

SUPREME COURT OF NIGERIA
3RD DECEMBER, 1999. SC. 41/1999
CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,
S. U. ONU, A. I. IGUH, E. O. AYoola

TIGRIS INTERNATIONAL CORPORATION PLAINTIFF/
RESPONDENT

AND

EGE SHIPPING & TRADING IND. INCO. & ORS. DEFENDANTS/
2. KORAY SHIPPING & TRADING INC. APPELLANTS
3. OWNERS OF THE MV "S. ARAZ"
4. MV "S. ARAZ"

***ACTIONS** - Dismissal - In limine - Application - To dismiss an action in limine at the Federal High Court - Which did not challenge the jurisdiction of the court - Such an application is in the nature of a demurrer.*

***PRACTICE & PROCEDURE** - Demurrer - Application - In such an application it is presumed that all the facts pleaded by the plaintiff are correct - What the defendant who dispute any of such facts should do.*

***PRACTICE & PROCEDURE** - Pleadings - Defence - The proper way to dispute an averment of fact - Made in a Statement of claim.*

FACTS

At the Federal High Court holden at Lagos, the plaintiff/respondent by a Writ of Summons sued the defendants/appellants jointly and/or severally, claiming the sum of US \$ 200,000.00 (Two Hundred Thousand US Dollars) being for damages for breaches of contract arising out of a Time-Charter Party Agreement dated at London, the 5th day of July, 1994, for the use and/or hire of the 1st to 3rd defendants' vessel, the MV "S. Araz", sued as 4th defendant in these proceedings, which said sum the defendants or any of them have failed and/or refused to pay despite

repeated demands. The plaintiff filed a statement of claim which with leave of court was subsequently amended. Rather than file a statement of defence to meet the case made out by the plaintiff in its amended statement of claim, the defendant brought an application before the trial Court seeking the following Orders:

(1) Set aside the Writ of Summons and/or Statement of Claim.

(2) Set aside and/or discharge unconditionally the interim order made on the 28 February 1995 for the arrest and detention of the 4th defendant/applicant, the M. V. "S. Araz," presently lying at berth 4 Apapa Port, Apapa, Lagos.

(3) Strike out the name of the 3rd defendant as a party to this suit.

The defendant/applicant relied on several grounds set out in the motion Paper. The applicant contended inter alia that there is no cause of action against the 4th defendant, and that the Order of the arrest of the 4th defendant/applicant made on the 28 February 1995 is a nullity.

The trial judge after hearing the application found for the defendants and granted all their prayers. Aggrieved, the plaintiff appealed to the Court of Appeal. That court allowed their appeal, and ordered the defendants to file their statement of defence to enable the trial court to determine the suit on the merits. The defendants have now appealed to the Supreme Court raising three issues but the appeal was determined on a sole issue.

ISSUE FOR DETERMINATION

"was the application dated the 25 March, 1996 a demurrer application as was decided by the learned Justices of the Court of Appeal?"

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

Practice & Procedure - Pleading

1. Surely where a defendant is disputing an averment of fact made in a statement of claim, the proper way to do so is not by filing an application to have the plaintiffs' action dismissed in limine but to file a defence traversing that averment of fact and establishing evidence at the trial on

which the trial Court will make a finding of fact either for or against the plaintiff on such averment of fact. (p. 3092 C)

Action - Dismissal

2. I have considered all the grounds upon which the defendants sought in the Federal High Court to have plaintiff's action dismissed in limine; none of them, as I observe earlier in this judgment, questions the jurisdiction of the Court to hear and determine the action. It is, therefore, incorrect to say, as contended by learned senior Advocate for the defendants, that the application is in the nature of a challenge to the jurisdiction of the court. In my respectful view, the Court below was right when it held that the application was in the nature of a demurrer. (p. 3093 D)

Practise & Procedure - Demurrer

3. The use by the defendants of affidavit evidence to counter or traverse matters of fact pleaded by the plaintiff is clearly not a correct practice or procedure. In an application of the nature brought by the defendants, it must be presumed that all the facts pleaded by the plaintiff are correct. Where the defendants dispute any of such facts they must file a statement of defence and lead evidence at the subsequent trial in support of their case. (p. 3093 F)

NOTABLE POINTS OF INTEREST

OGUNDARE JSC

1. Need for briefs to be concise

Order 6 rule 5 (1) (a) provides:

"The appellant shall within ten weeks of the receipt of the Record of Appeal referred to in Order 7 file in the Court and serve on the respondent a written Brief being a succinct statement of his argument in the appeal." (underlining is mine for emphasis)

"Succinct" by ordinary dictionary meaning is "concise", "brief", thus what the rule provides for is a concise, brief statement of argument and not a treatise. The Appellants' brief in this rather simple matter runs to 121 pages. That the Respondent runs 57 pages. These can hardly be

described as briefs. They are essentially treatises, particularly that of the Appellant. Neither of the briefs can be said to comply strictly with the rule of this Court. (p. 3086 E)

B 2. *What a well written brief should contain*

Only very recently this Court once again had cause to revisit the question of long unwieldy briefs. In Shell petroleum Dev. Company (Nig) Ltd. v. Fed. Board of inland Revenue (1996) 8 NWLR 256, 274, Uwais CJN commenting on the briefs of the parties in that case observed as follows:

C *"It is well settled, as a rule of practice, that a well written brief of argument should be brief and concise, containing concise statement of the facts of the case which are material to the consideration of the questions presented for determination by the court. It should also contain*
D *direct, concise and succinct statement of the argument in the appeal.*
(p. 3087 D)

KARIBI-WHYTE JSC

E 3. *Requirements for on application to dismiss an action on grounds of law*

It is important to understand that an application to dismiss an action on grounds of law may attack the jurisdiction of the court simpliciter, or
F raise the issue that plaintiff has not made out on the writ of summons and statement of claim a cause of action. In either case the applicant is deemed to rely for his argument on the facts as stated by the plaintiff.
(p. 3099 C)

G 4. *Application to dismiss an action in the Federal High Court*

In the Federal High Court, the Rules of Court enable a defendant to apply to dismiss an action where he conceives he has a good legal or equitable defence to the suit.

H Under these rules, the application to dismiss the suit must be made before issue is joined, i.e. before the defence files a statement of defence - see Odivo v. Obor (1974) 2 SC.23. The applicant relying on this rule for dismissal of an action on grounds of law is taken to have accepted that all

the facts as alleged by the plaintiff are true - See Irona Nwadiaro & ors. v. Shell Petroleum Development Co. of Nigeria Ltd. (1990) 5 NWLR. 522. The Defendant is not in this procedure allowed to contest the truth or otherwise of the facts pleaded in the claims. They are to be taken as established - See Fidelis Oguchi & anor. v. Federal Mortgage Bank of Nigeria Ltd. (1990) 6 NWLR. 330. The Defendant having not challenged the jurisdiction of the Court may, if his application was properly formulated, come within the purview of Order 27. To come under Order 27, Defendant must admit all the facts pleaded by the plaintiff and will not be heard to contest any. (p. 3101 C)

5. The basis of a demurrer

Where the objection to the claim against the Defendant in the writ of summons and statement of claim is patently unsustainable, it has always been accepted as good practice and unnecessary to continue to hear evidence in the action. In such a situation an application to dismiss the action would be granted. The rationale has been stated in Aina v. Trustees of Railway Corporation Pensions fund (1970) 1 All NLR. 281 where it was said;

"The whole basis of a demurer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained....."

This was what the Defendant intended to achieve, but unfortunately has not been able to accomplish. (p. 3103 C)

REPRESENTATION

Dr. Eyimofe Atake, S.A.N. with A. Yusufu Esq. for the Appellants
P. O. Atoyebi Esq. with A. Olorunfemi Esq. for the Respondents

CASES REFERRED TO

Shell petroleum Dev. Company (Nig) Ltd . v. Fed. Board of inland Revenue (1996) 8 NWLR 256, 274

Odivo v. Obor (1974) 2 SC.23

Nwadiaro v. Shell Petroleum Development Co. of Nigeria Ltd. (1990) 5

NWLR. 522

Oguchi v. Federal Mortgage Bank of Nigeria Ltd. (1990) 6 NWLR 330
Aina v. Trustees of Railway Corporation Pensions fund (1970) 1 All NLR. 281

B Foko vs. Foko (1968) NMLR. 441

Thomas v. Olufosoye (1986) 1 NWLR. 669

Ojengbede v. M. O. Esan (Loja Oke) (1987) NWLR (part 63) 49

Olu-Ibukun v. Olu-Ibukun (1974) 2 S.C. 41

Falobi v. Falobi (1976) 1 NWLR. 169

C Okoye v. Lagos State Government (1990) 3 NWLR (136) 115 at 123

LEAD JUDGMENT BY OGUNDARE JSC

D By a writ of Summons issued in the Federal High Court holden at Lagos on 24/2/95 the plaintiff who is now Respondent before us in this appeal sued the four Defendants herein (who are now Appellants) jointly and/or severally, claiming:

E *"the sum of US\$200,000.00 (Two Hundred Thousand US Dol-*
F *lars) being for damages for breaches of contract arising out of a Time-Charter Party Agreement dated at London, the 5th day of July 1994 for the use and/or hire of the 1st to 3rd Defendants' vessel, the MV"S. Araz", sued as 4th Defendant in these proceedings, which said sum the Defendants or any of them have failed and /or refused to pay despite repeated demands. AND THE PLAINTIFF claims the said sum of US \$ 200,000.00 (Two Hundred Thousand US Dollars) and the additional relief herein together with interest and costs."*

G The Appellant filed a statement of claim which, with leave of Court, was subsequently amended. Rather than file a statement of defence in answer to the case made out by the plaintiff in its amended statement of claim, the defendant brought an application before the trial Court seeking the following orders:

H *"1. Set aside the writ of Summons and/or statement of Claim.*

2. Set aside and/or discharge unconditionally the interim order made on the 28 February 1995 for the arrest and detention of the 4th Defendant/Applicant, the M.V."S. Araz", presently lying at berth 4 Apapa

port, Apapa, Lagos.

3. Strike out the name of the 3rd Defendant as a party to this suit."

Upon the grounds as set out on the motion paper -

"a. There is no cause of action against the 4th Defendant/Applicant because the 1st and 2nd Defendants whom the plaintiffs have allegedly a claim against are neither the beneficial Owners as respect all the shares in the vessel, nor are they the Charterers of the vessel under a charter by demise.

b. The order of arrest of the 4th Defendant/Applicant made on the 28 February 1995 is a nullity.

c. The Plaintiffs have not made out any claim against the 3rd Defendant either in their writ of Summons or, amended statement of Claim.

d. The Defendants did not breach clauses 1, 8, 21, 28 or any other terms and conditions of the Charter party.

e. The plaintiffs claim against the Defendants for accrued port charges and dues is not sustainable in law in view of the provisions of Order VIII r.2 (1) of the Admiralty Jurisdiction Procedure Rules 1993.

f. The Plaintiffs are estopped from claiming, as contained in their amended Statement of Claim, the sum of N50,000.000 (fifty million Naira as indemnity in respect of Suit No. FHC/L/CS/233/95, between Isiyaku Rabiun & Sons Ltd. v. Ben Commodities of London and Tigris International Corporation (Time Charterers/Disponent Owners of M.V. "S. Araz) in view of the Notice of Discontinuance and terms of settlement dated and filed on the 23 March 1995 by the plaintiffs in that suit and the Order of Court dated the 29 March 1995 striking out the suit.

g. The proceedings are an abuse of the process of Court.

h. The Arrest Order was obtained on misrepresentation of facts.

i. The Plaintiffs have not used the process of the Court bona fide.

j. The machinery of the Court has been used by the Plaintiffs as a means of vexation and oppression in the process of litigation".

The application was heard by Olomojobi J. who in a reserved ruling found for the Defendants and adjudged as follows:

"1. It is hereby ordered that the Writ of Summons and the Statement of Claim in this suit be and the same is hereby set aside.

2. It is further ordered that the vessel M.V."S. Araz" presently lying at berth 4 Apapa port, Apapa, Lagos which was arrested and detained by the order of this Court made on the 28th February, 1995 is hereby released from arrest and detention without any condition whatsoever.

3. It is also ordered that the name of the 3rd defendant that is 'Owners of M.V. "S. Araz" be and the same is hereby Struck Out from this Suit."

The Plaintiff was unhappy with this decision and appealed to the Court of Appeal. The latter Court allowed the appeal and struck out the Defendants application filed in the trial Court and ordered that the defendants should file their Statement of Defence to enable the trial Court to determine the suit on the merits. It is against that judgment that the Defendants have now appealed to this Court upon three grounds of appeal.

Parties filed and exchanged their respective briefs of arguments. Before I proceed further with this appeal, I need comment on the briefs filed by the parties. Order 6 rule 5 (1) (a) provides:

"The appellant shall within ten weeks of the receipt of the Record of Appeal referred to in Order 7 file in the Court and serve on the respondent a written Brief being a succinct statement of his argument in the appeal." (underlining is mine for emphasis)

"Succinct" by ordinary dictionary meaning is "concise", "brief", thus what the rule provides for is a concise, brief statement of argument and not a treatise. The Appellants' brief in this rather simple matter runs to 121 pages. That the Respondent runs 57 pages. These can hardly be described as briefs. They are essentially treatises, particularly that of the Appellant. Neither of the briefs can be said to comply strictly with the rule of this Court.

This Court has on a number of occasions, in recent years, commented on what a brief should look like. In Engineering Enterprises v. Attorney-General of Kaduna State (1987) 2 NWLR 381, this Court per

Eso and Oputa JJSC laid down the requirements of a good brief and in Universal Vulcanizing (Nig.) Ltd v. I. U. T. T. C. & Others (1992) 9 NWLR 387, 397, Omo JSC had cause to comment on an unduly long brief. He observed:

"The brief of the plaintiff/appellant prepared and filed by Dr. F.A. Ajayi, S.A.N. calls for some comment. It is a 70 page booklet which is more of a treatise than a brief. Commendable as it is for the learning it exudes it does not conform to the definition of a brief of argument in Order 6 Rule 5, as 'being a succinct statement of his argument in the appeal'. The document filed by Dr. Ajayi is most certainly not succinct. It is lengthy, otiose and not surprisingly, repetitive. This court will continue to insist that counsel should comply with the rules of court. It is to be hoped that this court will not be inflicted in the future with the tiresome task of wading through such a document."

The above comments apply with stronger force to the purported briefs filed in this case, particularly that of the Appellant.

Only very recently this Court once again had cause to revisit the question of long unwieldy briefs. In Shell petroleum Dev. Company E (Nig) Ltd . v. Fed. Board of inland Revenue (1996) 8 NWLR 256, 274, Uwais CJN commenting on the briefs of the parties in that case observed as follows:

"It is well settled, as a rule of practice, that a well written brief of argument should be brief and concise, containing concise statement of the facts of the case which are material to the consideration of the questions presented for determination by the court. It should also contain direct, concise and succinct statement of the argument in the appeal. But what are we confronted with in this appeal? The appellant's brief consists of 70 pages while the respondent's brief is made up of 435 pages (including the preliminaries). Surely these are, with respect, far from the ideal. Rather than assist the Court to easily follow the argument in support of the questions for determination, they helped in making the arguments complex."

Belgore JSC in his own observation at page 297 said

"The Hon. Chief justice, in the lead judgment adverted to 'unbrief

briefs', I agree that but for the importance of this appeal as a revenue matter of the government on strategic petroleum tax, the respondent's brief of argument is not a brief for the purposes of our Rules. I would have discountenanced it; but I take it for what it is worth as some aide
 B memoire. If the energy exerted in preparing it had been devoted to the study of the issues this court would have been greatly helped. I must confess that I find not much use in the brief for all its length of over five hundred pages."

In my own judgment in the case I reviewed at length the requirements of
 C a good brief and concluded thus at page 300:

"The respondent's brief in the appeal on hand, prepared and filed by U. A. Inyang Esqr. can hardly be described as a 'succinct statement of his argument in the appeal' - see: Order 6 rule 5 (1) (a) of the
 D Supreme Court Rules, 1985. It is a book on diverse subjects full of sentiments, rather than hard legal arguments, and containing intemperate language against opposing counsel. I advise learned counsel to look into the Briefs filed in the number of cases listed by Eso JSC in Engi-
 E neering Enterprises and to which list is to be added Fawehinmi v. Akilu (No.1) (1987) 4 NWLR (pt.67) 797. I am sure he will learn a lot from these cases on the art of brief writing. The appellant's Brief of argument is not without its own drawback, though to a lesser degree when compared to that of the respondent. Its own drawback is more in its length -
 F 70 pages; it could be shorter".

Bearing in mind the nature of the application brought by the defendants at the Federal High Court and the issues raised by the application, I cannot say that the Appellant's brief in this appeal prepared by
 G Eyimofe Atake Esqr. addressed the primary issues one would expect the defendants would advance in this appeal. The issues canvassed in that brief are what one would expect to see canvassed after a full trial of the issues arising between the parties based on the plaintiff's case and the
 H defendants' reply.

The Respondent's brief prepared by P. O. Atoyebi Esqr. though in part touched on the question raised by the application on the defendants in the trial Court, went off tangent in replying to issues raised in the

Appellants' brief. The Respondent's brief, therefore, though less offensive than the Appellants' brief is equally not a brief as envisaged in the rules of Court. The Appellants' brief, with respect, is merely an academic exercise not related to the real issues of the day.

I think this Court has said enough on the effect of a purported brief that does not qualify as a brief within the contemplation of the rules of Court. One would expect counsel by now, to have mastered the art of brief writing that will not inflict on the Court a tiresome task. And unless there is compliance with the rules of Court in this respect, delay in the administration of justice cannot be ruled out.

So much on the written briefs of arguments of the parties in this case.

In the Appellants' brief, three issues are set down as calling for determination in this appeal. These are:

"(i) *Can the Admiralty jurisdiction of the Federal High Court be invoked in this particular case having regard to the provision in section 5 (4) (a) of the Admiralty jurisdiction Decree 1991, and the Decisions by the Court of Appeal in the cases of MV "Araz" v. Scheep [1996] 5 NWLR (part 447), 204, and MV "S. Araz" v. LPG Shipping SA [1996] 6 NWLR (part 457), 720? In other words, are the persons whom the Plaintiffs/Respondents say they have a contract with the beneficial owners with respects to all the shares in the Motor Vessel "S.Araz" or are they charterers of the vessel under a charter by demise?*

(ii) *Can an action in rem and one in personam be commenced by the same initiating process?*

(iii) *Does the provision in section 5 (4) of the Admiralty Jurisdiction Decree 1991 raise a jurisdictional or procedural issue or is the provision in the manner of a demurrer; and was the application dated the 25th March 1996 a demurrer application as was decided by the learned Justices of the Court of Appeal?"*

The three issues are adopted in the Respondents's brief.

Reading through the proceedings in the Court of trials I think this otherwise simple case has been complicated by the trend of arguments of learned counsel for the defendants in arguing the application.

Although learned counsel for the plaintiff in his own address before the trial court, tried to get the Court to focus its mind on the real issue in controversy in the application, the learned trial judge, with respect to her, fell into the error she was led into by learned counsel for the defendants/ B applicants. This led to pronouncements on issues that did not arise for determination. In her ruling on the application the learned trial judge had this to say and, quite rightly in my respectful view:

"Two issues come for determination in this ruling. They are as follows:-

1. *What is the nature of the defendant's application?*
2. *Whether there is any cause of action by the plaintiff against the defendants/applicants."*

Had she confined herself to the consideration and determination of those D two issues she would not need to go into, and make pronouncements on, issues unrelated to those two issues such as the question of jurisdiction and ownership of the vessel "S. Araz".

The Court below, that is, the Court of Appeal faired only a little E better. It focussed its mind, to a large extent, on the nature of the defendants' application before the trial Court - and that was the main issue; but it, too, allowed itself to be led into pronouncing on other issues unconnected with the application such as the interpretation of section 5 of the F Admiralty Jurisdiction Act 1991, the nature of an action in rem and the ownership of the vessel "S. Araz" on which it made copious pronouncements. It is the challenge to the pronouncements made on these issues that led the defendants to formulate their issues (1) and (2) above. In so far as these two issues are, therefore, unrelated to the determination of G the appeal arising out of the application brought by the defendants before the trial High Court I will refrain from considering them in this appeal. The same consideration applies to part of issue (3) which raises the issue of section 5(4) of the Admiralty Jurisdiction Act 1991 as to whether or H not that section raises a jurisdictional or procedural issue. The question that is to be determined in this appeal, in my respectful view, is:

"was the application dated the 25 March, 1996 a demurrer application as was decided by the learned Justices of the Court of Appeal?"

In arguing this question in his Appellant's brief Dr. Atake, SAN, with respect to him, fell into the same error he fell into in the Federal High Court when he directed his arguments to issues of jurisdiction. It is his argument that the defendants' application was brought under section 5(4)(a) of the Admiralty Jurisdiction Act 1991. Submitting finally learned Senior Advocate argued:

"In answer to the question posed therefore, your Lordships are urged to hold that, the provision in section 5(4) of the Admiralty Jurisdiction Decree 1991 raises a jurisdictional issue. It does not raise a procedural issue and is certainly not in the manner of a demurrer. That being so, the application dated 25 March 1996 brought by the Defendants/appellants is not a demurrer application. It was clearly an application challenging the jurisdiction of the court". (underlining is mine)

I may here mention that this was also his line of argument at the oral hearing of the appeal notwithstanding efforts made by us to let him focus his mind on what we consider to be the correct question arising in the appeal. In the course of his oral argument, learned Senior Advocate's attention was drawn to paragraph 2 of the amended Statement of claim which reads:

"2. The 1st and 2nd Defendants herein are the beneficial Owners and/or Head Owners/Charterers of the MV "S. ARAZ", the 4th Defendant herein. The 3rd Defendant is the Owner of the 4th Defendant Vessel chartered to the Plaintiffs herein and where sued as such in view of the uncertainty of the identity of the true Owners of the vessel."

Learned Senior Advocate replied that he was contesting the correctness of the averments in that paragraph. He, however conceded that if those averments were correct, there would be no need for the defendant's application brought before the Federal High Court.

For the plaintiff, Mr. Atoyebi both in his brief and in oral argument submitted that the defendants' application did not challenge the jurisdiction of the Federal High Court but sought to defeat the action in limine. This, learned counsel submitted, the defendants could not do without filling a defence and leading evidence. He too replied in his brief to arguments of the defendants on the construction or interpretation of

section 5(4) of the Admiralty Jurisdiction Act.

I have already set out earlier in this judgment the orders sought by the Defendants in the Federal High Court and the grounds relied on. I must observe that none of the grounds questions the jurisdiction of the B Court. I shall now consider the grounds.

In ground (a) the defendants contend that a cause of action is not disclosed against the 4th defendant on the premise that the 1st and 2nd defendants are neither the beneficial owners of the ship nor its charterers under a charter by demise. This premise challenges the correctness of the averments in paragraph 2 of the amended statement of claim. C **Surely where a defendant is disputing an averment of fact made in a statement of claim, the proper way to do so is not by filing an application to have the plaintiffs' action dismissed in limine but to** D **file a defence traversing that averment of fact and establishing evidence at the trial on which the trial Court will make a finding of fact either for or against the plaintiff on such averment of fact.**

Ground (b) challenges the validity of the order of arrest of the E 4th defendant made on the 28th of February 1995 on the premise that the order was nullity. I do not think any effort was ever made to show that the order made by the Federal High Court on 28/2/95 for the arrest of the 4th defendant was a nullity. Of course, defendants would be right to come by way of an application to set aside the order if it was a nullity. F Surprisingly, however, there was no finding by the learned trial Judge to this effect.

On ground (c), what is being challenged is that a case is not made out against the 3rd defendant either in the Writ of Summons or G amended statement of claim. If this were so, the defendants would be in order to come by way of an application to have the case against the 3rd defendant dismissed but in the light of paragraph 2 of the amended statement of claim, I do not see how they could have succeeded. In the H copious affidavit evidence placed before the trial Court, effort was directed to showing the contrary of the averments in the pleading of the plaintiff. In my respectful view the way to do this is by traversing, in a statement of defence, such averments and not come by way of applica-

tion to dismiss in limine.

Ground (d) denies a breach by the defendants of some clauses of the charter party pleaded by the plaintiff. I do not see how a Court would dismiss a plaintiff's case on such ground without the defendants filing a statement of defence and leading evidence in support.

I would think that grounds (e), (f), (g), (i) and (j) are matters of defence to be set up in a statement of defence. It is for the trial Court after hearing evidence on both sides to make findings of fact for or against such defences.

Ground (h) cannot be a ground for claiming that the order of arrest made is a nullity. Evidence will need to be led on both sides and findings of fact made after a full blown trial to justify a court in concluding that the arrest order was made as a result of misrepresentation of facts.

I have considered all the grounds upon which the defendants sought in the Federal High Court to have plaintiff's action dismissed in limine; none of them, as I observe earlier in this judgment, questions the jurisdiction of the Court to hear and determine the action. It is, therefore, incorrect to say, as contended by learned senior Advocate for the defendants, that the application is in the nature of a challenge to the jurisdiction of the court. In my respectful view, the Court below was right when it held that the application was in the nature of a demurrer. The use by the defendants of affidavit evidence to counter or traverse matters of fact pleaded by the plaintiff is clearly not a correct practice or procedure. In an application of the nature brought by the defendants, it must be presumed that all the facts pleaded by the plaintiff are correct. Where the defendants dispute any of such facts they must file a statement of defence and lead evidence at the subsequent trial in support of their case.

I agree entirely with the court below that the learned trial Judge was in serious error in granting the application and making the orders made by her. I have no hesitation whatsoever in upholding the conclusion of the Court below and in holding that this appeal is completely

lacking in substance.

. Before I end this judgment I like to extend to the learned counsel for the defendants a short piece of advice. No doubt, his brief is commendable for the learning he showed but the arguments contained therein, B with respect to learned Senior Advocate, are completely misplaced. He can do better by focusing on issues relevant for determination and advancing arguments in his brief in a succinct manner. It is only then that he can be of tremendous assistance to the Court. I am also disturbed by C a show of intellectual arrogance displayed by him at the oral hearing of this appeal. A great restraint had to be shown by us. I think counsel ought to weigh the language employed by him. A word is enough for the wise.

Finally, I dismiss this appeal and affirm the orders made by the D Court of Appeal striking out the defendants' application dated 25th March 1996 and directing the defendants to file their statement of defence in the court of trial which is now to be done within 30 days from the date thereof. I award N10,000.00 costs of this appeal to the Plaintiff/Respon- E dent.

KARIBI-WHYTE JSC

F I have read the leading judgment of my learned brother Ogundare, JSC in this appeal, I agree entirely with his reasoning and the conclusion that there is no merit whatsoever in this appeal and that the appeal should be dismissed. My learned brother Ogundare, JSC has set out the facts of the case in considerable detail. I adopt the facts as stated by him.

G The only issue before this court is whether the Court of Appeal was right in their decision setting aside the judgment of Olomojobi J of the Federal High Court and striking out the application of the defendant seeking the following orders -

- H
- (1) Set aside the writ of summons and/or statement of claim,
 - (2) Set aside and/or discharge unconditionally the interim order made on the 28 February, 1995 for the arrest and detention of the 4th Defendant/Applicant the M.V. "S. ARAZ" presently lying at berth 4, Apapa

port, Apapa, Lagos.

(3) Strike out the name of the 3rd Defendant as a party to the suit"

Applicant relied on several grounds, (1) -(j) set out in the motion paper. The claim of the Applicant inter alia is that there is no cause of action B against the 4th Defendant, and that the order of the arrest of the 4th Defendant/Applicant made on the 28 February 1995 is a nullity. (a) It was stated that no claim has been made out against the 3rd Defendant either in the writ of summons or in the amended statement of claim. (c) C It was also stated that the defendants did not breach clauses 1,8, 21, 28 or any other terms and conditions of the charter party. (d) The plaintiffs claim against the Defendants for accrued port charges and dues is not sustainable in law in view of the provisions of Order VIII r. 2(1) of the Admiralty Jurisdiction Procedure Rules 1993 (e). The other grounds (f) D -(j) are based on estoppel, abuse of the court's process, misrepresentation of facts, lack of bona fides in the use of the court's process, and that the machinery of the court has been used by the plaintiff as a means of vexation and oppression. E

The trial Judge granted the application and struck out the writ of summons and statement of claim of the plaintiff. The trial Judge also made an order to release from arrest and detention unconditionally the vessel M.V."S. Araz" lying at berth 4, Apapa port, Apapa, arrested and F detained by the Order of this Court on 28th February, 1995. There was also granted an order striking out the name of the 3rd Defendant, i.e. owners of M.V. "S.Araz" from the suit.

The aggrieved plaintiff appealed to the Court of Appeal. The G Court of Appeal allowed the appeal, and ordered the Defendants to file their statement of defence to enable determination on the merits of the issues in the action. The Defendant's appeal against that decision is what we have before us.

Appellant has filed three grounds of appeal, which I reproduce H hereinbelow as follows.-

"GROUND OF APPEAL:

(i) *The learned Justices of the Court of Appeal erred in law in*

striking out the Defendants/Appellants application filed on the 25 March 1996, and setting aside the decision of the lower court, when based on two earlier decisions of that Court, and evidence on the Records of proceedings, it is clear that, the 3rd Defendants/Appellants are not the persons who would be liable had the action been brought in personam by virtue of the provision in section 5 (4) (a) of the Admiralty Jurisdiction Decree 1991.

PARTICULARS

(A) In the cases of MV "S Araz" v. SCHEEP [1996] 5 NWLR PART 447, 204, the Court of Appeal held that, the 2nd Defendants/Appellants, Koray Shipping and Trading Inc. are not the persons who would be liable had the action brought in personam and accordingly struck out the entire case in the action in rem against the MV "S. Araz."

(b) In the case of MV ".S Araz v. LPG Shipping SA [1996] 6 NWLR, Part 457, 720, the Court of Appeal had held that, the 1st Defendants/Appellants, Ege Shipping and Trading Industry Inc. are not the persons who would be liable had the action been brought in personam and accordingly struck out the entire case in the action in rem brought against the MV "S. Araz."

(c) At the time the action in rem was brought against the Motor Vessel "S Araz, " the owners of the MV "S. Araz", were not the persons who would be liable if the action were brought in personam and consequently no action in rem lies against the MV "S. Araz."

(d) The persons who the plaintiffs/Respondents state would be liable in an action in personam in this particular claim or action, Koray Shipping and trading Inc. and/or Ege Shipping and Trading Industry Inc. are not the beneficial owners with respects to all the shares in the MV "S. Araz" nor are they charterers by demise in accordance with the provision in section 5 (4) (a) of the Admiralty Jurisdiction Act.

(e) Consequently, the party or parties whom the plaintiffs/Respondents have an agreement with are neither the Owners of the MV "S. Araz" nor are they charterers by demise a fortiori no action in rem can lie against the MV "S. Araz."

(ii) The learned Justices of the Court of Appeal erred in law

when they held that, an action in rem and one in personam can be commenced by the same initiating process.

PARTICULARS

(a) Order II, Rule 3 (3) states very clearly that an action in personam and one in rem must not be commenced by the same initiating process. B

(b) Yet, the learned justices of the Court of Appeal held that, the learned trial Judge should have struck out the names of the 3rd and 4th Defendants from the suit and allow the suit to proceed as a purely action in personam against the 1st and 2nd Defendants because the Defendants were sued jointly and severally. C

(iii) The learned Justices of the Court of Appeal erred in law in coming to the conclusion that the application of the Defendants/Appellants dated the 25 March 1996 was in the nature of a demurer and not one challenging the Jurisdiction of the Federal High Court to invoke its Admiralty Jurisdiction. D

PARTICULARS

(a) The learned Justices held that section 5 (4) (a) of the Admiralty Jurisdiction Decree 1991, does not raise a jurisdictional issue but only a procedural matter. E

(b) The learned Justices held that for the purpose of such an application, the Defendants ought to be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact and no discussion of questions of facts should have been allowed." F

Both Appellant and Respondents filed and exchanged briefs of argument, which are both of inordinate length. Both briefs of argument would seem to have ignored the guidelines in Order 6 rule 5 requiring a brief of argument to be a succinct statement of the argument in the appeal. Rather what the court has been treated with is a compendious treatise of argument on the Admiralty jurisdiction exercise of actions in rem and in personam. In a different setting and submitted for a different purpose, H the industry and intellectual effort demonstrated in the briefs of the parties is commendable.

Where however, as in this case, the issue between the parties is

whether the trial Judge was right in holding that the writ of summons of the plaintiff and the statement of claim, should be struck out in limine on the objection of the defendant, properly directed the brief of counsel should be confined only to that issue. The requirements of a good brief have been prescribed in judgments of this court. I refer only to Engineering Enterprises v. Attorney-General of Kaduna state (1987) 2 NWLR. 381; Universal Vulcanizing (Nig) Ltd. v. I.U.T.T.C.& Ors. (1992) 9 NWLR (pt.266) 388, Shell Petroleum Dev. Company (Nig.) Ltd. v. Feb. Board of Inland Revenue (1996) 8 NWLR (pt.466) 256.

The issues canvassed in the briefs before us belong in the main to the realm of arguments from disputed issues, arising after a conducted trial. For the purpose of the hearing Appellant has formulated three issues for determination arising from the grounds of appeal filed. Respondent on his part has adopted the issues formulated by the appellant. The issues formulated are as follows-

"(i) Can the admiralty jurisdiction of the Federal High Court be invoked in this particular case having regard to the provision in section 5 (4) (a) of the Admiralty Jurisdiction Decree 1991, and the Decisions by the Court of Appeal in the cases of M.V. "S. Araz" v. Scheep (1996) 5 NWLR (part 447) 204, and M. V. "S. Araz" v. LPG Shipping S. A. (1996) 6 NWLR (part 457) 720. In other words, are the persons whom the plaintiffs/Respondents say they have a contract with the beneficial owners with respect to all the shares in the Motor Vessel "S. Araz" or are they charterers of the vessel under a charter by demise?

(ii) Can an action in rem and one in personam be commenced by the same initiating process.

(iii) does the provision in section 5 (4) of the Admiralty Jurisdiction Decree 1991 raise a jurisdictional procedural issue or is the provision in the manner of a demurer; and was the application dated 25th March, 1996 a demurer application as was decided by the learned Justices of the Court of Appeal?"

In the determination of this appeal, I consider it relevant to refer to and rely only on the alternate formulation in issue (iii), where learned counsel to the Appellants raised the issue whether the provision in Section 5 (4)

of the Admiralty Jurisdiction Decree 1991 was a jurisdictional procedural issue, or is the provision in the manner of a demurer, and was the application dated 25th March, 1996 a demurer application as was decided by the learned Justices of the Court of Appeal?" This is the only pertinent issue on the facts.

It is important in the determination of this appeal, to appreciate that only the nature of defendant's application seeking to strike out the writ of summons and statement of claim of plaintiff is of critical importance. That is the issue before the Court. I therefore agree with the formulation in the leading judgment of the question, which reads,

"was the application dated 25 March, 1996, a demurer application as was decided by the learned Justices of the Court of Appeal?"

It is important to understand that an application to dismiss an action on grounds of law may attack the jurisdiction of the court simpliciter, or raise the issue that plaintiff has not made out on the writ of summons and statement of claim a cause of action. In either case the applicant is deemed to rely for his argument on the facts as stated by the plaintiff. Dr. Atake, SAN arguing this issue concentrated on the question of jurisdiction of the court and his interpretation of section 5 (4) (a) of the Admiralty Jurisdiction Decree 1991. Learned Counsel submitted in his brief of argument and in the oral expatiation of same that Defendants application was brought under the said section 5 (4) (a). He submitted as follows -

"In answer to the question posed therefore, your Lordships are urged to hold that, the provision in section 5 (4) of the Admiralty Jurisdiction Decree 1991 raises a jurisdictional issue. It does not raise a procedural issue and is certainly not in the manner of a demurrer. That being so the application dated 25 March, 1996 brought by the Defendants/Appellants is not a demurrer, application. It was clearly an application challenging the jurisdiction of the court."

It is obvious from the position consistently adopted by Mr. Atake SAN from the trial High court that he was relying on the want of jurisdiction of the trial Court in his application to strike out the writ of summons and statement of claim of the plaintiff. He did not advert to the issue of a

demurrer. In the course of his oral argument before us, his attention was drawn to paragraph 2 of the amended statement of claim, which reads as follows-

"2. *The 1st and 2nd Defendants herein are the beneficial owners and/or Head Owners/Charterers of the M.V."S. Araz" the 4th Defendant herein. The 3rd Defendant is the owner of the 4th Defendant. Vessel Chartered to the plaintiff herein and were sued as such in view of the uncertainty of the identity of the true owners of the Vessel.*"

Mr. Atake replied that the Defendant was contesting the correctness of the averment in that paragraph. He conceded that if those averments were found to be correct, the application brought by the Defendants before the Federal High Court would have been unnecessary. Since facts are contested a trial of the issues become inevitable.

Mr. Atoyebi, learned Counsel to the Respondents submitted that Appellants did not challenge the jurisdiction of the Federal High Court. The application also sought to defeat the action of the Plaintiff's in limine. Learned Counsel therefore submitted that the defendants could not do this without filing a defence and leading evidence. Mr. Atoyebi replied to arguments on the construction of section 5 (4) (a) of the Admiralty Jurisdiction Act, 1991.

I should now consider the submissions of the parties before us. It seems to me that Mr. Atake learned Senior Counsel for the Appellant based his argument on the want of jurisdiction in the court, hence his effort to construe the provisions of section 5 (4) (a) of the Admiralty Jurisdiction Act. 1991. I agree with the submission of Mr. Atoyebi for the Respondents that Appellants did not challenge the jurisdiction of the Court in any manner. This is because neither the composition of the membership, nor the subject-matter of the action has been challenged. See Gabriel Madukolu v. Nkemdilim (1962) 1 All NLR. 587. None of the grounds relied upon challenged the jurisdiction of the court. The formulation in issue (11) is not a challenge of the jurisdiction.

As a matter of practice, objection of grounds of want of jurisdiction in the court can be raised even before pleadings have been ordered in the case. Applicant was in order in this ground.- See National

Bank v. Shoyoye (1977) 5 SC. 181. It is elementary principle that the jurisdiction of the court is determined by the claim on the writ of summons of the plaintiff - See Adeyemi v. Opeyori (1976) 9-10 SC. 31. For the purpose of determining the cause of action the court must accept the averments of the plaintiff - See Joseph Ayanboye & Ors. vs. Balogun B (1990) 5 NWLR. 398. There is nothing to show that the trial court lacked jurisdiction to hear the claim before it. Accordingly if there is jurisdiction applicant can only determine the case in limine by application under Rules of Court - Shell-BP Petroleum Dev. Co. of Nigeria & Ors. V. C M. S. Onasanya (1976) 6 SC. 89.

In the Federal High Court, the Rules of Court enable a defendant to apply to dismiss an action where he conceives he has a good legal or equitable defence to the suit. Order 27 Rules of the Federal High Court 1976 provide as follows - D

"1. Where a Defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the Defendants, he may raise this defence by a motion, that the suit be dismissed without any answer upon questions of fact being required of him.

2. For the purposes of such application, the Defendant shall be taken as admitting the truth of the plaintiff's allegations, and no evidence respecting matters of fact, and no discussions of questions of fact, shall be allowed. F

3. The Court on hearing the application, shall either dismiss the suit or order the Defendant to answer the plaintiff's allegations of fact, and shall make such order as to costs as the court deems just." G

Under these rules, the application to dismiss the suit must be made before issue is joined, i.e. before the defence files a statement of defence - see Odivo v. Obor (1974) 2 SC.23. The applicant relying on this rule for dismissal of an action on grounds of law is taken to have accepted that all the facts as alleged by the plaintiff are true - See Irona Nwadiaro & ors. v. Shell Petroleum Development Co. of Nigeria Ltd. (1990) 5 NWLR. 522. The Defendant is not in this procedure allowed to contest the truth H

or otherwise of the facts pleaded in the claims. They are to be taken as established - See Fidelis Oguchi & anor. v. Federal Mortgage Bank of Nigeria Ltd. (1990) 6 NWLR. 330.

The Defendant having not challenged the jurisdiction of the Court
 B may, if his application was properly formulated, come within the pur-
 view of Order 27. To come under Order 27, Defendant must admit all
 the facts pleaded by the plaintiff and will not be heard to contest any. It
 is obvious from answers to questions from the court in argument, and
 C the text of the grounds relied upon for the application, that a number of
 the facts are disputed.

For instance ground (a) which contends that no cause of action
 is disclosed against the 4th Defendants on the contention that the 1st and
 2nd Defendants are neither the beneficial owners of the ship nor its char-
 D terers under a charter by demise. This is a challenge to the correctness
 of the averments in paragraph 2 of the statement of claim. Ground (b)
 is a challenge as to the validity of the order of arrest of the 4th Defendant
 made on the 28th February, 1995 on the ground that it was a nullity.
 E There was nothing to show that the order challenged made by the Fed-
 eral High Court on 28/2/95 for the arrest of the 4th Defendant was a
 nullity. On ground (c), the allegation is that no case has been made out
 against the 3rd Defendant in the writ of summons or in the amended
 F statement of claim. The approach of the Defendant on this ground was
 to answer the allegation by the filing of a copious affidavit showing the
 contrary to the averments in the statement of claim. There is no doubt
 this procedure is a infringement of the provisions of Order 27 rule 2 of
 which requires the application to have admitted the facts averred in the
 G statement of claim. Accordingly an application to dismiss the action in
limine cannot be supported by statement howbeit in an affidavit disputing
 the averments in the statement of claim.

Ground (d) which denies a breach by the Defendant of some
 H clauses in the charter party, has not done so on grounds of law. This
 defence will undoubtedly require evidence in support. Similarly the
 grounds relied upon in (e), (f), (g), (i), (j), are matters of defence to be
 determined by a trial court after hearing evidence and making findings of

fact. Also ground (h) which alleges misrepresentation of facts, cannot be determined with hearing evidence as to the correct position.

Having considered all the grounds relied upon I am satisfied they do not come within the purview of Order 27 as to support the application of the defendant to dismiss the action of plaintiff on grounds of law. It is well settled that where the ground of law relied upon by an applicant to dismiss the suit appears on the face of the motion, and if established, will be conclusive of the case of the applicant even in the absence of documentary evidence the court will grant the application. - See Martins v. Federal Administrator-General (1962) 1 All NLR .120, Katagum v. Roberts (1967) NMLR. 167. Where the objection to the claim against the Defendant in the writ of summons and statement of claim is patently unsustainable, it has always been accepted as good practice and unnecessary to continue to hear evidence in the action. In such a situation an application to dismiss the action would be granted. The rationale has been stated in Aina v. Trustees of Railway Corporation Pensions fund (1970) 1 All NLR. 281 where it was said;

"The whole basis of a demurer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained....."

This was what the Defendant intended to achieve, but unfortunately has not been able to accomplish. Dr. Atake, SAN, learned Senior Counsel for the Appellants who was also counsel to the Defendants in the High Court misconceived the position in law between challenging the jurisdiction of the court in an action, and applying to dismiss an action in limine. An application to dismiss an action on grounds of law does not necessarily challenge the jurisdiction of the trial court. It merely establishes that the plaintiff has not made out a cause of action. - See Bello Adegoke Foko & ors. vs. Oladokun Agboola Foko & ors. (1968) NMLR. 441. The court will take the preliminary objection if the point when taken will decide the whole litigation and dispense with further trial.

So long as the statement of claim discloses some cause of action or raises some issues fit for determination the mere fact that the case is weak and not likely to succeed is not sufficient ground for striking it out.

- See Irene Thomas & ors v. Timothy Olufosoye (1986) 1 NWLR. 669.

It is obvious from the grounds relied upon in the application of the Appellants that there is no challenge to the jurisdiction of the court. Besides, the defendants is disputing facts in the claim of the plaintiff, the resolution of which requires the filing of a statement of defence. In the circumstance the writ of summons of the plaintiff has a cause of action which requires a defence.

I am satisfied that the learned trial Judge was in error in granting the application of the Defendant to strike out the writ of summons and statement of claim of the plaintiff. The Court of Appeal was right in setting aside the judgment of the trial High Court. The Appeal is completely devoid of any merit and lacks substance. I also, like my brother Ogundare, JSC will dismiss this appeal. I award N10,000.00 costs to the plaintiff/Respondent. I make the same consequential orders.

ONU JSC

I had the privilege to read before now the judgment of my learned brother Ogundare, JSC. just read. I am in entire agreement with him that the appeal lacks merit and ought therefore to fail.

The facts giving rise to this appeal, which are not in dispute have been so admirably stated in the leading judgment of my learned brother that with then, I entirely associate myself. I therefore do not deem it pertinent here to review them except to add a few words of mine by way of comment in elaboration as follows:

Right from the inception of this case in the trial Court where the appellants were intent on circumventing its hearing by contending (a) that a cause of action was not disclosed against the 4th appellant on the ground that the 1st and 2nd appellants were neither the beneficial owners of the ship nor its charterers under a charter by demise, clearly that ground posed a challenge to the correctness of the averments in paragraph 2 of the amended statement of claim wherein it is averred as follows:-

"The 1st and 2nd Defendants herein are the beneficial Owners

and/or Head Owners/Charterers of the M.V."S. ARAZ", the 4th Defendant herein. The 3rd Defendant is the owner of the 4th Defendant Vessel chartered to the plaintiffs herein and were sued as such in view of the uncertainty of the identity of the true Owners of the Vessel ". (underlining is mine for emphasis).

(b) Where an averment of facts as in the underlined words above, in a statement of Claim, is being disputed the proper way to do so is not by filing an application to have the plaintiffs action dismissed in limine, but to file a defence traversing that averment of fact and establishing evidence at the trial on which the trial court will make a finding of fact either for or against the plaintiff on such averment of fact.

Thus, when at the trial court a trial strictly so-called was not embarked upon but rather proceedings founded upon a Ruling premised on the Amended statement of Claim and affidavit evidence proffered by the parties, the learned trial judge was clearly in error when in her Ruling dated 26/6/96 she, inter- alia, set aside the Writ of Summons as well as the Amended statement of claim, and by holding that the name of the 3rd defendant, that is , Owners of M.V."S" ARAZ", be struck out from the suit.

The appellants being aggrieved by that decision appealed to the Court of Appeal, Lagos Division, which in a considered judgment delivered on 15th February, 1999, allowed the appeal. It held (per Oguntade, JCA) among others that:-

"The issues could only be resolved in a proper trial. In view of the order I intend to make in this judgment I ought not to discuss issues 2, 3 and 4.

On issue V and VI, I think the Lower Court had been mistaken in its orders. The plaintiff's claims in its writ of Summons and Amended Statement of Claim were joint and several. Even if the Lower was correct (and I think it was not) to have held (1) that the plaintiff ought not to have brought an action in rem against the 4th Defendant. (2) that 3rd Defendant ought not to have been sued, the course open to the Lower Court was to strike out the names of the 3rd and 4th Defendants from the suit, and allow the suit to proceed as an action in personam against the

1st and 2nd Defendants. It was clearly a mistake to have set aside plaintiff's suit against the 1st and 2nd Defendants to whom the whole claim before the Lower Court against the Defendants was joint and several. If I had been able to hold that the procedure adopted by the Lower Court was right and that the conclusion reached concerning 3rd and 4th Defendants was correct, I would have struck out the 3rd and 4th Defendants from the suit and allowed the action to proceed as one in personam against the 1st and 2nd Defendants.

In the final conclusion, this appeal succeeds and is allowed. The ruling of Olomojobi, J. given on the 26th of September, 1998, is set aside in its entirety. I make an order striking out the Defendants' application filed on the 25th March, 1996. It is ordered that the Defendants should file their statement of Defence to enable the Lower Court determine the suit on the merits....."

In this Court, the three issues submitted by the Appellant (the Respondents adopted same) as arising for determination, are:-

"I. Can the admiralty jurisdiction of the Federal High Court be invoked in this particular case having regard to the provision in section 5 (4) (a) of the Admiralty Jurisdiction Decree 1991, and the Decisions by the Court of Appeal, in the cases of M.V."S. ARAZ' 'V. SCHEEP (1996) 5 NWLR (part 447) 204, and M.V."S. ARAZ" v. LPG SHIPPINGS A. (1996) 6 NWLR (part 457, 720). In other words, are the persons whom the Plaintiffs/Respondents say they have a contract with the beneficial owners with respects to all the shares in the motor Vessel "S. Araz" or are they charterers of the Vessel under a charter by demise?

II. Can an action in rem and one in personam be commenced by the same initiating process?

III. Does the provision in section 5 (4) of the Admiralty Jurisdiction Decree, 1991, raise a jurisdictional or procedural issue or is the provision in the manner of a demurrer; and was the application dated the 25th March, 1996, a demurrer application as was decided by the learned justices of the Court of Appeal?"

At the hearing of this appeal on 12th October, 1999, upon his attention being adverted to issue No. 2 as being at best academic, the

learned Senior Advocate for the Appellants readily conceded. In respect of issue 3, his attention was drawn to paragraph 2 of the Amended statement of Claim (ibid). He agreed with us that the facts deposed to in the affidavits with statements therein contained are disputable. That being so, demurrer especially with regard to the statement of Claim, would be out of the question. Thus, because of the irreconcilable points therein deposed to or pleaded which needed to be resolved, the Defendants ought to be allowed to file their statement of Defence and the case allowed to proceed to trial on the merits. See Ojengbede v. M. O. Esan (Loja Oke) (1987) NWLR (part 63) 49, in which the decisions of Olu-Ibukun v. Olu-Ibukun (1974) 2 S.C. 41 through Falobi v. Falobi (1976) 1 NWLR. 169, cited with approval in the case of Okoye & Anor. v. Lagos State Government & 2 Ors. (1990) 3 NWLR (pt.136) 115 at 123 which are deemed herein as apposite it being clear that the prior responsibility of the Court of Appeal (as well as other courts) is to hear the parties, not to shut them out, it is only right to hear the merits of the case or appeal and decide according to those merits - per Oputa, JSC. in Nneji v. Chukwu (1988) 3 NWLR (part 81) 184 at 206; Nigerian Cement Co. Ltd. v. N. R. C. & Anor. (1992) 1 NWLR (part 220) 747; Cardoso v. Daniel (1986) 2 NWLR (part 20) at 45; and U.T.C. v. Pamotei (1989) 2 NWLR (part 103) 244 at 268 and 294. This is why I am of the opinion that the court below was right to have allowed the respondent's appeal when it sent the case back to the trial court for it to be heard on the merit.

On brief writing and the failure and/or refusal of learned Senior Advocate for the appellant as well as learned Counsel for the respondents to be bound by stare decisis as well as to heed the sustained admonitions of the highest courts of the land in the past, enough has been said in the leading judgment which I cannot improve upon. It will suffice here for me to add that any failure and/or refusal to abide by court admonitions for the future in writing briefs briefly ought to be visited with penalties such as sanctions to be imposed on counsel personally in place of the litigants, to pay costs, and this, to instil some sanity.

It is for the above reasons and the fuller ones contained in the leading judgment of my learned brother Ogundare, J. S. C. that the ap-

peal herein is dismissed by me with similar consequential orders inclusive of costs as contained therein.

IGUH JSC

B

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I agree entirely with the reasoning and conclusions therein reached. I have nothing more to add

C

Accordingly, I, too, dismiss this appeal and affirm the orders of the 15th February, 1999 made by the court below. I also abide by the same consequential orders, including those as to costs, therein made.

D

AYOOLA JSC

E I have had the advantage of reading in advance in draft the judgment just delivered by my learned brother, Ogundare, JSC. I am in entire agreement with him that the appeal should be dismissed. For the reasons he gives, I too would dismiss the appeal with N10,000.00 costs to the respondent.

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