

SUPREME COURT OF NIGERIA
17TH JULY, 1998. SC. 47/1992
CORAM:- I. L. KUTIGI, E. O. OGWUEGBU, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC

B. A. SHITTA-BEY APPELLANT
AND
ATTORNEY GENERAL OF THE
FEDERATION
FEDERAL CIVIL SERVICE COMMISSION RESPONDENTS

APPEALS - *Judgment - Decision of a member who participated at the hearing and conference - Could on account of death or the other reasons - Be pronounced or read by another justice.*

COURTS - *Jurisdiction - The question can be raised at any stage of the proceedings or on appeal - As a substantive point of law.*

EVIDENCE - *Affidavits - Admissible evidence - Documents attached to an affidavit - Constitute admissible evidence.*

JUDGMENTS - *Appeals - Constitution of appeal court - Where out of three justices hearing an appeal only two were present at the delivery of the judgment - The proceedings is not vitiated*

JURISDICTION - *Ouster - Of the jurisdiction of the trial court under Decree No. 17 of 1984 - To be effective the appellant must have been retired by the appropriate authority.*

MAXIMS - *Omnia Praesumuntur rite esse acta - What it means.*

STATUTES - *Public Officers (Special Provisions Decree) 1984 No. 17 - Applies to all public officers - And any Public officer could be removed under it.*

STATUTES - Decree No. 17 of 1984 - Retrospective operation - Was clearly intended - And it will not be declared incompetent for that reason.

STATUTES - Decree No. 17 of 1984 - Retirement of a public officer - The appropriate authority is not required to state the reasons for his decision.

WORDS AND PHRASES - "Appropriate authority" - In Decree No. 17 of 1984 for an office held under the Federal Government - It's definition.

WORDS AND PHRASES - "Public Officer" - Under Decree No 17 of 1984 - What it connotes.

FACTS

The plaintiff/appellant in the Lagos High Court issued a writ of summons against the defendants/respondents. He claimed for a declaration that the decision of the respondents to retire him (appellant) from the Federal Civil Service of Nigeria (with the letter issuing forth from 2nd respondent) Ref. No. FC.0017/Vol. VIII/969 of 14th January, 1986 was irregular, illegal, null and void. The appellant was an employee of the Federal Civil Service Commission of Nigeria. He earned series of promotions culminating in his appointment as Director in 1979 and as Acting Director of Public Prosecutions of the Federation in November, 1985. By a letter dated 14th January, 1986, signed by the permanent Secretary of the 2nd Defendant, the plaintiff was informed of the Government's intention to retire him in the public interest with immediate effect. The letter was exhibit B in the proceedings. The appellant petitioned the 2nd respondent but to no avail. Hence he instituted the action. The respondents filed a joint statement of Defence wherein they raised a preliminary objection on points of law and contended that the High Court lacked jurisdiction to hear the suit.

The learned trial judge in a considered ruling dismissed the ob-

jection as lacking in merit. The respondents appealed to the Court of Appeal, Lagos Division which in a well considered judgment allowed the appeal. It held that the jurisdiction of the trial court has been ousted and consequently struck out the case. It is against the judgment of the Court of Appeal that the appellant has now appealed to the Supreme Court on nine grounds. The appellant formulated no issues for determination in his brief. The respondents raised two issues which the court considered adequate in disposing of the appeal.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in holding that the jurisdiction of the trial Court to entertain this matter was properly ousted by the provisions of Section 3(3) of Decree No. 17 of 1984.

2. Whether the Court of Appeal was properly constituted while determining this matter."

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

Courts - Jurisdiction

1. The question of jurisdiction can be raised at any time or stage in the proceedings or on appeal as a substantive point of law (see Bronik Motors Ltd & Anor. v. Wema Bank (1983) 6 SC. 158 at 273 and Onyema v. Oputa (1987) 3 NWLR (Part 60) 259, being mindful of the fact that any defect in jurisdiction is fatal to the whole proceeding and the judgment obtained thereby is a nullity. See Gabriel Madukolu v. Johnson Nkemdilim (1962) ALL NLR 587. (p. 2068 D)

Jurisdiction - Ouster

2. For the jurisdiction of the trial court to be said to have been properly ousted³ in this case, the appellant must have been retired by the appropriate authority and his retirement must fall within the provision of Decree

³ The issue of ousting of Court's jurisdiction by Decree was also considered by the Supreme Court in the following cases: Kotoye v. Saraki (1994) 12 KLR 226 Obaba v. Military Gov. of Kwara State (1994) 6 KLR 114.

No. 17. In the present case which is on all fours with Nwosu's case (supra), the retirement was the act of the appropriate authority and the provisions of Section 3(3) of Decree No. 17 of 1984 properly and effectively oust the jurisdiction of the trial court and I so hold. (p. 2070 A)

B

"Appropriate authority"

3. Although the above two cases dealt with offices undoubtedly held under a State Government, the definition is unquestionably applicable to an office held under the Federal Government where the Appropriate Authority accordingly becomes the Head of Federal Military Government (President) or Head of State or any person authorized by him or the Supreme Military Council (later Armed Forces Ruling Council) vide Section 4(2) (ii) of Decree No. 17 of 1984 (ibid). The Appropriate authority⁴ to retire the Appellant therefore is, in my opinion, the Federal Military Government personified in the Head of State who, before he could be said to have acted properly, must be doing so in respect of a public officer. (p. 2071 B)

E

"Public Officer"

4. The appellant having been shown to have held office as a Director in the Federal Ministry of Justice until he was retired on the 14th day of January, 1986 by the receipt of the letter written to him, to wit: Exhibit B by the 2nd respondent, comes within the definition of a public officer under Decree No. 17 in Section 1(1) as well as under the 1979 Constitution. See F. S. Uwaifo v. Attorney General of Bendel State (1982) 7 SC. 124. (p. 2071 H)

G

Evidence - Admissible evidence

5. As Nnaemeka-Agu, JSC stated the law in Nwosu v. Imo State Environmental Authority (supra) at page 718:

H *Evidence by affidavit is, it must be noted, a form of evidence.*

⁴ "Appropriate authority" was also defined by the Supreme Court in Anya v. Iyayi (1993)

It is entitled to be given weight where there is no conflict, after the conflict has been resolved from appropriate oral or documentary evidence."

In which case, documents attached to an affidavit as in the instant case, constitute admissible evidence. In view of the above pronouncement, I am of the firm view that the appellant cannot be right in thinking that in spite of the unequivocal statements made in each of Exhibits 'A' and 'B' particularly Exhibit A, there is still need to have admissible evidence. (p. 2074 H)

Public Officers (Special Provisions Decree) 1984

6. The appellant further argued that his retirement did not fall within the provisions of Decree No.17 of 1984 since he did not fall within the category of officers specified in Section 1 (1) thereof who can be removed by the appropriate authority. A cursory look at the title of the Decree depicts it as stating 'Public Officers (Special Provisions Decree, 1984.' As the title suggests, it applies to all public officers, in which case, any public officer could be removed under the decree. The law, as it stands now therefore, admits of two ways of removing public officers - firstly through the normal Civil Service method or through Decree no. 17 of 1984. (p. 2075 C)

Decree No. 17 of 1984 - Retrospective operation

7. With due respect, the appellant's argument is based on a misinterpretation of Section 1(2) of the Decree whose purport is to give it retrospective effect. While under our law there is a presumption against retrospectivity - See Adegbenro v. Akintola (1963) 1 All NLR 299 at 301-302; where, as in the instant case, a retrospective operation to Decree No. 17 of 1984 was clearly intended and spelt out, that legislation will not be declared incompetent vide Attorney-General East Central State & Anor. v. Ugwuh (1975) 6 SC.13 and Ojokolobo .v. Alamu (1987) 3 NWLR part 61) 377 at 404. Indeed, in the case in hand, the retrospectivity pronounced would appear clearly not to affect the pending proceedings before the law courts. See Uwaifo .v. A.G. Bendel State (supra) and Eyesan .v. Sanusi (1984) 4 SC. 115 at page 137. There is therefore no

requirement under this Decree that any act done by the appropriate authority outside 31st December, 1983 and 27th June, 1984 must be proved. (p. 2076 G)

B *Decree No. 17 of 1984 - Retirement of a Public Officer*

8. The appropriate authority is not required by the Decree to state the reasons for his decision to retire a public officer under any of the sub-sections of the Decree. The reason for his action is personal and therefore subjective. Although admittedly, it is desirable to state the reason for the decision of the appropriate authority to act under the Decree, the Decree makes no such requirement imperative. As Nnaemeka-Agu, JSC in the Nwosu case (supra) puts it, what is necessary is that the appropriate authority "should be satisfied from materials placed before him that he should act." Nor by the demands of the Decree, is the appropriate authority required to set up a panel to examine the case. (p. 2077 F)

Appeals - Judgment

9. It is now firmly established by this court through a long line of judicial interpretation that a decision arrived at by the Court of Appeal or the Supreme Court in which a member who participated at the hearing and at conference and signified his views therein, could, on account of death, retirement, elevation, dismissal or other cause, have his judgment pronounced or read by another Justice as the case may be.⁵ See Section 258(2) of the 1979 Constitution. (p. 2079 E)

Omnia Praesumuntur rite esse acta

10. Apart from what is called presumption of regularity of official acts, there is the presumption that, where there is no evidence to the contrary, things are presumed to have been rightly and properly done. This is (p. 2084 G)

H _____

⁵ See also *Dadi v. Garba* (1995) 9 KLR 1755 and *Adesokan v. Adegorolu* (1997) 3 KLR (pt 49) 505 on the same principle

expressed in the common law maxim in the latin phrase- Omnia Praesumuntur rite esse acta.⁶ This presumption is very commonly resorted to and applied especially with respect to official acts. See Ogbuanyinya v. Okudo (No. 2) 4 NWLR (part 146) 551 at 570 paragraphs D-E. See also section 114 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. But it seems that the court is bound to draw the inference where, as in the instant case, there is no evidence to the contrary. (p. 2084 G)

Constitution of appeal court

11. I agree with the learned Senior State Counsel's argument that where, as in this case, we had three competent Justices hearing and determining an appeal, it is of no moment that two only (Kalgo and Awogu, JJ.C.A.) were present at the delivery of the judgment or that the absence of the third unavailable Justice whose opinion was pronounced and forms part of the judgment of the court vitiates the proceedings, his elevation to the Supreme Court notwithstanding. Again, it must be remembered that the judgment appealed against was a unanimous one as pointed out by this court in Shuaibu v. Nigerian Arab Bank Ltd ⁷ (supra) and that the provisions of section 11 of the Court of Appeal Act (ibid) and Section 258 (2) of the 1979 Constitution were in no way breached. Even if kalgo and Awogu, JJ.C.A. Had agreed and Babalakin, J.C.A. dissented (which is not the case here) the respondents would still have succeeded. (p.2086E)

NOTABLE POINTS OF INTEREST

ONU JSC

1. How issues for determination are to be formulated

It has been stated times without number that issues should be formulated in general practical terms and tailored to the real issues in controversy in the case. Such issues or questions for determination, it has also been stressed in several decisions of this court, must of necessity be limited

⁶ This maxim was also in focus in the case of Tewogbade v. Obadina (1994) 7 KLR 1

⁷ Shuaibu v. Nigeria-Arab Bank Ltd. was reported in (1998) 4 KLR (pt 62) 891

by, circumscribed and fall within the scope of the grounds of appeal. See Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688 at 714 A-B. The above proposition is complemented by another which states that in framing issues for determination
 B the proper procedure is to argue issues (not grounds) and show how they relate to the grounds of appeal vide Chinweze v. Masi (1989) 1 NWLR (Part 97) 254 and Oyebade v. Ajayi (1993) 1 NWLR (Part 269) 313. (Parenthesis are supplied by me). (p. 2066 F)

C
 2. *Special Powers to remove Public Officers*

The appellant's contention that Decree no. 17 of 1984 does not give anybody arbitrary powers to remove public officers overlooks the fact that the Decree invests in the Head of the Federal Military Government as
 D appropriate authority with special powers to carry out this function. Although such powers have been said to be drastic and unpopular, in the words of Nnaemeka-Agu, JSC in Nwosu's case (supra), there is "no escape route." If it is remembered that Armed Forces Ruling Council,
 E the maker of the legislation is not a parliament and never pretended to be so, no matter how one construes the Decree, effect must be given to its provisions. Indeed, Decree No.17 of 1984 spells out clearly what types of acts are covered by it. (p. 2076 A)

F
IGUHJSC

3. *The word "Pronounced" need not be expressly used*

I need hardly add that it is no provision of any law that the word "pronounced" or "pronouncement" must be expressly used or employed in
 G the record of proceeding before an opinion or judgment of a Justice who has ceased to be a member of the relevant court as at the date of judgment may be deemed duly pronounced in accordance with the law. It suffices, in my view, if the opinion of such deceased, retired, dismissed
 H or elevated Justice is inter alia, declared, uttered, proclaimed or stated in open court at the time of the delivery of the judgment. It must not, however, be read as his opinion or judgment after he has ceased to be a member of the relevant court as such opinion or judgment would, under

the circumstance amount to a nullity. (p. 2104 D)

REPRESENTATION

B. A. Shitta-Bey Esq., in person for the Appellant

C. I. Onuogu (Mrs.), Legal Adviser Federal Civil Service Commission, B
with Okey Nwamba Esq., Assistant Legal Adviser, Federal Civil Service
Commission, for the Respondents

CASES REFERRED TO

Bronik Motors Ltd v. Wema Bank (1983) 6 SC. 158 at 273

C

Onyema v. Oputa (1987) 3 NWLR (Part 60) 259

Madukolu v. Nkemdilim (1962) ALL NLR 587

Uwaifo v. Attorney General of Bendel State (1982) 7 SC. 124.

Adegbenro v. Akintola (1963) 1 All NLR 299 at 301-302

D

Adesina v. Lemonu (1965) 1 All NLR 233

Attorney -General East Central State v. Ugwuh (1975) 6 SC.13

Ojokolobo v. Alamu (1987) 3 NWLR part 61) 377 at 404

Eyesan v. Sanusi (1984) 4 SC. 115 at page 137

E

Ogbuanyinya v. Okudo (No. 2) 4 NWLR (part 146) 551 at 570

Adelaja v. Fanoiki (1990) 2 NWLR (Part 131) 137 at 148E

Momodu v. Momo (1991) 1 NWLR (Part 169) 608

Onifade v. Olayiwola (1990) 7 NWLR 130 at 157

F

Chinweze v. Masi (1989) 1 NWLR (Part 97) 254

Oyebade v. Ajayi (1993) 1 NWLR (Part 269) 313

STATUTES AND RULES REFERRED TO

Public Officers (Special Provisions) Decree 1984 No. 17 ss. 1, 3, 4

G

Constitution (Suspension and Modification) Decree 1984 No. 1 ss. 5, 6
(3), 12 (1)

Federal Military Government (Supremacy and Enforcement of Powers)

Decree 1984 No. 13

H

Constitution of the Federal Republic of Nigeria, 1979, ss. 226, 277, 258
(2)

Interpretation Act, 1964 s. 18 (1) (6)

Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990, ss. 74

(1) (a) and (b), 114

Constitution (Suspension and Modification) Decree No. 107 of 1993, s. 6(3)

B Court of Appeal Act, 1976, s. 11

BOOKS REFERRED TO

Wade, Administrative Law, 3rd Edition, Page 67

Phipson on Evidence, Eleventh Edition.

C

LEAD JUDGMENT BY ONU JSC

The appeal herein which concerns the ouster of jurisdiction of courts under a Decree of the Federal Military Government of Nigeria is D against the judgment of the Court of Appeal holden in Lagos and delivered on the 10th day of May, 1991 (Coram: Babalakin, JCA as he then was and concurrent in by Awogu and Kalgo, JJ.C.A.)

The genesis of the appeal is that the appellant as plaintiff had E sued the respondents then defendants, in the High Court of Lagos State presided over by Segun, J. The claim therein was succinctly for a declaration that the decision of the respondents to retire him (appellant) from the Federal Civil Service of Nigeria (with the letter issuing forth from 2nd respondent) Ref. NO. FC.0017/Vol. VIII/969 of 14th January, 1986 (Ex- F hibit B) which was preceded by an earlier one from the President and Commander-in-Chief of the Armed Forces - Exhibit A to 2nd respondent) notice of which was given in the Statement of Defence, was irregular, illegal, null and void.

G By a notice of preliminary objection, the respondents contended that the trial court lacked jurisdiction to hear the appellant's claim. The High Court in a considered Ruling dismissed their objection as lacking in merit. Whereof, the respondents being aggrieved, appealed to the Court H of Appeal (hereinafter referred to as the court below) which in a well considered judgment, allowed the appeal. It is against the latter judgment that the appellant has now appealed to this court on nine grounds contained in a Notice of Appeal dated 29th July, 1991.

Briefly stated, the facts of the case as proffered by the appellant, are that he was first appointed to the post of a Crown Counsel in 1961; that he had earned series of promotions in his civil service career as State Counsel Grade 1 in 1964; Senior State Counsel in 1966; Principal State Counsel in 1970; Legal Adviser in 1972 and Director on Salary Grade Level 16 by 1977. Thereafter, said he, he was promoted to the rank of Acting Director of public Prosecutions of the Federation in November, 1985 - a post he held until by Exhibit B, he was abruptly retired from service. The appellant pleaded in his Statement of Claim to the effect that he wrote two letters to the 2nd respondent, both to which he received no response despite the failure in all his attempts at personal calls at its office. He finally averred in the penultimate paragraphs 19 to 21 of Statement of Claim thus:

"19. The Plaintiff will also contend at the trial that the purported premature retirement from service was conceived and executed in very bad faith so as to frustrate the Plaintiff's acting appointment as the Director of Public Prosecutions of the Federation from being substantively confirmed by the Federal Civil Service Commission, the second Defendant.

20. The Plaintiff will contend that the purported premature retirement from the Federal Civil Service was misconceived by the perpetrators of the action which is illegal, unjustifiable, unfair and totally indefensible.

21. WHEREOF the Plaintiff claims as per his Writ of Summons."

After the respondents had categorically denied in their entirety paragraphs 1, 3, 6, 9, 12,13, 14, 15, 16, 17, 18, 19, 20 and 21 of Statement of Claim, they averred in paragraphs 8-10 of the Statement of Defence as follows:

"8. The Defendants will further contend that the retirement of the Plaintiff by the appropriate authority as stated in paragraph 7 above was in turn conveyed to the Plaintiff by a letter dated 14th January, 1986 from the Federal Civil Service Commission. The Defendants will rely on this letter and all other relevant documents at the trial of the action.

9. In answer to the claim or declarations sought by the Plaintiff,

the Defendants will raise by way of preliminary objection on point of law on or before the trial, the following issues:-

(i) *The court has no jurisdiction to entertain this suit by virtue of the provisions of Section 3 of the Public Officers (Special Provisions)*

B *Decree 1984 No. 17.*

(ii) *The Defendant in addition to the above will further contend that by virtue of the provisions of Section 5 of the Constitution (Suspension and Modification) Decree 1984 No. 1 as amended, this action is void and it shall be so declared.*

C (iii) *By virtue of the provision of Decree No. 13 Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984, no decision of any court will avail the Plaintiff.*

D *10. Whereof the Defendants contend that the Plaintiff's action is frivolous, vexatious, speculative and an abuse of the courts process and should be dismissed with substantial cost."*

Acting pursuant to the rules of this court, the parties filed and exchanged briefs of argument. While the Appellant in his brief argued E contrary to the rules governing brief-writing) the grounds, the respondents in their brief submitted two issues as arising for the determination of this court. The argument by the appellant of the grounds of appeal is wrong. Since the art of brief-writing has been in practice in this court F for upwards of two decades issues and not grounds should be argued.

G It has been stated times without number that issues should be formulated in general practical terms and tailored to the real issues in controversy in the case. Such issues or questions for determination, it has also been stressed in several decisions of this court, must of necessity be limited by, circumscribed and fall within the scope of the grounds of appeal. See Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Part 135) 688 at 714 A-B; Adelaja v. Fanoiki & Anor. (1990) 2 NWLR (Part 131) 137 at 148E; Momodu v. Momo (1991) 1 H NWLR (Part 169) 608 and Onifade v. Olayiwola (1990) 7 NWLR 130 at 157. The above proposition is complemented by another which states that in framing issues for determination the proper procedure is to argue issues (not grounds) and show how they relate to the grounds of appeal

vide Chinweze v. Masi (1989) 1 NWLR (Part 97) 254 and Oyebade v. Ajayi (1993) 1 NWLR (Part 269) 313. (Parenthesis are supplied by me).

Hence, as this court had occasion to poignantly point out in Macaulay v. NAL Merchant Bank (1990) 4 NWLR (Part 144) 283 at 421 "in framing issues for determination the proper procedure is to argue B issues and show how they relate to the grounds". See also Agu v. Ikewibe (1991) 3 NMLR (Part 180) 385. Irrespective of what the rules of court enjoin, on 18th May, 1998 when this appeal came up for hearing before us, the appellant relied on his brief by indicating that he would C argue these nine grounds of appeal as contained in his brief of argument. The learned Senior State Counsel for her part and on behalf of the respondents, adopted her brief in which, rightly in my view, she identified two issues as arising for determination, to wit:

"1. Whether the Court of Appeal was right in holding that the D jurisdiction of the trial Court to entertain this matter was properly ousted by the provisions of Section 3(3) of Decree No. 17 of 1984.

2. Whether the Court of Appeal was properly constituted while E determining this matter."

I take the view that the nine grounds framed by the appellant to attack the decision of the court below, were they to have been contracted into issues, would clearly and undoubtedly have overlapped and/or been concomitant with the respondents' two issues set out above, with issue 1 F covering grounds 1 to 8 and issue 2, ground 9 respectively.

All told, I deem these two issues as more precise and indeed enough to dispose of the matters in controversy in this appeal. I accordingly adopt the two respondents' issues in my consideration of this appeal, the gravamen of whose complaint is pivoted on the purported G retirement of the appellant from his Civil Service post for just or no just cause and which can, in my opinion, be decided on that single issue of whether such removal is illegal, unjustifiable, unfair and totally indefensible. Such issue in my firm view, is that epitomized in the respondents' H issue No. 1 and not that in all or any of the eight grounds (1-8) of appeal which are unduly repetitive and prolix. Equally, my opinion is that appellant's ground 9 covers the respondents' issue 2 which is adequate to

dispose of the matter in controversy raised therein. This is why in my consideration of this appeal, I do not hesitate for a moment in adopting the respondents' issues 1 and 2 to aid me in my consideration of the appeal.

B Before going into the merits of this appeal, however, I deem it pertinent firstly, to consider albeit briefly, the issue of jurisdiction. As decided by this court in Obikoya v. Registrar of Companies & Anor. (1975) 4 SC. 31 at 34/35:

C "..... the existence or absence of jurisdiction in the court of trial goes to the root of the matter so as to sustain or nullify the trial Judge's decision or order in respect of the relevant subject-matter". See also Ezomo v. Oyakhire (1985) 2 SC. 260 and Nwafia v. Ububa (1966) NMLR 219 at 221."

D **The question of jurisdiction can be raised at any time or stage in the proceedings or on appeal as a substantive point of law (see Bronik Motors Ltd & Anor. v. Wema Bank (1983) 6 SC. 158 at 273 and Onyema v. Oputa (1987) 3 NWLR (Part 60) 259, being mindful of**
 E **the fact that any defect in jurisdiction is fatal to the whole proceeding and the judgment obtained thereby is a nullity. See Gabriel Madukolu v. Johnson Nkemdilim (1962) ALL NLR 587. Thus, stressing the importance of jurisdiction, Bello, CJN said in Utih & ors. v. Onoyivwe & others (1991) 1 NWLR (Part 166) 166:-**

F *"Moreover, jurisdiction is blood that gives life to the survival of an action in a court of law and without jurisdiction, the action will be like an animal that has been drained of its blood. It will cease to have life and any attempt to resuscitate it without infusing blood into it would*
 G *be an abortive exercise."*

Obaseki, JSC in Western Steel Works Ltd. v. Iron & Steel Workers Union (1986) 3 NWLR (Part 30) 617 at 625 had this to say:

H *"Whenever the question of jurisdiction of any court is raised, it is a question that touches the competence of the court that is raised. It does not raise any issue touching the rights of the parties in the subject matter of the litigation or dispute. Indeed, in our jurisprudence, only a court of competent jurisdiction can adjudicate on issues touching the*

rights of the parties. A court that has no jurisdiction to entertain the matter before it cannot exercise judicial powers in respect of that matter. Any such exercise is a nullity and the proceedings and judgment as a result of that exercise are null and void." See also Timitimi v. Amabebe & ors. 14 WACA 376 and Teliat A. O. Sule v. Nigeria Cotton Board (1985) 2 NWLR (Part 5) 17 at 36 for the proposition that if a court has no jurisdiction to hear a matter any step taken in relation to the matter is void."

Thus, as decided by this court in Mrs. Victoria Okotie-Eboh v. Adolo Okotie-Eboh (1986) 1 SC. 479, jurisdiction cannot be acquired by consent of parties nor can it be enlarged by estoppel.

Having examined the principles concerning jurisdiction - when to raise it, its strategic importance in proceedings before the courts and its effect when raised, the two issues I had hereinbefore indicated, I will consider them in their order of sequence as follows:-

ISSUE NO. 1

On 18th May, 1998 when this appeal came up for hearing the appellant appearing for himself and learned Senior State Counsel (Mrs. Onuogu) for the respondents both adopted and elaborated on their respective briefs. The appellant in addition, applied and was granted leave to tender a certified true copy of proceedings in Suit No. CA/L/137/89 before the Court of Appeal dated 10th May, 1991 and it was received as Exhibit SC. 1.

The question posed in issue 1 (which is similar to issue 1 raised in the court below and resolved against the appellant) is, whether the court below was right in holding that the jurisdiction of the court to entertain the appellant's action was properly ousted by the provisions of Section 3(3) of the Public Officers (Special Provisions) Decree No. 17. I shall in the rest of this judgment refer to the latter Decree as Decree No. 17 of 1984 simpliciter.

Now, Section 3(3) of Decree No. 17 provides:

"(3) No Civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this act and if any such pro-

ceedings have been or are instituted before, on or after the making of this Act, the proceedings shall abate, be discharged and made void."

For the jurisdiction of the trial court to be said to have been properly ousted in this case, the appellant must have been retired by the appropriate authority and his retirement must fall within the provision of Decree No. 17 (ibid). Who, one may then ask, is the appropriate authority? The term appropriate authority has been defined in a number of judicial decisions of this court as well as in Decree No, 17 of 1984. Section 4(2) of Decree 17 states:

- "In the operation of this Decree, the Appropriate Authority -*
- (i) in respect of any office which was held for the purposes of any state shall be the Military Governor of that state or any person authorized by him; and*
 - (ii) in any other case, shall be the Head of the Federal Military Government or any person authorized by him or the Supreme Military Council."*

It is common ground that prior to his retirement, the appellant was director (Acting Director of Public Prosecutions to be precise) in the Federal Ministry of Justice. Section 4(2) (ii) above therefore properly or appropriately applies to him, having served in an office which he held under the aegis of the Federal Government. And as to who is or is not an Appropriate Authority two decisions of this court clearly illustrate this, namely:

- (i) In Wilson v. Attorney General of Bendel State (1985) 1 NWLR (Part 4) 575, a case of unlawful dismissal in which the single issue was whether in purporting to dismiss the appellant, the Civil Service Commission is an "Appropriate Authority" by the combined effect of the provisions of Act No. 37 of 1968, Act No. 10 of 1976 and Act No. 18 of 1977, which oust the jurisdiction of the court to inquire into the validity of the purported dismissal, this court held inter alia:*

"The Appropriate Authority" - which means either the Military Governor himself or any other person whom he has clearly and specifically authorized to act in that behalf."

The above decision was upheld in another unanimous judgment of this court in Garba v. Federal Civil Service Commission (1988) 1 NWLR

(Part 71) 449, where it was held that:

"Even if the action of the respondents had come within the period of operation of the Decree and within the act protected by the Decree, the respondents not coming within the definition of appropriate authority cannot avail themselves of the protection of the Decree: Wilson v. A.G. of Bendel State (1985) 1 NWLR (Part 4) 575 applied." B

Although the above two cases dealt with offices undoubtedly held under a State Government, the definition is unquestionably applicable to an office held under the Federal Government where the Appropriate Authority accordingly becomes the Head of Federal Military Government (President) or Head of State or any person authorized by him or the Supreme Military Council (later Armed Forces Ruling Council) vide Section 4(2) (ii) of Decree No. 17 of 1984 (ibid). The Appropriate authority to retire the Appellant therefore is, in my opinion, the Federal Military Government personified in the Head of State who, before he could be said to have acted properly, must be doing so in respect of a public officer. For the retirement of the appellant to be said to be proper, his designation must fall within the definition of a public officer. In this regard, Section 4(1) of Decree No. 17 of 1984 stipulates: C D E

"In this Decree, "public officer" means any person who holds or has held any office on or after 31st December, 1983 in - (a) the public service of the Federation or of a State within the meaning assigned thereto by Section 277(1) of the Constitution of the Federal Republic of Nigeria, 1979." F

The Constitution of the Federal Republic of Nigeria (hereinafter referred to as the 1979 Constitution) defines public service in Section 277 as "The service of the Federation in any capacity in respect of the Government of the Federation." See also Section 18(1) (b) of the Interpretation Act, 1964 where the term "public officer" is defined to mean "a member of the public service of the Federation within the meaning of the Constitution of the Federal Republic of Nigeria or of the public service of a State." G H

From the foregoing, **the appellant having been shown to have held office as a Director in the Federal Ministry of Justice until he**

was retired on the 14th day of January, 1986 by the receipt of the letter written to him, to wit: Exhibit B by the 2nd respondent, comes within the definition of a public officer under Decree No. 17 in Section 1(1) as well as under the 1979 Constitution. See F. S. Uwaifo v.

B Attorney General of Bendel State (1982) 7 SC. 124. For purposes of clarity, Exhibit 'B' is couched in the following terms:

"Retirement in the Public Interest

I write to convey to you Government's decision to retire you from the service in the public interest with effect from the 14th January, 1986.

C 2. I also wish to take this opportunity to thank you for the service you rendered to the Federal Civil Service and to wish you prosperity in all your endeavours in your retirement.

D 3. It is usual on such an occasion to remind you to please hand over all Government property in your possession.

Yours faithfully,

(Sgd S. B. Agodo

Permanent Secretary."

E Be it noted that Exhibit 'B' above was written by the 2nd respondent to the appellant after 2nd respondent's Chairman had received a letter (Exhibit 'A") from the Secretary to the Federal Military Government. Exhibit 'A" which the appellant had argued strenuously does not constitute admissible evidence set out in full, sheweth:

"Cabinet Office

P. M. B. 12571

Lagos , 10 Th January 1986.

Secretary to the Federal Government

G Ref: No. S.F.M.G. 39/S.1/Vol. iv/257

Alhaji Bagudu Shettima,

Chairman,

Federal Civil Service Commission,

H *Federal Secretariat, Phase II,*

Ikoyi.

Retirement in the Public Interest

The President, Commander-in-Chief of the Armed Forces, Ma-

jor-General Ibrahim Babangida C.F.R., has directed that the following officers be retired from the service in the public interest with immediate effect:-

1. I. I. Iyeyemi, Accountant-General, Federal Ministry of Finance. B

2. C.C.E. Ugbodaga, Administrative Officer 1 Ministry of Industries.

3. B. A. Shitta-Bey, Director, Federal Ministry of Justice.

4. A. Ahmadu, Director of Prisons, Ministry of Internal Affairs. C

Sgd. (G.A.E. Longe C.F.R.)

Secretary to the Federal Military

Government."

It is crystal clear that appellant's retirement contained in item 3 of Exhibit 'A' above was a direct act of the President who himself was the Appropriate Authority empowered to retire under Decree No. 17 of 1984. True it is that it was the Secretary to the Federal Military Government that signed it and not the Head of the Federal Military Government himself. The reason for this cannot albeit be far-fetched since Section 6 (3) of the Constitution Suspension and Modification Decree, 1984 provides: D E

"The executive authority of the Federal Republic of Nigeria may be exercised by the Federal Military Government whether direct or through persons or authorities subordinate to him." F

Also Section 12 (1) of the same Decree (ibid) provides:-

"The Head of the Federal Military Government may, subject to such conditions as he may think fit delegate any function conferred on him by any law (including the Constitution of the Federal Republic of Nigeria 1979) to the Federal Executive Council or to any other authority in Nigeria, provided that this subsection shall not apply to the function of signed Decrees." G

As this court (per Nnaemeka-Agu, JSC) in Nwosu v. Imo State Environmental Sanitation Authority (1990) (supra) at page 719 in respect of a State Military Governor, stated:- H

"Howbeit Section 6(9) of the Constitution (Suspension and Modification) Decree No.1 of 1984 gave a constitutional stamp to the power

of a Military Governor to perform his executive functions either directly or through persons or authorities subordinate to him. It provides"

Earlier on in his judgment, the learned Justice at page 718 of the Report said:-

"Part of the argument on behalf of the appellant suggests that the letter of his dismissal from the service ought to have been signed by the Military Governor of the State himself. I think this line of argument has ignored a fundamental principle of law which is represented by the maxim: *qui facit per alium facit perse*. It was expressed in *Co. Little on 258 (a)* thus: *Qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself)." C

Be it noted that the above maxim has been applied in the execution of many official acts and directives, particularly by high functionaries of government. Thus, the learned author, Wade, in his book: *Administrative Law*, 3rd Edition, page 67 said: D

"Although therefore the courts are strict in requiring that statutory power shall be exercised by persons on whom it is conferred and by no one else, they make liberal allowance for the working of the official hierarchy at least so far as it operates within the sphere of responsibility of the Minister." E

It would be unrealistic to imagine that the Minister would enjoy this power of acting through officials in his Ministry but that a governor or (administrator) would not." (Parenthesis mine). It follows therefore, in my opinion, that it is even more unrealistic or absurd to imagine that the President and Commander-in-Chief of the Armed forces cannot enjoy the privilege of having his documents signed by his Secretary. For instance, the appellant in his brief made heavy weather about the need to have admissible evidence in order to resolve the so-called conflicting claims as to who directed the retirement of the appellant. As has been G H
amply demonstrated earlier on, there is no doubt that the President directed the retirement of the appellant from the contents of Exhibit A. As **Nnaemeka-Agu, JSC stated the law in Nwosu v. Imo State Environmental Authority (supra) at page 718:**

Evidence by affidavit is, it must be noted, a form of evidence. It is entitled to be given weight where there is no conflict, after the conflict has been resolved from appropriate oral or documentary evidence."

In which case, documents attached to an affidavit as in the instant case, constitute admissible evidence. In view of the above pronouncement, I am of the firm view that the appellant cannot be right in thinking that in spite of the unequivocal statements made in each of Exhibits 'A' and 'B' , particularly Exhibit A, there is still need to have admissible evidence.

The appellant further argued that his retirement did not fall within the provisions of Decree No.17 of 1984 since he did not fall within the category of officers specified in Section 1 (1) thereof who can be removed by the appropriate authority. A cursory look at the title of the Decree depicts it as stating 'Public Officers (Special Provisions Decree, 1984.' As the title suggests, it applies to all public officers, in which case, any public officer could be removed under the decree. The law, as it stands now therefore, admits of two ways of removing public officers - firstly through the normal Civil Service method or through Decree no. 17 of 1984.

As Nnaemeka-Agu JSC had occasion to explain in clearer and unambiguous language in Nwosu's case (supra) at page 725:

"..... dismissal and other disciplinary actions against civil and public officers are not a normal function of a Military Governor and Chief Executive of a State, but of such bodies as the Civil Service Commission and the heads of different parastatals. Decree No. 17 of 1984 conferred a special and unusual power on a Military Governor to dismiss public officers. It was promulgated on the 27th of June, 1984 and makes a special provision in section 1(2) (a) and (b) whereby persons dismissed, terminated or retired by or at the direction of the Military Governor between December, 31, 1983 and the date of the promulgation of the Decree would be deemed to have been duly dealt with under the Decree. In the circumstance, I believe it would be unreasonable to hold that persons similarly dealt with since the promulgation of the Decree, cannot be deemed

to have been dealt with under the Decree simply because no section of the Decree was quoted in the letter of dismissal. I do not so hold."

The appellant's contention that Decree No.17 of 1984 does not give anybody arbitrary powers to remove public officers overlooks the fact that the Decree invests in the Head of the Federal Military Government as appropriate authority with special powers to carry out this function. Although such powers have been said to be drastic and unpopular, in the words of Nnaemeka-Agu, JSC in Nwosu's case (supra), there is "no escape route." If it is remembered that Armed Forces Ruling Council, the maker of the legislation is not a parliament and never pretended to be so, no matter how one construes the Decree, effect must be given to its provisions. Indeed, Decree No.17 of 1984 spells out clearly what types of acts are covered by it. For instance, Section 1(1) of the Decree provides:

"the appropriate authority may at any time after 31st December, 1983-

(i) dismiss or remove the public officer summarily from his office: or

(ii) retire or require the public officer to compulsorily retire from the relevant public service."

In the case in hand, the act complained of by the appellant is his retirement by the appropriate authority which is well covered by sub-section (ii) of section 1 of Decree No. 17 (bid). The appellant has argued in his brief that any act of the appropriate authority outside 31st December, 1983 and 27th June, 1984 when Decree No. 17 of 1984 was promulgated, is not automatically accepted to have been done under the Decree. There must be admissible evidence, he contends, to prove that the appropriate authority acted under the Decree. **With due respect, the appellant's argument is based on a misinterpretation of Section 1(2) of the Decree whose purport is to give it retrospective effect.** While under our law there is a presumption against retrospectivity - See Adegbenro v. Akintola (1963) 1 All NLR 299 at 301-302; Adesina v. Lemonu & ors.(1965)1 All NLR 233 and The Swiss Air Transport Co. Ltd .v. The African Continental Bank Ltd.(1971)1

All NLR 37 at 45 and 46 where, as in the instant case, a retrospective operation to Decree No. 17 of 1984 was clearly intended and spelt out, that legislation will not be declared incompetent vide Attorney -General East Central State & Anor. v. Ugwuh (1975) 6 SC.13 and Ojokolobo .v. Alamu (1987)3 NWLR part 61) 377 at 404. B
Indeed, in the case in hand, the retrospectivity pronounced would appear clearly not to affect the pending proceedings before the law courts. See Uwaifo .v. A.G. Bendel State (supra) and Eyesan .v. Sanusi (1984) 4 SC. 115 at page 137. There is therefore no require- C
ment under this Decree that any act done by the appropriate authority outside 31st December, 1983 and 27th June, 1984 must be proved. Decree No.17 of 1984 is still a subsisting legislation; it was in existence at the time the appellant was retired in 1986, it is yet to be repealed and its existence must therefore be judicially noticed by all courts D
vide Section 74(1) (a) and (b) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. See also Adetipe v. Amodu (1969) NMLR 62 at page 67 and Olayiwola v. Ashiru (1967)1 All NLR 184 at 185.

In both Exhibits A and B, it is unambiguously stated that the E
appellant's retirement is in the public interest and this brings it under Section 1 (1) (d) of Decree No.17 (ibid) which provides:

"The general conduct of a public officer in relation to the performance of his duties has been such that his further or continued employment in the relevant service would not be in the public interest." F

The appropriate authority is not required by the Decree to state the reasons for his decision to retire a public officer under any of the sub-sections of the Decree. The reason for his action is personal G
and therefore subjective. Although admittedly, it is desirable to state the reason for the decision of the appropriate authority to act under the Decree, the Decree makes no such requirement imperative. As Nnaemeka-Agu, JSC in the Nwosu case(supra) puts it, what is necessary is that the appropriate authority "should be satisfied from materials placed before him that he should act." Nor by H
the demands of the Decree, is the appropriate authority required to set up a panel to examine the case. It is for this reason that the case

in hand is distinguishable from the cases of Wilson v. Attorney General of Bendel State (supra); Garba v. Federal Civil Service Commission (supra) and Anya v. Iyayi (1988)2 NWLR (Part 82) 359. In none of the above cases was the retirement in question that of the appropriate authority. **In the present case which is on all fours with Nwosu's case (supra), the retirement was the act of the appropriate authority and the provisions of Section 3(3) of Decree No. 17 of 1984 properly and effectively oust the jurisdiction of the trial court and I so hold.**

Issue 1 is accordingly resolved against the appellant.

ISSUE NO.2

The appellant's grouse in issue 2 is whether the court below was properly constituted while determining this matter. He first of all pointed out how it is the appointment of Babalakin, J.C.A. to the Supreme Court that vitiated the Record. This court promptly drew his attention to page 136 of the Record which for its brevity and shortness I set out hereunder as follows:-

"CA/L/137/89
BOLARINWA OYEGOKE BABALAKIN, J.C.A.
I agree.
(SGD)

B.O. BABALAKIN
JUSTICE, COURT OF APPEAL."

Concentrating his attack on Exhibit SC 1, the appellant submitted that from Exhibit SC. 1 only Justices Kalgo and Awogu sat and shown to have read the Court of Appeal's judgment on 10/5/91. Justice Babalakin having ceased as at the latter date to belong to the Court of Appeal, appellant contended that since Exhibit SC.1 stated that the judgment of the court below was read, he would urge this court to remit the case to that court for rehearing on the ground that there was nothing to show that any of the two other Justices (Kalgo and Awogu) read Justice Babalakin's judgment. He concluded his argument by submitting that since the judgment was not constitutionally determined, Justice Babalakin could not have legally been a member of that court.

The learned Senior State Counsel for the respondents in her re-

ply, submitted shortly that as Babalakin, J.C.A (as he then was) originally sat on the Panel that heard the case, his judgment could be pronounced by another Judge even though Babalakin, J.C.A. had been elevated to the Supreme Court as at the date the judgment was read on 10/5/91. We were referred to the purports of Sections 11 and 226 of the 1979 Constitution. She also cited in her brief the case of Ogbuanyinya & ors. v. Obi Okudo & ors. (1979) ANLR 105 as the Locus classicus on this issue after distinguishing it from the case in hand by demonstrating that the Ogbuanyinya case was heard by Nnaemeka Agu, J. (as he then was) sitting as a single Judge in the High Court, Onitsha before he was elevated to the Court of Appeal. She further contended that the case in hand was heard and determined by three competent Justices of the Court of Appeal. I think that her submission here is right and I agree with her. She also contended that Section 11 of the Court of Appeal act allows the views of a member of the Court of Appeal that is not present to be read by another member irrespective of the provisions of Section 226 of the 1979 Constitution which provide that:-

"226. For the purposes of exercising any jurisdiction conferred upon it by this Constitution or any other law, the Federal Court of Appeal shall be duly constituted if it consists of not less than 3 Justices of the Court of Appeal" (Underlining is mine for emphasis).

It is now firmly established by this court through a long line of judicial interpretation that a decision arrived at by the Court of Appeal or the Supreme Court in which a member who participated at the hearing and at conference and signified his views therein, could, on account of death, retirement, elevation, dismissal or other cause, have his judgment pronounced or read by another Justice as the case may be. See Section 258(2) of the 1979 Constitution. Thus, in the case of Adesokan v. Adegorolu (1997) 3 NWLR (part 493)261 where the appeal in a chieftaincy case failed and was accordingly dismissed, Ogwuegbu, J.C.A (as he then was) made the following pronouncement after Akpabio, J.C.A. who wrote the lead judgment had read it:

"Ogwuegbu and Awogu, JJ.C.A. concurred. Agoro, J.C.A. gave

his concurrence at conference on the appeal before he retires in December, 1990."

Considering the purport of Section 226 vis-a-vis Section 258 (2) of the 1979 Constitution (ibid) Iguh, JSC elaborated in the Adegorolu's Case (supra) as follows:-

"It is beyond dispute from the record of proceedings that Agoro, J.C.A. attended the conference on the appeal. It is also clear that he gave his consent to the dismissal of the said appeal before he retired in December, 1990. He had however retired from the Court of Appeal as at the 27th February, 1991 when judgment in the appeal was delivered by that court.

It cannot be doubted that if a Justice of the Court of Appeal, although he took full part in the hearing of an appeal, physically joins in the delivery of the judgment in the appeal in his Capacity as a Justice of the Court of Appeal after the date he ceased to be a member of that court, either by retirement, dismissal or elevation to a higher bench, he would be acting without jurisdiction. Such judgment would therefore be totally infective, null and void There is however, the provision of Section 258(2) of the Federal Republic of Nigeria 1979 which provides thus- "258 (2) Each Justice of the Supreme Court, Court of Appeal shall express and delivered his opinion in writing that he adopts the opinion of any other Justice who delivers a written Opinion, provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing."

A little further down in the judgment, the learned Justice expatiating said:

"It is clear that pursuant to Section 258(2) of the 1979 Constitution, once a panel of the Court of Appeal Justices who heard an appeal is competent and properly constituted, it is not necessary for all the Justices who heard the cause or matter to be present at the delivery of judgment. But the opinions of any Justices who were in the panel that heard the appeal, but are unable to take part in the delivery of the judgment, may be read or pronounced at the time of the delivery of the Judgment by any

other Justice, whether or not he was present at the hearing."

Pointing out that Section 258(2) of the Constitution has received judicial interpretation in the decision of this court in Anyoke and others v. Dr. Felix Adi and ors. (1985) 1 NWLR (part 2) 342 at 350, the learned Justice quoted with approval the views, of Irikefe, JSC (as he then was) B thus:

"for the purpose of this appeal, only Section 258(2) with the proviso thereto arises for interpretation. From the foregoing, it would appear that once the panel that heard the case on appeal was properly constituted, that is, competent, a judgment read within the following permutations would nevertheless be valid and unimpeachable:- C

(a) One Justice sitting alone to read his own signed judgment to which the others who sat with him had earlier signified their concurrence in writing. D

(b) All the Justices who sat in the case sitting together to read their own individual opinions one after the other.

(c) Justices, other than those who sat to hear the case sitting to read the judgments already signed and authenticated, produced by those who actually sat over the case." E

See also the case of Alhaji Aminu Ishola v. Societe Generale Bank (Nig) Ltd. (1997)2 NWLR (part 488) 405 where one of the issues for determination was whether the judgment of the Court of Appeal delivered by only two Justices of that court was not a nullity after the third Justice that took part when the appeal was argued and judgment reserved, was no more de facto, de jure a member of that court before the Court of Appeal purported to have delivered the judgment therein. It was held by Iguh, JSC writing the leading judgment of this court as follows:- F G

"Pursuant to Section 11 of the Court of Appeal Act, 1976 and Section 258(2) of the 1979 Constitution, once an appeal in any cause or matter has been fully heard before the Court of Appeal, and judgment is reserved, it is not necessary for all the three Justices who heard the appeal to be present together in court on the day of the delivery of the judgment. It is lawful if the written opinion of any one of them who is unavailable is read by any other Justice of that court. Ogbuanyinya v. H

Okudo (1979)3 LRN 318 distinguished.) (page 428 paragraphs E-F). "The learned Justice at pages 428 paragraphs F-G: 432-433, paragraphs C.C. further held:

"I need stress, therefore, that the fact that only two of the Justices who heard the appeal sat to deliver the judgment of court cannot be any matter of great moment as it is clearly unnecessary for all the three Justices who heard the appeal to be present together in court for the delivery of the judgment. Accordingly I am unable to accept learned counsel's submission that the judgment of the Court of Appeal in this case was void simply because only two Justices of the Court below who heard the appeal were present to deliver the judgment of court." "In the first place the proviso to Section 258 (2) of the 1979 Constitution provides that it shall not be necessary for all the Justices who HEARD an appeal to be present when judgment is to be delivered. Indeed, the second arm of that proviso provides that the opinion of an unavailable Justice who heard an appeal may be pronounced on judgment day by any other Justice whether or not he was present at the hearing. That Section of the Constitution by natural interpretation, intendment or by necessary implication appears clearly to limit the meaning of "hearing" therein stated up to the stage the parties have fully argued and concluded their respective cases and the appeal is thereafter adjourned for judgment. It seems to me quite clear from a close examination of Section 258 (2) of the 1979 Constitution that the "hearing" therein envisaged is that concluded when the parties have closed their respective addresses, arguments or cases and the appeal is adjourned for judgment. It seems to me quite clear from a close examination of Section 258(2) of the 1979 Constitution that the "hearing" therein envisaged is that concluded when the parties have closed their respective addressed, arguments or cases and the appeal is adjourned for judgment. I therefore entertain no doubt that Uthman Mohammed, J.C.A. as he then was, took full part in the hearing of the appeal in issue notwithstanding the fact that he was not present when judgment in the appeal was delivered and that the pronouncement of his opinion by Okunola, J.C.A. was, to all intents and purposes, valid, constitutional and in accordance with the law.

Reverting once more to the decision in *Onyeama Ezenwa v. Samuel Mazeli* (supra), I think it ought to be observed that the interpretation of the word "hearing" in that case was in relation to the issue of joinder of parties as plaintiffs under the provisions of Order IV Rule 5(1) of the then Supreme Court (Civil Procedure) Rules of Nigeria. Having regard B to the said Rules of Court under consideration, the West African Court of Appeal arrived at the decision, and quite rightly in my view, that the hearing of a case continued up to the delivery of the judgment and that a trial Judge may therefore properly reopen a case and order the joinder of parties at any stage of the proceedings before final judgment. The deci- C sion in that case needs not therefore be binding in the present case in so far as the meaning of the word "hearing" in the context of the two enactments are entirely different.

I think I should point out that the provisions of Section 258(2) D of the 1979 Constitution of Nigeria which I have set out earlier on in this judgment govern both this court and the court below alike. I need only observe that this court has times without number exercised its undoubted jurisdiction pursuant to the said Section 258(2) of the 1979 Constitution E of Nigeria. This, it has done, by the opinion of an unavailable Justice, retired, elevated or dead, being pronounced by any other Justice of the Court so long as such opinion was duly given at a time the retired, el- evated or dead Justice was still a member of the court. See *U.B.A. Ltd F and Anor. v. Mrs .N. Achoru* (1990)10 SCNJ.17; (1987)1 NWLR (part 48) 172; *Alhaji Juradat Animashaun v. Olojo* (1990)10 SCNJ 43; (1990)6 NWLR (Part 154)111; *Ademola Atoyebi v. Williams Odudu* (1990) 10 SCNJ. 52; (1990)6 NWLR (part 151) 384; *The Registered Trustees of Apostolic Church v. Mrs. Emmanuel Olowoleni* (1990)10 SCNJ 69; G (1990)6 NWLR (part 155)514; *Globe Fishing Industries Ltd. & ors. v. Chief Folarin Coker* (1990)11 SCNJ. 56; (1990)7 NWLR (part 162) 265; *Chief Asuguo Oko and ors. v. Chief James Ntukidem and ors.* (1993)2 SCNJ 33; (1993)2 NWLR (part 274)124; *Dr. Kwazeme Ofundu v. S.E. H Niweigha* (1993)2 NWLR (part 275)235; *Gregory Obi Ude v. Clement Nwara and Anor.* (1993)2 SCNJ. 47; (1993)2 NWLR (part 278) 638; *Jinadu Ajao and ors. v. Bello Adigun* (1993)3 SCNJ.1; (1993)3 NWLR

(part 282) 389; *C.C.B. (Nig.) Ltd. v. Emeka Ogwuru* (1993)2 SCNJ. 53 at 64; (1993)3 NWLR (part 284) 630; *Ibrahim Kano v. Gbadamosi Oyelakin* (1993)3 SCNJ. 65 at 89; (1993)3 NWLR (part 282) 399; *The State v. Nnolim and Anor .* (1994)6 SCNJ (part 1) 48 at 66; (1994) 5 B NWLR (part 345)394; *Eboigbe v. N.N.P.C.* (1994) 6 SCNJ . 71 at 81; (1994)5 NWLR (part 347)649; *Alhaji Aliyu v. Dr. J.A. Sodipo* (1994)5 SCNJ. 1 at 23; (1994)5 NWLR (part 342)1; *Himman Merchants Ltd. v. Alhaji Inuwa Aliyu* (1994)6 SCNJ (part 1) 87 at 101; (1994)5 NWLR C (part 347)667.

"The procedure adopted by this court in the above cases was substantially applied by the court below in the determination of this appeal. In my view, there can be no reason whatever to fault this time-tested procedure which, speaking for myself, is unimpeachable, promotes speedy D administration of Justice, is in accordance with the law and the Constitution of the land and is incapable of occasioning any miscarriage of justice or undue delay in the determination of causes before this court or the Court of Appeal."

E The underlining above is mine for emphasis and it under-scores the validity of the judgment of B.O. BABALAKIN, J.C.A. as he then was at page 136 therefor and when read in conjunction with what Kalgo, J.C.A. said in Exhibit SC.1, the opinion of an unavailable Justice who had been elevated to the Supreme Court was being pronounced and that when the elevation came he (BABALAKIN, J.C.A. as he then was wrote) Exhibit F SC. 1 when he was a member of the court by reason of the presumption of regularity

G I wish to touch on the point as to what in law is referred to as the presumption of regularity. **Apart from what is called presumption of regularity of official acts, there is the presumption that, where there is no evidence to the contrary, things are presumed to have been rightly and properly done. This is expressed in the common H law maxim in the latin phrase- Omnia Praesumuntur rite esse acta. This presumption is very commonly resorted to and applied especially with respect to official acts. See Ogbuanyinya v. Okudo (No. 2) 4 NWLR (part 146) 551 at 570 paragraphs D-E. See also section**

114 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, 1990. The learned authors of Phipson on Evidence, Eleventh Edition have this to say on the subject:

"The presumption which is nearly akin to that of Innocence is chiefly applied to judicial and official acts, and though sometimes conclusive is in general only reputable. Thus, the constant performance of divine service from an early period in a Chapel raises a rebuttable presumption of its due consecration. Common instances occur also with respect to the validity of a person's appointment to a public office, from his acting therein; and as to the due execution of deeds and wills. User of a way by the public as of right for twenty years gives rise to a presumption of dedication. See also Eaglehill v. J. Needham (Builders) Ltd. (1972) 3 All E.R. 895 (H.L.) especially at page 905. It should be noted that Lord Cross expressly disavowed the application of the presumption of regularity and relied instead on the principle of construction ut res magis valeat quam pereat. It is, with respect, hard to see why the latter should be applicable, or indeed the former inapplicable on the facts of the case. (Lord Dilhorne who reached the same result as Lord Cross -with whom the rest of the House agreed - preferred to rely on neither latin tag). However, whatever the true description of the presumption involved, it seems clear that it cast a persuasive and not merely an evidential burden." **But it seems that the court is bound to draw the inference where, as in the instant case, there is no evidence to the contrary.** See Ogbuanyinya v. Okudo (No.2) (supra). I therefore infer from Exhibit SC. 1 dated 10th May, 1991- the main body of which states:

"Parties absent but served. No appearance. Judgment delivered by Kalgo , J.C.A. Appeal allowed, and claim before the lower court struck out for want of jurisdiction. N500.00 costs in favour of the appellants in this court and N300.00 costs in respect of the trial at the lower court."

as regular until the contrary is shown.

In the latest decision of this Court in J.E.A. Shuaibu v. Nigerian Arab Bank Ltd. (1998)5 NWLR (part 551) 582 where one of the issues posed for decision was as to whether the Court of Appeal was properly

constituted when judgment was delivered on 10th April, 1991, my learned brother Ogundare, JSC opined inter alia at page 605 thus:

"....What it means is that even if Mukhtar, J.C.A., had dissented, her dissent would have no effect on the judgment that the appeal was allowed. Therefore, in my respectful view, and having regard to the circumstances, the participation of Adio, J.C.A. in the judgment of the court below regrettable as it is, did not vitiate the proceedings of the court below. The position would have been otherwise had Okezie, J.C.A. or Ndoma-Egba, J.C.A. had dissented and Adio, J.C.A., had joined either of them to form a majority."

I too made my humble contribution to the above views in the following words:

"Thus, although the plea of nullity of a judgment as raised in the case in hand, will be entertained at any stage of the proceedings of an appeal. (See Hakido Kpema v. The State (1986) 1 NWLR (Part 17) 396 and Okoro v. I. G. of Police 14 WACA 370), the majority opinions of Ndoma-Egba and Okezie, JJ.C.A. (As he then was), that majority decision prevails. The Constitution of the court below cannot therefore, in my opinion, be successfully impeached or be declared a nullity."

It is in the light of the above that I agree with the learned Senior State Counsel's argument that where, as in this case, we had three competent Justices hearing and determining an appeal, it is of no moment that two only (Kalgo and Awogu, JJ.C.A.) were present at the delivery of the judgment or that the absence of the third unavailable Justice whose opinion was pronounced and forms part of the judgment of the court vitiates the proceedings, his elevation to the Supreme Court notwithstanding.

Again, it must be remembered that the judgment appealed against was a unanimous one as pointed out by this court in Shuaibu v. Nigerian Arab Bank Ltd. (supra) and that the provisions of section 11 of the Court of Appeal Act (ibid) and Section 258 (2) of the 1979 Constitution were in no way breached. Even if kalgo and Awogu, JJ.C.A. Had agreed and Babalakin, J.C.A. dissented (which

is not the case here) the respondents would still have succeeded.

It is for the above reasons that I also resolve issue
2 against the appellant.

The appeal herein lacks substance and it fails. I affirm the decision of the court below and award N10,000.00 as costs in favour of the respondents.

KUTIGI JSC

The Plaintiff was an employee of the Federal Civil Service Commission of Nigeria. He was first appointed as a crown Counsel in 1961. He earned series of promotions culminating in his appointment as Director in 1979 and as Acting Director of Public Prosecutions of the Federation in November, 1985. By letter dated 14th January, 1986, signed by the Permanent Secretary of the 2nd Defendant, the plaintiff was informed of the Government's intention to retire him in the public interest with immediate effect. The letter was Exhibit B in the proceedings. It reads:-

"Retirement in Public Interest

1. I write to convey to you Government's decision to retire you from the service in the public interest with effect from 14th January, 1986.

2. I also wish to take this opportunity to thank you for the service you rendered to the Federal Civil service and to wish you prosperity in all your endeavours in your retirement.

3. It is usual on such an occasion to remind you to please hand-over all Government property in your possession.

*Yours faithfully,
(Sgd.) S.B. Agodo,
Permanent Secretary."*

After receiving Exhibit B above, the plaintiff petitioned the 2nd defendant to which he received the following reply:-

"I am directed to acknowledge the receipt of your letter No. BA/FCSC/86/I dated 16th January, 1986, addressed to the Chairman of this Commission and to request you to address your petition to the Chief of

Staff, General Staff Headquarters, Lagos, because your retirement was at the instance of the Federal Military Government.

Yours Faithfully,

(Sgd.) M.N. Nwokoye,

for Permanent Secretary."

B

By yet another petition to the 2nd defendant, the plaintiff got a final reply thus:-

"With reference to your letter on the subject, No. BA/FCSC/86/3 if 10th April, 1987, I am directed to inform you that the decision to retire you never originated from this Commission, and to add that since only the General Staff Headquarters is responsible for, and only can review same no further partitions from you on the subject will be entertained.

C

Yours faithfully,

for Permanent Secretary."

D

(Sgd.)

A.I.Ukaomah,

Thereafter the plaintiff wrote several letters to the 2nd defendant concerning his retirement to which he received no response. He then decided to go to court. And on 29th February, 1988, the plaintiff in the Lagos high Court issued a writ of summons accompanied by a Statement of Claim against the 1st and 2nd defendants claiming:-

E

"A declaration that the decision to retire the plaintiff from the Federal Civil Service of Nigeria and his purported retirement as contained in letter Ref. No. FC.0017/V0. VIII / 969 of 14th January, 1986, is irregular, illegal, null and void.

F

PARTICULARS

G

As per Statement of Claim attached."

The defendants filed a joint Statement of Defence wherein they raised a preliminary objection on points of law and contended that the High Court lacked jurisdiction to hear the suit. The learned trial judge took arguments of counsel and in a considered ruling dismissed the objection, holding that he had jurisdiction to entertain the claim. The defendants appealed to the Court of Appeal holden in Lagos. In a reserved judgment the Court of Appeal unanimously allowed the defendants' ap-

H

peal. It held that the jurisdiction of the trial High court has been ousted and consequently it struck out the case before the High Court. It is against the judgment of the Court of Appeal that the plaintiff has now appealed to this Court.

The parties filed and exchanged their briefs of argument as provided by the Rules of Court. They were adopted at the hearing of the appeal. The plaintiff who filed nine Grounds of Appeal formulated to issues for determination in his brief contrary to the Rules of this Court. He chose to argue the grounds one after another. Under normal circumstances I would not have hesitated to strike out the brief as incompetent. I leave it at that.

After studying the Grounds of Appeal and the briefs, I agree with the defendants that only two arise for determination in this appeal. They are:-

1. Whether the Court of Appeal was right in holding that the jurisdiction of the trial High Court to entertain this matter was properly ousted by the provisions of section 3(3) of the Public Officers (Special Provisions) Decree No.17 of 1984.

2. Whether the judgment delivered by the Court of Appeal on Friday, the 10th day of May, 1991 is a nullity.

Issue (1)

Simply put, I think the jurisdiction of the High Court can be said to have been ousted if the plaintiff had been shown to be a public officer and was retired by the "Appropriate Authority" within the provisions of Public Officers (Special Provisions) Decree No. 17 of 1984 (now cap. 381 Laws of the Federation Nigeria, 1990).

Prior to his retirement, the plaintiff was a substantive Director and Acting Director of Public Prosecutions in the Federal Ministry of Justice. He was therefore a public officer within the definition under section 4(1) Decree No. 17 of 1984 which provides as follows:-

"4(1) In this Decree, "public officer" means any person who holds or has held any office on or after 31st December, 1983 in- (a) the public service of the Federation or of a State within the meaning assigned thereto by section 277(1) of the Constitution of the Federal Re-

public of Nigeria.

(b)

(c)

B The Constitution of the Federal Republic of Nigeria 1979 defines "public service of the Federation" to mean the service of the Federation in any capacity in respect of the Government of the Federation amongst others.

C The next question is-was the plaintiff retired by the Appropriate Authority under and in compliance with Decree 17 of 1984? The term "Appropriate Authority" is defined in section 4(2) of the Decree thus:-

"4(2) In the operation of this Decree, the appropriate authority:-

(a)

D (b) *in any other case, shall be the president or any person authorized by him or the Armed Forces Ruling Council."*

E The letter dated 14th January, 1986, (Exhibit B.) as well as subsequent letters above written to the plaintiff made it clear that the Federal Civil Service Commission was merely conveying to the plaintiff the decision of the Government to retire him. Exhibit B. above was actually written to the plaintiff after the Chairman of the 2nd defendant had received from the Secretary to the Federal Military Government, a document dated 10th January, 1986, (Exhibit A) which reads:-

F *"Retirement in the Public Interest*

G *The President, Commander-in Chief- of the Armed Forces, Major-General Ibrahim Babangida, CFR., has directed that the following officers be retired from the service in the public interest with immediate effect:-*

1.

2.

3. *B.A. Shitta-Bey, Director, Federal Ministry of Justice.*

H 4.

*(Sgd.) G.A.E. Longe, CFR.,
Secretary to the Federal
Military Government."*

The President and Commander-in -Chief of the Armed Forces of Nigeria is undoubtedly an appropriate authority for the purposes under Section 4(2) (b) while the use of the words "in the public interest" signified compliance with section 1(1) (d) of the said Decree.

From the forgoing it is clear that the plaintiff was a public officer and his retirement was an act of the Appropriate Authority empowered by Decree 17 of 1984 to do so.

Now, section 3(3) of the Decree provides:-

"(3) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this Decree and if any such proceedings have been or are instituted before, on or after the making of this Decree, the proceedings shall abate, the discharged and made void."

Having regard to the facts and circumstances of the case as analyzed above, I have no hesitation in agreeing with the Court of Appeal that the provision of section 3(3) above which are clear and unambiguous ousted the jurisdiction of the trial High Court completely. And the order striking out the case before the High Court was properly made. See for example WILSON V. A.G. BENDEL STATE (1985)1 NWLR (part 4) 572; GARBA V. FEDERAL CIVIL SERVICE COMMISSION (1988) 1 NWLR. (part 71) 449; NWOSU V. IMO STATE ENVIRONMENTAL SANITATION AUTHORITY (1990)2 NWLR (part 135) 688.

Issue (1) is therefore answered in the affirmative.

Issue (2)

This is about the elevation of retired Hon. Justice Babalakin from the Court of Appeal to the Supreme Court. When the appeal was heard in Lagos on 11/2/91, he presided as a member of that court. But before judgment was delivered on 10/5/91, he had been elevated to this Court. He could not therefore have been present in the Court of Appeal to read his judgment. I think situations like this are covered by the provisions of section 258(2) of the 1979 Constitution (as amended) thus:-

"(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written

opinion:

PROVIDED that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.

PROVIDED FURTHER that the Supreme court or the Court of Appeal shall be duly constituted for the purpose of delivering its decision if at least one member of that Court sits for the purpose."

There was therefore nothing illegal or wrong for Exhibit SC.1 to have shown that only two members of the panel which heard the appeal (Awogu and Kalgo, JJ.C.A.), were available when the judgment was finally read. Normally after Kalgo, JCA. had read his lead judgment, Awogu, JCA. Would then read his own judgment and as a Presiding Justice he would then say or announce that Babalakin, JSC. also agreed with them before his elevation to the Supreme Court. Nothing more. Exhibit SC. 1 reads:-

IN THE COURT OF APPEAL LAGOS JUDICIAL DIVISION HOLDEN AT LAGOS ON FRIDAY THE 10TH DAY OF MAY, 1991 BEFORE THEIR LORDSHIPS.

HON. JUSTICE F.O. AWOGU JUSTICE, COURT OF APPEAL

HON. JUSTICE U.A. KALGO JUSTICE, COURT OF APPEAL

CA/L/1377/89

Attorney General of the Federation &Anor.

AND

B.A. Shitta-Bey

Parties absent but served. No appearances.

Judgment delivered by Kalgo, J.C.A.

Appeal allowed, and claim before the lower court struck out for want of jurisdiction. N500.00 costs favour of the appellant in this court and N300.00 costs in respect of the trial at the lower court.

(SGD)

F.O.AWOGU,

JUSTICE, COURT OF APPEAL"

Equally too, I cannot see anything wrong with the "judgment" of Babalakin,

JCA. which is shown on page 136 of the record as follows:

"CA/L/137/89

Bolarinwa Oyegoke Babalakin, J.C.A.

I agree.

(Sgd.)

B

B.O. Babalakin,

Justice, Court of Appeal."

There is no dispute about the fact that Babalakin, JSC., was no longer a member of the Court of Appeal on 10/5/91 when the judgment was read. He could not therefore have written his own judgment on that day. He wrote and signed the "judgment" as Justice, Court of Appeal. This could only mean that he wrote it when he was still a member of that Court and before his elevation to the Supreme Court. There is no evidence or suggestion that the "judgment" that is page 136 above, was written after his elevation to the Supreme Court. In my view the "judgment" only goes to show or prove now that the retired learned Justice actually agreed with the lead judgment of Kalgo. J.C.A which he must have read before his elevation and nothing else. And I have no doubt as I said above, that the Presiding Justice Awogu, J.C.A. would have said so in open court on that day. That is normal and proper. (See ISHOLA V. S.G.B. LTD. (1997) 2 NWLR (part 488) 405; ADESOKAN V. ADEGOROLU & ORS. (1997) 3 NWLR (part 493) 261; DURU V. THE STATE (1993) 3 NWLR (part 281) 283. The judgment of the Court of Appeal delivered on 10/5/91 was therefore not a nullity. Issue (2) therefore fails.

It is for the above reasons and others contained in the lead judgment of my learned brother, Onu, JSC., that I also dismiss the appeal. The decision of the Court of Appeal is affirmed. Costs of N10.000.00 (Ten Thousand Naira) are awarded to the respondents.

H

OGWUEGBU JSC

I entirely agree with the judgment just delivered by my learned brother Onu, JSC. That the appeal fails and should be dismissed.

The facts of the case and the questions to be determined in this appeal have been fully stated by my learned brother, Onu, J.S.C. in the lead judgment and I need not repeat them.

The appellant purported to formulate nine issues which in his opinion call for determination in this appeal. The sum total of his complaints as I conceive them is whether the Court of Appeal was right in holding that the jurisdiction of the trial court to entertain the matter was properly ousted by the provisions of section 3(3) of Decree No.17 of 1984 now Public Official (Special Provisions) Act Cap. 381 Laws of the Federation of Nigeria, 1990. Section 3(3) of the Public Officers (Special Provisions) Act which will hereinafter be referred to as the Act provides as follows:

"(3) No civil proceedings shall lie or be instituted in any court for or on account of or in respect of any act, matter or thing done or purported to be done by any person under this Act and if any such proceedings have been or are instituted before, on or after the making of this Act, the proceedings shall abate, be discharged and made void."

The appellant held a substantive post of Director in the Federal Ministry of Justice and was an Acting Director of Public prosecutions until 14th January 1986 when he was retired by a letter Exhibit "B" signed by the Permanent Secretary of the 2nd defendant. The said Exhibit "B" reads:

"I write to convey to you Government's decision to retire you from the service in the public interest with effect from the 14th January, 1986.

2. I also wish to take this opportunity to thank you for the service you rendered to the Federal Civil Service and to wish you prosperity in your retirement.

3. It is usual on such occasion to remind you to please hand over all Government property in your possession.

*Yours faithfully,
(Sgd.) S.B. Agodo
Permanent Secretary."*

The 2nd defendant wrote exhibit "B" on receipt of Exhibit "A"

from the Secretary to the Federal Military Government. Exhibit "A" reads:

"Cabinet Office,
P.M.B. 12571,
Lagos.

10th January, 1986.

B

Ref: No. S.F.M.G.39/S.1/Vol. iv/257

Alhaji Bagudu Shettima,
Chairman,
Federal Civil Service Commission,
Federal Secretariat, Phase 11,
Ikoyi.

C

Retirement in the Public Interest

The President, Commander-in-Chief of the Armed Forces, Major-General Ibrahim Babangida C.F.R., has directed that the following officers be retired from the service in the public interest with immediate effect:-

1.
2.
3. B.A. Shitta-Bey, Director, Federal Ministry of Justice,
4.

E

Sgd. (G.A.E. Longe C.F.R.)
Secretary to the Federal
Military Government."

F

The learned trial judge held that his jurisdiction to hear and determine the case was not ousted by the Act. The court below held otherwise hence the further appeal by the plaintiff to this court. The plaintiff identified nine issues for determination in his brief of argument and proceeded to argue the grounds of appeal one after the other. A lot has been said about this wrong procedure by this court and the court below. This is another reminder.

G

The appellant's complaints may be summarized as follows:

(1) *For section 3(3) of the Act to oust the jurisdiction of the court of the*

H

land, the act complained of must have been done under the Act and the appropriate authority is obliged to be satisfied on at least one of the grounds stated in section 1(1) of the Act before such authority can be said to have validly acted or purported to act under the Act. He cited
B and relied on the case of Garba v. Federal Civil Service Commission & Ors. (1988)2 S.C.N.J. 20 at 284-285.

(2) That an action taken by the appropriate authority outside the periods 31st December, 1983 and 27th June, 1984, is not automatically accepted to have been done under the Act in that section 1(2) thereof provides that
C it is only an act of dismissal, removal from office or compulsory retirement of any public office by the appropriate authority between 31st December, 1983 and 27th June, 1984 which shall be deemed to have been done pursuant to the Act. He referred the court to the case of Osita
D Nwosu v. Imo State Environmental Sanitation Authority (1990)2 N.W.L.R. (pt.135) 688.

(3) That in his case the appropriate authority is the Head of the Federal Military Government, the Armed Forces Ruling Council or any person
E authorized by the Head of the Federal Military Government for the ouster of jurisdiction to come into effect.

(4) That it is not enough to show that the act complained of was done by the appropriate authority, it is also necessary to prove that the act com-
F plained of was done under the Act.

(5) That the evidence before the court is that the plaintiff was a good and efficient public officer with no suggestion or evidence that his general conduct as a public officer had been such that his further or continued employment in the Federal Civil Service would not be in the public inter-
G est.

(6) That Exhibit "B" speaks of the Federal Military Government and that the court has jurisdiction to look into the apparent conflict and resolve it. He cited the case of Katto v. Central Bank of Nigeria (1991)9
H N.W.L.R. (pt.214)126."

From the issues summarized above, the plaintiff who is the appellant before us does not dispute the fact that he was a public officer as defined in section 4(1) (a) of the Act. There is no doubt in my mind that sections

4(1) (a) of the Act, section 277(1) of the Constitution of the Federal Republic of Nigeria, 1979 and section 18(1) of the Interpretation Act Cap.192 Laws of the Federation of Nigeria, 1990 are applicable to the plaintiff. One of his complaints is that his retirement was not in compliance with section 4(2) (b) of the Act and that Exhibit "B" did not emanate from the appropriate authority. He argued that Exhibit "B" did not issue from the President or any person authorized by him or the Armed Forces Ruling Council and that the Federal Civil Service Commission which issued Exhibit "B" is not the appropriate authority.

Exhibit "A" and "B" should be read together and not in isolation. In Exhibit "A", dated 10th January, 1986, the Secretary to the Federal Military Government conveyed to the Chairman of the Federal Civil Service Commission (second defendant), the directive of the President, Commander-in-Chief of the Armed Forces, Major-General Babangida that the plaintiff and three other public officers named in the exhibit be retired from the service in the public interest with immediate effect. On the receipt of Exhibit A, the 2nd defendant conveyed the above decision to the plaintiff by Exhibit "B" which is dated 14th January, 1986. Exhibit "B" shows on the face of it that the retirement of the plaintiff was authorized by the appropriate authority i.e. the President, Commander-in-Chief of the Armed Forces. Exhibit "A" which was admitted in evidence preceded the issuance of Exhibit "B" and the latter derived its authority from the former. There was therefore compliance with sections 1(1) (d) and 4(2) (b) of the Act in so far as the issuance of the letter retiring the plaintiff from the public service was concerned.

Section 1(1) (d) of the Act provides as follows:

"1. (i) Notwithstanding anything to the contrary in any law, the appropriate authority if satisfied that -

(a)

(b)

(c)

(d) the general conduct of a public officer in relation to the performance of his duties has been such that his further or continued employment in the relevant service would not be in the public interest, the

appropriate authority may at any time after 31st December 1983 -

(i)

(ii) retire or require the public officer to compulsorily retire from the relevant public service."

B The plaintiff was retired under section 1(1) (d) above. "Public Officer" and the a' appropriate authority" in so far as they relate to the plaintiff have the meaning attached to them in sub-sections (1) (a) and (2) (b) of section 4 of the Act and they provide as follows:-

C "4(1) In this Act, "Public Officer" means any person who holds or has held any office on or after 31st December 1983 in

(a) the public service of the Federation or of a State within the meaning assigned thereto by section 277(1) of the Constitution of the Federal Republic of Nigeria;

D (b)

(c)

(2) In the operation of this Act, the appropriate authority.....

(a) and

E *(b) in any other case, shall be the President or any person authorized by him or the Armed Forces Ruling Council."*

One may say that Exhibit "A" was signed by the Secretary to the Federal Military Government and not by the President, Commander -in-Chief of the Armed Forces himself. The answer can be found in section 6(3) of the Constitution (Suspension And Modification) Decree, 1984 which provides:

G *"The executive authority of the Federal Republic of Nigeria may be exercised by the Head of the Federal Military Government whether directly or through persons or authorities subordinate to him."*

See also section 6(3) of Constitution (Suspension and Modification) Decree 1993 otherwise known as Decree No. 107 of 1993.

H I have no doubt that the contents of Exhibits "A" and "B" are unequivocal and the need for oral evidence to resolve any imaginary conflict between the two exhibits did not arise. The combined effect of Exhibits "A" and "B" is that the President, Commander-in-Chief of the Armed Forces directed the compulsory retirement of the plaintiff and he

was retired accordingly.

Having come to the conclusions that the plaintiff was a public officer within section 4(1) of the Act and that he was compulsorily retired by the appropriate authority, section 3(3) of the Act deprived him of any right to sue. He has no cause of action and the court has no jurisdiction to entertain the claim. It would have been different if the President, Commander -in- Chief of the Armed Forces had not authorized his retirement by Exhibit "A". See Wilson v. Attorney-General, Bendel State (1985)1 N.W.L.R. (pt.4) 572, Garba v. Federal Civil Service Commission & Or. (1988)1 N.W.L.R. (pt.71) 449 and Nwosu v. Imo State Environmental Sanitation Authority & Ors. (1990)2 N.W.L.R. (Pt. 135). The facts of the present case are distinguishable from those of Wilson v. Attorney-General, Bendel State (supra) and Garba v. Federal Civil Service Commission & Or. (supra) in that in both cases, the retirements of the plaintiffs were not by the appropriate authority hence the jurisdiction of the court was ousted in each case.

The plaintiff also misconstrued section 1(2) of the Act which reads:

"For the avoidance of doubt, it is hereby declared that any act or thing done at any time between 31st December, 1983 and the making of this Act by the appropriate authority in respect of -

(a) the dismissal, removal from office or compulsory retirement of any public officer; or

(b) shall be deemed to have been done pursuant to this Act."

His contention is that an act done by the appropriate authority outside the periods 31st December, 1983 and 27th June, 1984 is not accepted to have been done under the Act. The Act was promulgated on 27th June, 1984 and section 1(2) is a special provision whereby persons dismissed, removed or retired by or at the direction of the President or the Military Governor as the case may be between 31st December, 1983 and the 27th of June, 1984 would be deemed to have been duly dealt with under the Act. It is therefore a misconstruction of section 1(2) for the plaintiff to contend that persons dismissed or retired after 27th June, 1984 cannot

be deemed to have been dealt with under the Act. The Act did not cease to be law after the 27th June, 1984.

Once the court is satisfied that the retirement of a public officer such as the plaintiff is in compliance with section 1(1) of the Act, its jurisdiction is automatically ousted by virtue of section 3(3) which provides that "no civil proceedings shall lie or be instituted in any court on account of or in respect of any act, matter or thing done or purported to be done by any person under this Act and if any such proceedings have been or are being instituted before or after the coming into force of this Act, the proceedings shall abate, be discharged and made void." There is no requirement for the appropriate authority to give any reason for its action once it is satisfied under any of paragraphs (a), (b) (c) or (d) of section 1(1) of the Act. This is so in view of the fact that sub-sections 1(1) and (2) of section 3 exclude the operation of any enactment, law or instrument including the Constitution of the Federal Republic of Nigeria relating to appointments, benefits, dismissal and disciplinary control of a public officer. Chapter IV of the Constitution is also suspended for the purposes of this Act.

It is for the above reasons and the fuller reasons given in the lead judgment of my learned brother Onu, J.S.C. That I too dismiss the appeal with N10,000.00 costs in favour of the defendants

F _____

MOHAMMED JSC

I agree that this appeal has no merit and ought to be dismissed. I have had the advantage to read the opinion of my learned brother, Onu, JSC, in the judgment just read and I agree that the lower court's decision is not a nullity. The proceedings in the Court of Appeal, Lagos Division, on the 10th of May, 1991, wherein the lower court delivered its judgment in which it allowed the appeal filed before it by the Federal Civil Service Commission, was in order.

Under Section 258 (2) of 1979 Constitution the judgment of a justice of the Supreme Court or the Court of Appeal could be pronounced or read by any other justice whether or not the justice who wrote the

judgment was present at the hearing. In this case two justices, Awogu and Kalgo JJCA were present in court when the decision of the Court was pronounced. There is nothing to show that the decision of the court was not agreed upon by all the three learned justices before Babalakin, JSC, was elevated to the Supreme Court. The situation here is the same B as when a justice dies after he had agreed at the conference of justices who sat on an appeal to dismiss or allow the appeal. The deceased opinion could be pronounced on the day the judgment is delivered in open court by any other justice.

Accordingly, this appeal fails and it is dismissed. The judgment of the Court of Appeal is hereby affirmed. I abide by the order made in the lead judgment on costs.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Onu, J.S.C. and I agree entirely with his reasoning and conclusion therein and about them as mine.

The law is firmly established that an appeal in any cause or matter has been fully before the Court of Appeal or, indeed, the Supreme Court and judgment is reserved for delivery on a future date, it shall not be necessary for all the Justices before whom the appeal was heard to be present in court at the delivery of the judgment. The written opinion of any Justice who was in the panel that heard the appeal, but who for one reason or the other is unable to take part in the delivery of the judgment, may be read or, in the alternative, pronounced, as the case may be, at the time of the delivery thereof by any other Justice, whether or not he was present at the hearing. See Section 11 of the Court of Appeal Act, 1976 and section 258(2) of the Constitution of the Federal Republic of Nigeria, 1979. See too Alhaji Aminu Ishola v. Societe Generale Bank (Nig) Ltd (1997)2 N.W.L.R (part 488) 405 and Lawani Adesokan and others v. Prince Micheal Adegorolu and others (1997) 3 N.W.L.R. (part 493) 261.

It is perhaps necessary for ease of reference to reproduce hereunder the provisions of Sections 11 of the Court of Appeal Act, 1976 and

258(2) of the Constitution of the Federal Republic of Nigeria, 1979. Section 11 of the Court of Appeal Act, 1976 states as follows-

"When after an appeal in any cause or matter has been fully heard before the Court of Appeal, judgment is reserved for delivery on another day, then, on the day appointed for delivery of the judgment, it shall not be necessary for all those Justices before whom the appeal in the cause or matter was heard to be present together in Court, and it shall be lawful for the opinion of any of them to be reduced into writing and to be read by any other Justice, and in any such case, the judgment of the Court of Appeal shall have the same force and effect as if the Justice whose opinion is so read had been present in Court of Appeal and had declared his opinion in person."

There is next the provisions of Section 258(2) of the Constitution of the Federal Republic of Nigeria 1979 which goes thus-

"Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, and may state in writing that he adopts the opinion of any other Justice who delivers a written opinion."

Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered, and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing."

I think it ought to be stressed, however, that the provision as to the reading of the opinion of any Justice who was on a panel that heard an appeal but is unable to take part in the delivery of the judgment pursuant to Section 11 of the Court of Appeal Act, 1976 seems to cover only cases where the unavailable Justice who sat on the appeal is still a serving member of the Court of Appeal. This is unlike the provisions of Section 258(2) of the Constitution of the Federal Republic of Nigeria 1979, particularly the proviso thereof, which clearly deal with cases where the unavailable Justice who heard an appeal, whether in the Supreme Court or the Court of Appeal, but is unable to take part in the delivery of the judgment is a serving Justice of the court in issue or has ceased to be a member or a serving Justice of either of those courts. In other words,

Section 258(2) of the 1979 Constitution seems to cover both serving Justices, of the one part and retired, dismissed, elevated or deceased Justices of those courts, of the other part. The latter category of Justices by virtue of their retirement, dismissal, elevation or death before the date of judgment obviously ceased to be members of either court as at the date of the delivery of such judgment in issue. B

Where a Justice of either the Court of Appeal or, indeed, of the Supreme Court took full part in the hearing of an appeal but ceases to be a Justice of the court, either by retirement, dismissal, elevation to a higher bench or death, as the case may be, as at the date of delivery of the judgment, his written judgment or opinion may not be delivered or read on his behalf by any other Justice on the date of the delivery of such judgment. This is because, any written judgment or opinion purportedly delivered or read on behalf of such retired, dismissed, elevated or deceased Justice as his judgment after he has ceased to be a Justice of the relevant court would be without jurisdiction and would consequently be null and void. See Ogbuanyinya v. Okudo (1979) 6-9 S.C. 32 Nyarko v. Akowuah 14 W.A.C.A. 427 etc. It therefore seems to me that the written judgment or opinion of a Justice of this court or of the Court of Appeal may not be read as his judgment after he has died, retired, been dismissed or ceased to be a member of that court. The written judgment or opinion of such a deceased, retired, dismissed or elevated Justice may, however, be pronounced by any other Justice, pursuant to the provision of Section 258(2) of the 1979 Constitution, whether or not such other Justice was present at the hearing so long as such judgment or opinion was duly given usually at conference, at a time the unavailable Justice was still a Justice of the relevant court. See Eboigbe v. N.N.P.C. (1994) 6 S.C.N.J. 71 at 81 or (1994) 5 N.W.L.R. (part 347) 649, Alhaji Aliyu v. Dr. J.A. Sodipo (1994) 5 S.C.N.J. at 23 or (1994 5 N.W.L.R. (part 342) 1, Himma Merchants Ltd v. Alhaji Inuwa (1994) 5 N.W.L.R. (part 347) 667 etc H

The meaning of the phrase "may be pronounced" was considered by Fatayi - Williams, C.J.N. In the case of Attorney-General of Imo State v. Attorney-General of Rivers State (1983) 8 S.C 10 or (1983) 2

S.C.N.J. 108. Said the learned Chief Justice -

"To my mind, the phrase 'may be pronounced' used in subsection (2) above can only mean, in the context, "to utter, speak, declare aloud, or proclaim." Moreover, since the phrase is obviously intended to distinguish what may be 'pronounced' from what may be 'read' what is pronounced cannot be the same as what is read from a typewritten or handwritten script. It must mean, and I so hold, what is orally proclaimed declared aloud from personal knowledge. In view of the interpretation which I have put on the phrase 'may be pronounced', I also hold that any of the justices of the Supreme Court who heard any cause or matter can, after a decision has been arrived at by all the justices, pronounce the opinion of another justice who for one reason or another, is unable to reduce his opinion unto writing or be present when the judgment in the case is being delivered by each of the other justices."

I need hardly add that it is no provision of any law that the word "pronounced" or "pronouncement" must be expressly used or employed in the record of proceeding before an opinion or judgment of a Justice who has ceased to be a member of the relevant court as at the date of judgment may be deemed duly pronounced in accordance with the law. It suffices, in my view, if the opinion of such deceased, retired, dismissed or elevated Justice is inter alia, declared, uttered, proclaimed or stated in open court at the time of the delivery of the judgment. It must not, however, be read as his opinion or judgment after he has ceased to be a member of the relevant court as such opinion or judgment would, under the circumstance amount to a nullity.

In the case on hand, the appeal was duly heard on the 11th day of February, 1991 by Babalakin, J.C.A. as he then was, presiding; along with Awogu and Kalgo, JJ.C.A. Judgment was thereafter reserved. Before the 10th May, 1991 on which date judgment of the court was delivered, Babalakin J.C.A. had been elevated to the Supreme Court bench. Exhibit H S.C. 1 shows that only Awogu and Kalgo, JJ.C.A sat on the date of delivery of the said judgment. It also shows that judgment in the appeal was duly delivered and that appeal was allowed.

The said record of proceedings also clearly indicates that the

judgment of the court was unanimous. Although the word "Pronouncement" was not expressly employed by Awogu, J.C.A. who presided on the date of the delivery of the judgment in proclaiming the opinion of the said Babalakin, J.C.A., the unanimity of their decision was clear from the record and was so stated. There is no suggestion that the opinion of B Babalakin, J.C.A., as he then was, was delivered or read on his behalf. This is not borne out by the record of proceedings. It is plain to me that the opinion of Babalakin, J.C.A. was duly pronounced as required by the Constitution on the date of the delivery of judgment appealed against. C

In this regard, attention must be drawn to the legal presumption of regularity, omnia praesumuntur rite esse acta which, principally, is applied to judicial and official acts. Although classified generally as a reputable presumption of law, it is significant that its application in the proceedings of the 10th May, 1991 on which date judgment in the appeal D was delivered was neither rebutted nor effectively challenged in any way. This is quite understandable as, from Exhibit S.C.1, neither the appellant nor the respondents were present in court on the date of delivery of judgment in the appeal. In my view, the presumption of regularity fully E applies to the proceedings of the 10th May, 1991, Exhibit S.C.1, in the absence of any credible evidence in rebuttal thereof. In my view, the judgment of the court below under attack seems to me unimpeachable as the same was not faulted in any manner by the appellant in this appeal. F

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

G

H

B

C

D

E

F

G

H