotrin Ltd. v. A.G. Federation (1996) 12 KLR (pt 46)

ONU.JSC

2. *S. 46 (1) of the University of Ife Edict is not inconsistent with the Constitution*

The provisions of section 46(1) of the Edict which are all embracing are not at the same time inconsistent with the provisions of sections 6(6) (b), 33(1) and 236(1) of the Constitution of the Federal Republic of Nigeria, 1979. That this is so contrasts with the main plank of the appellant's arguments on the last issue (issue 4) which would appear to be contending that section 46(1) "fetters or restricts the citizen's right to evoke the jurisdiction of the court to seek a remedy as quickly as possible immediately his rights have been, are being or likely to be infringed upon, is inconsistent with the spirit of the 1979 constitution....."

This cannot be true as it is a faulty construction put upon the provisions of s 46(1) of the Edict which in no way restricts access to court. See this court's recent decision in Chief Eugene C. Offor v. Chief S.C. Osagie & Ors. (1998)3 NWLR (part 541)205. These are provisions bordering on service of judicial processes out of court vide sections 96 and 97 of the sheriffs and civil process Act. In this regard, the case of Adediran v. Interland Transport Ltd (1991)9 NWLR (part 214)155 at 180, is not apposite to the extent that the provisions of section 46(1) of the Edict do not in any way constitute any obstacle along the same line. Thus, the appellant when entering into a contract with the respondent and conversant with its statute while equally being aware of the preconditions before it could institute any action, cannot now argue that its rights to go to court on the claim are being fettered. See Metalimpex v. A.G Leventis & Co. (Nig) Ltd (1976) 2 SC.91 and Offor v. Osagie & 2 Ors. (supra). (p. 1196 E)

REPRESENTATION

Parties absent. Not represented

CASES REFERRED TO

Ogbuanyiya vs Okudo (No.2.) (1990) 4 NWLR (pt 146) 551
N.P.A. v. Construzioni Generali (1974)12 SC.81 at 95

Kano State Urban Development Board vs. Fanz Construction Ltd. (1990)4 NWLR 142.

Offor v. Osagie (part 541) 205, (1998)3 NWLR

Adediran v. Interland Transport Ltd (1991)9 NWLR (part 214)155 at 180

Metalimpex v. A.G Leventis & Co. (Nig) Ltd (1976) 2 SC.91

Ariori v. Elemo (1983) 1 SCNLR1 at 72

Obembe vs Wemabod Estates Ltd. (1977) 5SC.155, 131-2

Akinnyede vs Opera (1967) All NLR 322

STATUTES AND RULES REFERRED TO

Arbitration Act, s. 5

University of Ife Edict No. 14 of 1970 s. 46

Supreme Court Rules, Order 6 rule 8 (6)

Constitution of the Federal Republic of Nigeria, 1979 ss. 6(6); 33(1)

Evidence Act, s. 150 (1)

Ports Authority Act, s. 97

LEAD JUDGMENT BY BELGORE JSC

The appellant took out a writ claiming damages for breach of contract it entered into with the respondent, damages for wrongful detention of its plants, machineries and equipment by the respondent and an order for the plaintiff to be paid 'such other sums of money as the court may find to have been lost' as a result of continued detention of the plaintiff's plants, equipment and machineries. Also prayed for, is the order to the defendant to release to the plaintiff the plants, machineries and equipment detained by it on the site where the execution of the contract between them was being carried out. On the day the appellant as plaintiff filed its writ it also filed a motion for order of mandatory injunction to compel the respondent as defendant to release the appellant's plant, machineries etc. aforementioned and 3rd day of June, 1987 was fixed for hearing the motion. The respondent got served with the writ and motion and on 25th day of May 1987 filed a motion seeking for stay of proceedings under s. 5, Arbitration Act until the parties submitted their

dispute to an arbitration as stipulated by clause 35 of the contract between the parties.

The motion for stay of proceedings aforementioned was argued and a ruling on it was delivered by the learned judge on 6th day of July B 1987 dismissing it. Without any evidence in support on the record, after the ruling, learned trial judge entered as follows:

At the instance of both counsel and their agreement " "the case is adjourned to 23rd, 24th and 25th September, 1987 for hearing.

C Looking at the record of proceedings there is nowhere the parties agreed to the case being adjourned for hearing. It was immediately the ruling was delivered by the learned trial judge holding that he would not stay proceedings for arbitration that he fixed the dates for hearing to 23rd, 24th, and 25th September, 1987. Pleadings by then had not been D filed. After this, the Appellant filed a statement of Claim to which no statement of defence was filed, rather the respondent raised the issue that the suit was not properly before the court since section 46 (of University of Ife (now Obafemi Awolowo University) Edict was not com- E plied with. The Edict in s. 46 states:

"No suit shall be commenced against the University until at least three months after written notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent, F and such notice shall clearly state the cause of action, the particulars of claim, the name and place of abode of the intending plaintiff and the relief which he claims."

After the motion was argued the court ruled that the respondent as defendant in the case had taken some steps amounting to waiver of its G rights under section 46 of the Edict and that it was too late to raise the issue of lack of notice or that the court had no jurisdiction to hear the case as the said notice was not given before instituting the action. Against this ruling the respondent University appealed to the Court of Appeal H which held;

"(1) That the agreement to proceed with the case before the trial court was extracted by that court from the counsel for the parties as what was on the record could not be regarded as acquiescence by the

defendant, now respondent, to withdrawing its objection that the matter was not properly before the court.

(11) That what was on record could not be regarded as defendant having taken a step in the proceedings and thus waiving its right to object to non-service of a prior notice.

(111) That section 46(1) University of Ife (now Obafemi Awolowo University) Edict applies to all causes of action and the case relied upon (Nigerian Ports Authority vs Constructioni generali (1974) 12 SC. 81, 95) was not applicable to this case.

It is against the decision that this matter is now before us on appeal. A new issue has been added, a ground of appeal which was not raised in the court below and the appellant's brief of argument indicated that during hearing leave would be sought to argue it. The parties were served hearing notices but none of them appeared neither were their counsel in court and by virtue of order 6 rule 8(6) supreme court Rules the appeal was treated as having been argued on the brief of argument. However, leave to argue the proposed new ground of appeal, concerning the inconsistency with the constitution of the Federal Republic of Nigeria 1979 of section 46(1) of the Edict (supra) was not moved as proposed in the brief of argument and therefore issue 4 proposed for determination reading

"4. Whether section 46(1) of the University of Ife Edict 1970 is not inconsistent with the provisions of section 6(6); 33(1) of the constitution of the Federal Republic of Nigeria 1979 and therefore void" is incompetently before the court and was therefore struck out. There thus remains three issues for determination on which the appeal was considered as follows:

"1. Whether the court of appeal was right in holding that the agreement to proceed with the case as recorded by the trial judge was extracted from the counsel for the parties,

2. Whether the court of Appeal was right in law in holding that the respondent could not be said to have taken a step in the proceedings and as such waived its right to raise the issue as to the failure of the appellant to give the statutory notice of intention to sue the respondent,

3. *Whether the court of Appeal was right in law in refusing to follow the decision of the supreme Court of Nigeria Ports Authority V. Construzioni Generali & Anor. 1974 12 SC. 81."*

What is clear on the record is that the parties had yet to file their pleadings when the trial judge handed down his ruling on stay of proceedings and immediately fixed dates for the hearing. There is nowhere on the record to indicate how the two counsel for the parties agreed to a date for hearing or even were unanimous that hearing would take place. The Court of Appeal held that the learned judge extracted this date from the counsel to the parties, With greatest respect there is nothing on the record that it was even extracted; all that appears on the record is that learned judge unilaterally fixed dates for hearing as it does not appear that he even sought the parties' opinion. **The record of the superior courts must be full especially at first instance as to leave no important matter out or to conjecture. The rules of courts always provide for adjournment from time to time and the record must bear out the events as they occur in court. In the trial court, where parties appear and more especially with their counsel present, their views must be recorded at every stage on relevant matters like issue of adjournment or costs or non-suit. Where a trial judge, without anything on the record supporting it, makes an order and that order is challenged as incompetent because the parties never addressed on it, in my view, that order must be set aside. It seems the trial court was rushing the case and I believe that prompted the court of Appeal to use the word "extracted" for there is no reason why immediately the ruling was read, counsel were not asked any more questions. At any rate, before the court of Appeal, respondent counsel denied ever consenting to a date for hearing. Adjournment from time to time is an important matter where parties are present in court and their submissions or views on it must be properly recorded to avoid a situation we find in this case. Section 149(1) of Evidence Act (now s. 150 (1) that was adverted to in the appellant's brief does not apply to this case. The section reads:**

"150 (1) When any judicial or official act is shown to have

been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with"

Record of proceedings is the only indication of what took place in court; it is not like minutes of a meeting, it is always the final reference of events, step by step, that took place in court. The counsel never applied for a date for hearing as the record never shows it. They never consented to a date fixed for hearing as no part of the record other than what the learned judge wrote (which is denied) showed the dates. There is nothing here to presume regularity upon. On its facts the case of Ogbuanyiya vs Okudo (No.2.) (1990)4 NWLR (pt 146) 551 is not on all fours with the present case. The parties are not saying the record is not complete whereby they can be allowed to supply the missing parts following the usual procedure. What they allege is that the written record is complete as the judge wrote it, that is , the correct record of proceedings is before the court. But the complaint is that the defendant said it never agreed to a hearing date being fixed. If a criminal record contains a charge and the evidence of parties, addresses by counsel and the judgment and sentence and it is discovered that the charge was not read and explained to the accused and no plea was taken, the entire trial will be a nullity. The procedure for challenging such a record is simple : the court is asked to look at it and if the irregularity aforementioned is found, the court of Appeal will declare the trial a nullity. The court will not require a separate application on the complaint on appeal. The lack of consensus by parties to a hearing date or being even asked to proposed a date was clearly not on the record. None of the parties has complained that the record is incomplete. It is not the duty of the appellate court to amend the record of proceedings once it is shown that record is complete, therefore, Akinnyede vs Opere (1967) All NLR 322 does not apply as both parties are not ad idem in this matter.

Now, by appearing before the trial court to raise a preliminary issue of clause on arbitration to be resorted to first before the trial in a court of law, could the defendant be said to have waived its right? **When parties enter into agreement and there is an arbitration clause**

whereby the parties must first go for arbitration before trial in court it is natural for the defendant in a case where the other party has filed a suit to ask for stay of proceedings pending arbitration. That does not amount to submission to trial. In the case where
 B such application is refused the next step is to invoke a statutory right where it exists if that right will make the suit incompetent. In the present case, S 46(1) of the Edict (supra) was invoked by the defendant and the learned trial judge held it was too late and that
 C the defendant had waived its right. The right under S.46 (1) is very wide. Waiver is not all that simple, appearance by way of demurrer is not enough to amount to waiver. When a party has a right whether by way of agreement or under a statute he can exercise it at the earliest time and can equally waive it if the statutory right is not
 D absolute and mandatory. The waiver must be clear and unambiguous like allowing all evidence to be taken or even decision given before challenging the hearing. It will then be shown that the party deliberately refused to take advantage of the right when it availed him.
 E Such failure to take advantage of a right must be so clear that there will be no other reasonable presumption than that the right is let to go. The preliminary skirmishes in this case at the trial court could not by any imagination be presumed to be a waiver. The
 F defendant had not filed his statement of defence and service of the statement of claim on it is certainly not a waiver by it. Had it filed a statement of defence but with indication that a preliminary objection would be raised that the suit was not properly before the court, it would not have been a waiver; this would have distinguished the dictum in Kano State Urban
 G Development Board vs. Fanz Construction Ltd. (1990)4 NWLR 142. It is therefore clear that the defendant had not taken any step in having the case heard by the trial court and had not waived its right under S. 46(1) of the Edict. Obembe vs Wemabod Estates Ltd. (1977) 5SC.115, 131-2
 H has no application in this case. There is certainly no evidence of waiver in this case.

Section 46(1) of the Edict is certainly not the same with S. 97 of ports Act relied upon in Nigerian Ports Authority vs

Constructioni General & Anor. (1974 12 S.C 81,95. The court of Appeal was right to distinguish between statutory provisions. Ports Act in section 97 is restrictive in its application whereas S.46(1) of the Edict is wide and covered a lot of grounds. I find no substance in this issue.

There was no motion before this court to argue an additional ground of appeal on a matter not canvassed in courts below as indicated in the brief. As I said earlier the issue raised on that proposed ground is incompetent in the brief and it is struck out as the motion to file the ground of appeal was not moved.

For the foregoing reasons I found no substance in this appeal and I dismiss it. I award N10,000.00 costs against the appellant in favour of the respondent.

KUTIGI JSC

I read before now the judgment just delivered by my learned brother, Belgore, JSC. I agree with the conclusion that the appeal is without merit and ought to fail. It is accordingly dismissed with costs as assessed in the lead judgment.

OGUNDARE JSC

The main question that calls for determination in this appeal is: what step by a defendant after being served with a writ of summons will disentitle him from raising objection to the proceedings on the ground of some irregularity in the institution of the action.

The parties to this appeal had entered into agreement for the construction of the museum of Natural History at the University in Ile - Ife. Plaintiff commenced work on the project and the defendant paid a mobilisation fee. While the project was still in progress the defendant called a meeting of all contractors handling capital projects for the defendant, including the plaintiff, and announced a suspension of all capital projects, including the museum being constructed by the plaintiff. Con-

sequent to this suspension the defendant directed its security men not to allow the plaintiff to remove his plants, machinery, equipment and other materials from the work site. Whereupon the said security men disallowed the plaintiff from removing the same despite protests from the plaintiff. Some months after the suspension of work, the plaintiff at the instance of the defendant, came to the site and an inventory was taken of all materials and equipment left on the site. A dispute arose between the parties leading to the institution of this action by the plaintiff wherein the plaintiff is claiming:

"1. The sum of N482,085.16 (Four hundred and eight two thousand and eight five naira , sixteen kobo) being damages for the breach of the contract entered into between the plaintiff and the Defendant on 15th July, 1982 for the construction by the plaintiff of the Museum of Natural History for the Defendant at Ile-Ife.

2. The sum of N1,701,600.00(One million, seven hundred and one thousand, six hundred Naira) being damages for the wrongful detention by the defendant of the plants, machineries and Equipment of the plaintiff on the work site of the said contract project from 23rd February, 1985 to 19th of March, 1987.

3. AN ORDER for the payment to the plaintiff by the Defendant of such other sum or sums of money as the court may find to have been lost by the plaintiff as a result of the continued detention of the plaintiff's plants machineries and Equipment by the Defendant from 20th March, 1987 until the date of their release.

4. AN ORDER directing the Defendant to release to the plaintiff all the plaintiff's plants, Machineries and Equipment detained by the Defendant on the said work site."

The plaintiff filed along with the writ a motion on notice praying the court for an order of mandatory injunction directing the defendant to release to the plaintiff the plants, machinery and equipment listed in the schedule to the motion paper and said to belong to the plaintiff but were being detained by the defendant. On being serve with all these proceedings, the defendant entered an unconditional appearance to the writ. This was on 21/5/87 barely three days after the filing of the writ. On 26/5/87

the defendant filed an application for stay of proceedings in the action until the parties submitted to an arbitration in accordance with clause 35 of the contract between them. Both applications of the parties were heard on the 23rd June 1987 and dismissed in a considered ruling given by the learned trial judge on 6th July 1987. The learned judge ended his ruling in these words:

"Having gone through the plaintiff's application, the affidavit supporting it and the circumstances of the case, I am not in a position to grant the prayers sought for.

Albeit, in the interest of justice and having regard to the urgency of the matter in view of the machineries and implements involved, an accelerated hearing of the case will meet the justice of the case.

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Finally, I make the following Orders:

1. The defendants application for stay of proceedings is hereby refused.

2. The plaintiff's application for an Order of mandatory injunction directing the defendant to release the plaintiff's plants, machineries and equipment is also refused.

3. The plaintiff is ordered to file in court and serve his statement of claim on the defendant's counsel on or before 27th July, 1987.

4. The defendant is ordered to file in court and serve his statement of Defence on the plaintiff's counsel on or before 18th August, 1987

5. The case is fixed at the instance of both counsel and by their agreement to 23rd, 24th & 25th Sept. 1987 for hearing.

6. Each party to bear his cost."

Pursuant to the Order made the plaintiff filed its Statement of claim. The defendant on 21/9/87 however, filed an application praying the court for an order striking out the action on the grounds that-

"(a) The plaintiffs did not give notice of intention to institute the action herein against the defendant as enjoined by the provisions of section 46 of the University of Ife Edict 1970.

(b) The court lacks jurisdiction to entertain the suit against the

defendant as presently constituted without due service of the notice aforesaid on the Defendants."

The application was heard and, in a ruling delivered on 24/9/87, was dismissed. The learned trial judge in this ruling found that the provisions of section 46 of the University of Ife Edict under consideration were not complied with. He also found that they were conditions precedent to the filing of an action by the plaintiff. He, however, found also that-

C "Be that as it may, it is my view that that is not the end of the case. In the instant case, it is on record that the defendant has taken several steps after service of the writ of summons on it. It has, inter alia entered an unconditional appearance, filed an application and swore to an affidavit by itself, argued the application and obtained a ruling. It D condescended to file its pleadings and lastly took dates for hearing. Their Lordships of the court of Appeal analysed what amounts to 'taking a step' in the case of Kano State Urban Development Board v. Fanz Construction Co. Ltd (1986) 5 N.W.L.R. (part 39) 74 at 86. Their Lordships E quoted with approval, the case of Ives & Baker v. Williams(1894) 2 Ch, p.484 where Linley L.J. . stated that :

"The authorities show that a step in the proceedings mean something in the nature of an application to the court, and not mere talk between solicitors or solicitors' Clerk, nor writing of letters, but the taking of some steps such as taking out summons or something of that kind which in the technical sense a step in the proceedings."

This may include issuing of summons for discovery of documents, the attendance and taking part at the hearing of summons for direction and seeking an order for pleadings."

"Having taking steps, it is my considered view that the University of Ife has waived his statutory right under section 46(1) of the University of Ife Edict No. 14 of 1970."

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"The supreme court advanced another dimension to this type of application. It is said that in regard to the effect of this type of provision

(Section 46 of the Edict) it is settled law that where a party intends to rely upon a condition precedent, it must be specifically pleaded. Section 46(1) of the Edict prescribes a condition precedent to the competence of any action commenced against the University of Ife.

See: Katsina Local Government v. Alhaji Barwa Wakudawa.(1971) /1 NWLR 100. /(sic) B

What the authority is saying in effect is that once the condition is not pleaded, It cannot at this stage be raised to stultify the plaintiff's action."

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"By the nature of the action, the cause of action between the parties is damages for, breach of contract. There is consensus on both parties. In other words, the plaintiff's claims are based on specific contract."

And Finally:

"Section 46(1) of the University of Ife Edict No. 14 of 1970 does not and will not affect an action based on contract. Where an action has been brought for something done or omitted to be done under an express contract, the section does not apply. Again where goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price,because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. "

See: Nigerian Ports Authority v. Constructioni Generale Farsura Cogefur SPA (1974) 12 SC 81 at 101.

The foregoings clearly show that section 46(1) of the Edict under consideration is not an absolute one as Mr. Adeniji would want me to believe." G

The defendant being displeased with this decision of the learned trial judge appealed to the court of Appeal. The latter court allowed the appeal. It found

. "Perhaps , I may say straight-away that it appears to me that the agreement to proceed with the case as recorded by the learned trial judge in the record of proceedings seems to have been extracted from the

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counsel for the parties and could not be regarded as an acquiescence by the appellant in this case to withdrawing its objection to the jurisdiction of the court."

2. "It is not enough to say that the appellant entered unconditional appearance and therefore he has waived his right to complain about jurisdiction. The decision in MUNI v. WORSFOLD (supra) which was followed in the case of U.B.A Trustees Ltd. v. Nigergrob ceramic Ltd. (supra) has determined that entering an appearance, even unconditional, does not constitute a waiver of the right to object."

3. "It is therefore not enough to say that the appellant having entered unconditional appearance cannot raise the objection on the decision of the court. For it is clear from the record that as soon as the appellant entered appearance, the first step taken by its counsel was to protest against the jurisdiction of the court by seeking a stay of its proceedings with a view to referring the case for arbitration as set out in the agreement between the parties. The only step taken after appearance therefore by the appellant was to protest against the court hearing the case. If any step could be said to have been taken, it is only in protestation."

4. "I do not think therefore that the above facts can support a plea of a waiver as the appellant never demonstrated any intention to abandon its right to object. Having regard to the circumstance of this case, I am of the firm view that the appellant could not be said to have taken a step in the proceedings amounting to a waiver of its right to insist on the statutory three months notice afforded it by the provisions of section 46 of the University of Ife Edict 1970."

5. "It is clear that this section is wide and all embracing. It speaks of all suits and whatever causes of action not limited to anything done pursuant to any Act or statute. It relates to all or any type of action. The wordings in the motion, in my opinion, are clear, positive and unambiguous and should be given their natural, ordinary and literary meaning. Nothing ought to be added to or detracted from them. They are clearly distinguishable from the provisions in section 264 of the public Health Act and I cannot say that the decision in the two cases i.e. N.P.A.

v. Construzioni and Midland Railways Company (supra) are binding on the case at hand. I do not subscribe to the fact as submitted by the learned counsel for the appellant that the provisions of the law interpreted in the two cases are identical with the provisions under consideration."

Sulu-Gambari JCA in his lead judgment, with which Akanbi JCA (as he then was) and Akpabio JCA agreed, concluded thus:

"Having so held, it follows that the learned trial judge was wrong to have held that the appellant has taken a step in the proceedings when in actual fact the contrary is the position. He was also in error to have held that section 46(1) of the University of Ife Edict 1970 does not apply to actions in contract."

It is against this decision that the plaintiff has now appealed to this court upon four grounds of appeal. In his written Brief of argument filed on his behalf by Mr. Oyetibo learned counsel, the plaintiff who is now Appellant before us, raised the following four issues as calling for determination in this appeal:

"1. Whether the court of Appeal was right in holding that the agreement to proceed with the case as recorded by the trial judge was extracted from the counsel for the parties.

2. Whether the court of Appeal was right in law in holding that the respondent could not be said to have taken a step in the proceedings and as such waived its right to raise the issue as to the failure of the appellant to give the statutory notice of intention to sue the respondent.

3. Whether the Court of Appeal was right in law in refusing to follow the decision of the supreme court in *Nigerian Ports Authority v. Construzioni Generali & Anor*: (1974)12 Sc.81.

4. Whether section 46(1) of the University of Ife Edict 1970 is not inconsistent with the provisions of sections 6(6); 33(1) of the constitution of the Federal Republic of Nigeria 1979 and therefore void."

The Respondent in its own written brief of argument filed on its behalf by Mr. Adeniji learned counsel adopted the above four issues.

Issue (4) arose out of Ground (4) of the Grounds of Appeal which, without its particulars, reads as follows:

"The court of Appeal erred in law in relying on section 46(1) of the University of Ife Edict to hold that the plaintiff's action was incompetent."

This issue was never taken up in the two courts below and although it is intimated in the Appellant's Brief that the leave of this court would be sought to raise this new point in this court at no time, however, was such leave sought nor obtained. Consequently this court not having granted leave to the plaintiff to raise the point of law as in Ground (4). I agree entirely with my learned brother Belgore JSC that the ground is incompetent and is accordingly struck out by me too. All arguments in the Appellant's Brief on issue (4) will be discountenanced by me.

It is pertinent at this stage to point out that both parties were not represented by counsel at the oral hearing of the appeal. Pursuant to the rules of this court, the appeal was taken as argued on the Briefs of the parties already filed in court.

I will now take Issues (1), (2) and (3) together as they dovetail into each other. It is argued strenuously in the Appellant's Brief that Section 46(1) of the University of Ife Edict does not apply to cases founded on contract as was decided by the supreme court in N.P.A. v. Construzioni (1974) 12 SC.81 and that it was wrong of the court not to have followed that decision. It is equally and strenuously argued in the Brief on behalf of the plaintiff that the defendant had taken a step in the proceedings in the High Court before raising their objection based on section 46(1) and that being so, the defendant is deemed in law to have waived its right to raise the objection. On the step said to have been taken by the defendant, it is submitted in the plaintiff's Brief that the defendant, having agreed to take trial dates, was deemed to have taken fresh step in the proceedings. A number of authorities are cited in the Brief in support of arguments advanced herein.

The defendant in its own Brief argued that the fixing of dates for hearing was not at the instance of any of the parties and that in consequence it could not be said that the defendant had taken a step in the proceeding before objecting to the competence of the action. It is also submitted in the Brief that section 46(1) of the Edict is wide enough to

embrace action for contract and that the court below was right in holding that the supreme court's decision in N.P.A. v. Construzioni (supra) did not apply.

I have read the record of appeal before us, there is nowhere in that record that the parties or either of them either applied for an order B for pleadings or applied for dates for hearing. It is evident from the ruling of the learned trial judge given on the 6th of July that the Orders for pleadings and the fixing of dates for hearing were at his own instance in his desire to see that justice was done between the parties. For he said C :

"Albeit, in the interest of justice and having regard to the urgency of the matter in view of the machineries and implements involved, an accelerated hearing of the case will meet the justice of the case.

I hereby order that the plaintiff should file in court and serve his D statement of Claim on the defendant's counsel on or before 27th July 1987. The defendant also should file in court and serve his statement of Defence on the plaintiff's counsel on or before 18th August, 1987." In the final order he made on the conclusion of the ruling, he wrote in his E handwriting "23rd, 24th & 25th September 1987"; the rest of the ruling including the orders made was typed out. Having regard to the circumstances, as disclosed on the record, of the making of order for pleadings and the giving of dates for hearing, I think the court below was right F when it, per Sulu-Gambari JCA, observed-

".....It appears to me that the agreement to proceed with the case as recorded by the learned trial judge in the record of proceedings seems to have been extracted from the counsel for the parties....." G

I can find nothing on record to suggest that there was an application made by either party for accelerated hearing of the action nor on dates for hearing. I find it hard therefore. to hold in the circumstance, that the fixing of the dates for hearing was as a result of a step taken by the H defendant in the proceedings. I agree entirely with the court below that the learned trial judge was wrong holding that the defendant had taken a step in the proceedings that would amount to a waiver of the right to

object to the competence of the action. Both courts below were right on the laws as to waiver. It is in the application of the facts to the law that the learned trial judge, with respect him, went wrong.

I agree also with the court below that section 46(1) applies not only to cases based on tort but equally to cases based on contract. Section 46(1) reads:

"No suit shall be commenced against the University until at least three months after written notice of intention to commence the same shall have been served on the University by the intending plaintiff or his agent, and such notice shall clearly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff and the relief which he claims."

Section 97 of the Ports Act that came for consideration in N.P.A. v. Construzioni (supra) on the other hand, reads:

"S. 97(1) When any suit is commenced against the authority for any act done in pursuance, 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 such Act law, duty or authority, such suit....."

S.97(2) No suit shall be commenced against the Authority until one month at least after written notice of intention to commence the same shall have been served upon the authority by the intending plaintiff or his agent....."

Section 46(1) of the Edict is clearly wider in its scope than Section 97 of the ports Act. Section 46(1) speaks of "no suit" and not "any suit.....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 such Act, law, duty or authority" as contained in section 97(1). I entirely agree with the interpretation placed by the court below on these two provisions. Consequently, I think the court below was right in distinguishing the case before it from N.P.A. v. Construzioni (supra). As the two provisions are not in pari materia the court below was right not to follow N.P.A. v. Construzioni.

For the reasons I give above and the fuller reasons given in the

judgment of my learned brother Belgore JSC, I agree entirely with the court below that the plaintiff, having failed to give before instituting its action, the statutory notice provided for in section 46(1) of the Edict, the action was incompetent and was rightly struck out by the court below, I, too, like my learned brother Belgore JSC dismiss this appeal with costs B as assessed by him in his judgment.

ONU JSC

I had the advantage of reading before now the judgment just delivered by my learned brother Belgore, JSC and I agree with his reasoning and conclusion that the appeal is devoid of substance and must therefore fail. C

My learned brother Belgore, JSC's review of the antecedents D and true setting of the facts leading up to the appeal have been so impeccably set out therein that I deem it unnecessary, in my consideration thereof to repeat them here. Suffice it to say, that the four issue distilled from the four grounds of appeal on which the consideration of this appeal hinge and with which the Respondent unequivocally agrees, are: E

1. Whether the court of Appeal was right in holding that the agreement to proceed with the case as recorded by the trial judge was extracted from the counsel. F

2. Whether the Court of Appeal was right in law in holding that the Respondent could not be said to have taken a step in the proceedings and as such waived its right to raise the issues as to the failure of the Appellant to give the statutory notice of intention to sue Respondent. G

3. Whether the court of Appeal was right in law in refusing to follow the decision of the supreme court in Nigeria Ports Authority v. Construzioni Generali & Anor. (1974) 12 SC 81.

4. Whether section 46(1) of the University of Ife Edict 1970 is not inconsistent with the provisions of section 6(6); 33(1) of the constitution of the Federal Republic of Nigeria, 1979 and therefore void. H
In the first place, with respect to issue 4, leave neither having been sought nor obtained to argued ground 4. the same is incompetent and it is

accordingly struck out.

In considering this case which is an interlocutory appeal and in which this court ought not to discuss in details so as not to prejudice the chances of the parties by removing the substratum thereof when it eventually comes to be heard, the issue here is not so much on what is contained in the record of proceedings concerning how hearing dates were fixed in the matter before the learned trial judge but rather what conclusions are to be drawn having regard to the glaring circumstances of the case. In seeking to do this I will consider all four issue together as follows:-

I wish to point out that the situation the Respondents were in gave little or no opportunity for their counsel at the trial court to contest the issue of the fixture of the case for hearing, they having lost their objection on ground of reference to arbitration to jurisdiction in the trial court's ruling. In this regard, the case of Ariori v. Elemo (1983) 1 SCNLR1 at 72 where this court held as follows:-

"The Appellants had no control on this act of the learned trial judge. They were therefore, not in a position to waive what was not within their competence and control."

is clearly apposite, In the instant case, it appears to me clear that the learned trial judge was bent on getting the case fixed for hearing when pleadings were yet to be completed. It was the non realisation of this fact that made him to fix hearing dates (over which the respondent had no control) in the hope that before time ran out, the parties would have settled and filed their pleadings within the limited periods given. As it turned out, the hearing was not to be, the reasons being because of the motion objecting to the trial court's jurisdiction the second time around formed the genesis of this appeal.

From the foregoing, one cannot but come to the irresistible conclusion that the learned justices of the court below were correct and properly directed themselves in the conclusion they arrived at about how the learned trial judge got the hearing dates fixed. The appellant's argument on the presumption of regularity and procedure for challenging the record of appeal are, in my view, irrelevant. The court below was there-

fore right, in my opinion, when it held, inter alia:-

"It is therefore not enough to say that the appellant having entered unconditional appearance cannot raise objection on the decision of the court. For it is clear from the record that as soon as the appellant entered appearance, the first step taken by its counsel was to protest against the jurisdiction of the court by seeking a stay of its proceedings with a view to referring the case for arbitration as set out in the agreement between the parties. The only step taken after appearance therefore by the appellant was to protest against the court hearing the case. If any step could be said to have been taken, it is only in protestation. I do not think therefore that the above facts can support a plea of a waiver as the appellant never demonstrated any intention to abandon its right to object. Having regard to the circumstance of this case, I am of the firm view that the appellant could not be said to have taken a step in the proceedings amounting to a waiver of its right to insist on the statutory three months notice afforded it by the provisions of section 46 of the university of Ife Edict 1970." (Underlining is mine for emphasis)

The facts justifying the correctness of the position taken by the court below I have set out above are not farfetched. The Respondent was very consistent on the trial court's lack of jurisdiction for at least two reasons, to wit :

(1) That having regard to the reference to the Arbitration Clause in the agreement between the parties, the matter could not have been properly before the learned trial judge until reference to arbitration.

(2) Lack of Notice as required by the provisions of section 46(1) of the Edict makes the action incompetent.

The appellant's notion that a step had been taken by the Respondent may have been borne out by the Respondent taking the Ruling on its application challenging the court's jurisdiction as well as its presence when trial dates were fixed.

The question of waiver is not in point in the application of the provisions of section 46(1) of the Edict. The court below so held and I cannot agree more with it when it held:

"It is clear that this section is wide and all embracing. It speaks

of all suits and Whatever causes of action, not limited to anything done pursuant to any Act or statute. It relates to all or any type of action. (Underlining is mine for emphasis).

Furthermore, the court below was right in holding that the supreme court decision in the case of N.P.A. v. Construzioni Generali & Anor. (1974)12 SC.81 at 95, is not applicable for the interpretation of the provisions of section 46(1) of the Edict. Calling for determination in this appeal was the simple reason that it is not in pari materia with section 97(1) of the ports Act (now section 110(1) laws of the Federation of Nigeria, 1990) which this court interpreted when it held among other things that-

"We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act," (underlining is mine for emphasis).

See the case of His Highness Isaac Boy Umukoro & ors . v. Nigerian Ports Authority & Anor. (1997)4 NWLR (part502)656 and Nigerian Broadcasting Corporation v. Bankole (1972)1 All NLR (part 1)327).

Furthermore, the provisions of section 46(1) of the Edict which are all embracing are not at the same time inconsistent with the provisions of sections 6(6) (b), 33(1) and 236(1) of the constitution of the Federal Republic of Nigeria, 1979. That this is so contrasts with the main plank of the appellant's arguments on the last issue (issue 4) which would appear to be contending that section 46(1) "fetters or restricts the citizen's right to evoke the jurisdiction of the court to seek a remedy as quickly as possible immediately his rights have been, are being or likely to be infringed upon, is inconsistent with the spirit of the 1979 constitution....." This cannot be true as it is a faulty construction put upon the provisions of s46(1) of the Edict which in no way restricts access to court. See this court's recent decision in Chief Eugene C. Offor v. Chief S.C. Osagie & Ors. . (1998)3 NWLR (part 541)205. These are provisions bordering on service of judicial processes out of court vide sections 96 and 97 of the sheriffs and civil process Act. In this regard, the case of Adediran v. Interland Transport Ltd (1991)9 NWLR (part 214)155 at 180, is not apposite to the extent that the provisions of section 46(1) of

the Edict do not in any way constitute any obstacle along the same line. Thus the appellant when entering into a contract with the respondent and conversant with its statute while equally being aware of the preconditions before it could institute any action, cannot now argue that its rights to go to court on the claim are being fettered. See Metalimpex v. A.G. Leventis & Co. (Nig Ltd) (1976) 2 SC 91. and Offor v. Osagie & 2 Ors (supra).

For these and the fuller reasons contained in the lead judgment of my learned brother Belgore, JSC I too dismiss the appeal. I abide by the consequential orders inclusive of costs awarded therein.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Belgore, J.S.C. and I am in entire agreement with him that this appeal is without substance and should be dismissed.

It is clear to me, from all the circumstances of the case, as borne out from the record of proceedings that the court of Appeal was completely justified when it came to the conclusion that the respondent could not be said to have taken any step in the proceedings to constitute a waiver of the application of the provisions of section 46(1) of the University of Ife Edict, 1970. The respondent had hardly any choice in the manner the trial dates were fixed by the learned trial judge and therefore could not properly be charged with taking any step in the proceedings to sustain a waiver of the application of the provisions of section 46(1) of the University of Ife Edict, 1970.

On failure by the court below to follow the decision of this court in the case of Nigeria Ports Authority v. Construzion Generali and Another (1974) 12 S.C 81 at 95, It seems to me that this course of action was without fault. This is because the provisions of section 46(1) of the Edict are not in pari materia with those of section 97 of the ports Authority Act which this court interpreted and was concerned with in the decision in question. The court of Appeal in treating the issued com-

mented, and quite rightly in my view as follows-

"It is clear that this section is wide and all embracing. It speaks of all suits and whatever causes of action not limited to anything done pursuant to any Act or statute. It relates to all or any type of action."

B Similarly this court in the Nigeria Ports Authority case commented as follows-

"We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the Act." (Underlining for emphasis).

C It is thus plain that the operation of section 97 of the Ports Authority Act is limited in scope as against that of section 46(1) of the edict which is clearly wide and all embracing. In my view, the reference to the decision of this court in the Nigeria Ports Authority case is not
D apposite to the issues under consideration in the present appeal.

The conclusion I therefore reach is that the court below was perfectly in order when it held that failure by the appellant to comply with the provisions of section 46(1) of the University of Ife Edict, 1970 is
E fatal to the competence of the action.

It is for the above and the more detailed reasons contained in the leading judgment of my brother, Belgore, J.S.C. that I, too dismiss this appeal as unmeritorious. I abide by the order for costs made in the said
F judgment.

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