

COURT OF APPEAL
ENUGU DIVISION
25TH JULY, 1996. CA/E/140/95
CORAM:- A. O. EJIWUNMI, N. TOBI, E. C. UBAEZONU, JJCA

AFRICAN CONTINENTAL BANK APPELLANT
AND
MRS. MARY OKONKWO RESPONDENTS
COMMISSIONER OF POLICE
ISAAC AIGBE (DPO) OGUI POLICE STATION

ACTIONS - Commencement of action - Under the Fundamental Rights provisions - Objection raised by the pleadings of the defence - Is right.

APPEALS - Leave to appeal - Against the refusal of the lower court to award costs - Failure to obtain leave - Renders the ground of appeal and the issue raised thereon incompetent.

CONSTITUTIONAL LAW - Fundamental rights - Enforcement - Claim for the return of the property seized by the Police - Action commenced under the Fundamental Rights (Enforcement Procedure) Rules - Is proper.

DAMAGES - General damages - Award of general damages - Care must be taken not to make unreasonable award.

DAMAGES - Special damages - Award of - Applicable principle - It is not the law - That where there is no counter-affidavit as in the instant case - Then the claim must be deemed to have been accepted.

DAMAGES - Special damages - The rule - Is that special damages are items of loss - Which the plaintiff must particularize in his pleadings - And these must be strictly proved.

FACTS

Before the Enugu High Court, the plaintiff/1st respondent commenced on action against the appellant and the 2nd and 3rd respondents. She sought for an order of the court to enforce her fundamental rights as guaranteed by sections 31, 33 and 40 of the constitution of the Federal Republic of Nigeria. Which said rights have been and are being infringed and unless restrained by the Honourable Court will continue to be infringed by the respondents by their acts of seizing and detaining her personal properties including some cars. It was alleged that the plaintiff's son who was employed by the appellant stole some money belonging to the appellant. The appellant consequently caused the 2nd and 3rd respondents to seize and detain the plaintiff's properties.

At the conclusion of hearing the learned trial judge delivered a ruling in favour of the plaintiff and made an order for the release of her properties. Being dissatisfied with the ruling and orders of the lower court, the appellant has appealed to the Court of Appeal, Enugu Division. The 1st respondent dissatisfied with the orders as to damages, also filed a cross-appeal. The appellant raised three issues with respect to the main appeal. Issues were also raised for the cross-appeal.

ISSUES FOR DETERMINATION

(i) Was the trial court right to entertain the respondents' complaint brought under the Fundamental Right Procedure Rules for the return to her of the property seized by the police in the course of their investigation when the respondent should have originated the action by way of a writ of summons?

(ii) Was the trial court right in making an award of N200,000.00 general damages against the appellant when all the appellant did was a report it made to the police on the theft of its money by one Kenneth Okonkwo (presumably the respondent's son) without any evidence of damage to the respondent resulting directly from that report and without calling evidence on the substantiality of the damage claimed and the subsequent award?

(1) Was the court right in not awarding costs to the successful litigant, the 1st respondent.

HELD (Unanimously allowing the appeal in part and dismissing the cross-appeal per lead judgment delivered by **EJIWUNMI JCA**)

Actions - Commencement of action

1. The first issue that falls for consideration is whether the 1st respondent was right to have commenced this action under the Fundamental Rights provisions of the Constitution. The right question is whether the issue was properly raised by the pleadings of the defence. I think the answer to that question is singular. It is right to raise it, and the Judge was right to have taken the objection and ruled thereon. See Akinsete v. Akindutire (1966) 1 All NLR 147. (p. 384 B)

Constitutional Law - Fundamental rights

2. I must refer to the argument as to whether the 1st respondent fulfilled the provisions of s. 40(1) of the Constitution to bring herself within the provisions of the Fundamental Right (Enforcement Procedure) rules. The above provisions fell for consideration in A.J.A. Adewole & Others v. Alhaji Jakande & Others (1981) 1 NCLR 262 and at p. 282-283 Omololu Thomas J (as he then was) said thus:-

"The effect of the provisions of the section is mainly to require that there shall not be acquired compulsorily any property or interest in property, movable or immovable, without prompt payment of compensation. The provision also guarantees right of access to the court for determining the amount of compensation. From the words used in the section, there is the implication, in my opinion, that the right to private property or interest in private property is preserved, having regard particularly to the provisions of sections 32 and 40(2) and (3). In coming to the conclusion, the full effect of the whole of Chapter II, particularly sections 16 and 17, is in my view to guarantee the right. The principle that such right may be properly implied has been long established.

I adopt with great respect this interpretation of s. 40 of the Constitution by Omololu Thomas J, who later became a member of this court, and where he continued to contribute immensely to the development of the law of the Constitution. That in the instant case, the 1st respondents' right was undoubtedly invaded when the appellant caused her properties

to be detained, was not shown that she was in a way involved with the criminal activities of her son, Kenneth Okonkwo who was an employee of the appellant. The conduct of the appellant is clearly reprehensible. I ask must the sin of a son be visited on the mother simply because of that relationship. I think not. To do that without any reason is inimical to justice. It follows from all I have said that the question as to whether the 1st respondent was right to have commenced against the appellant under the Fundamental Rights (Enforcement Procedure) Rules must be resolved against the appellant. (p. 387 D)

Special damages - The rule

3. I have in the course of the preparation of this judgment read the ruling of the learned trial Judge. It is clear that she did not give any reasons for making the award ordered in favour of the 1st respondent. There can be no doubt that the claim under the head of special damages cannot even be countenanced. The rule in respect of the claim in special damages is that special damages are items of loss which the plaintiff must particularize in his pleading to enable him give evidence thereof and recover thereon. These must be strictly proved. See Odumosu v. A.C.B. Ltd. (1976) 11 S.C. 55; A.G., Oyo State v. Fairlakes (No.2) (1989) 5 NWLR (pt. 121) 255. (p. 390 B)

Special damages - Award of

4. It is manifest from the printed record that the 1st respondent did not give evidence to support any of the various items of her claim she pleaded as special damages. It is not sufficient or even right for the learned trial Judge to have taken the view that as there is no counter affidavit from the appellant, then the claim must be deemed to have been accepted. That is not the applicable principle of law in considering whether special damages ought to be awarded. In any event as her Lordship of the lower court specially said that the award is for general damages, I will take it that in awarding that sum of N200,000.00 she had not taken into consideration the claim in special damages. (p. 390 F)

Damages - General damages

5. If even general damages ought to be awarded in favour of the 1st respondent, care must be taken not to make unreasonable award in this area. From what can be gathered from the printed record, the seizure of the 1st respondent's vehicle was ordered by the court on 1/11/93 upon an ex-parte order to that effect. The 1st respondent was not a part to that order. So it would appear that it was after her vehicles were seized that she became aware of what had befallen her. It was upon being so aware that she commenced the present proceedings against the appellant and two others. The order releasing her vehicle was made on the 25th of October 1994. I think that given the circumstances of this case, a sum of N50,000 is condign as general damages, and I so order. (p. 391 A)

D

Appeals - Leave to appeal

6. The other complaint concerning the failure of the learned trial Judge to award costs is properly met by the learned counsel for the appellant. The 1st respondent to succeed ought to have obtained the leave of this court or the lower court to appeal against the refusal of the lower court to award costs in her favour. See s. 220(2)(c) of the Constitution. And as there is no evidence that such leave was obtained, the ground of appeal is struck out. And the issue raised thereon becomes a non-issue. (p.391D)

F

NOTABLE POINTS OF INTEREST**EJIWUNMIJCA**

1. Order for the compulsory removal of property of an innocent person
However in the instant case on appeal, the facts show that the properties of the 1st respondent were compulsorily ordered to be removed from her, and it is uncontroverted that the properties were removed. It is also clear that upon the facts deposed to in the affidavit evidence filed in the matter that it is not shown that the 1st respondent had anything to do with the offence of stealing alleged against her son. Was it right for the appellant to have seized what are clearly the properties of the 1st respondent in the circumstances. I think not. (p. 385 C)

G

H

UBAEZONUJCA

2. The principle of stare decisis

The case of Peterside v. International Merchant Bank (Nigeria) Ltd. (supra) cited by learned counsel for the appellant, is quite a distance from the facts of this case. Since my learned brother has brought out the distinction between the facts of that case and the present one, I should not repeat the exercise here, but not before I ask this question: how can a case of master and servant which resulted in the dismissal of the latter be legal basis for the principle of stare decisis in a matter which clearly deals with the breach of fundamental rights entrenched in the Constitution? While Peterside dealt with the former situation the present appeal deals with the latter situation. There is therefore no relationship, legally or factually between the two situations. (p. 392 E)

3. Criminal responsibility is personal and cannot be transferred

The second area is the arrest of the 1st respondent by the police. I know of no law which authorizes the police to arrest a mother for an offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred. While I am aware of cases of vicarious liability in criminal law, the instant case is certainly not one. A police officer who arrests 'A' for the offence committed by 'B' should realize that he has acted against the law. Such a police officer should, in addition to liability in civil action, be punished by the police Authority. As a matter of fact, it bothers us so much for the Police operating the law of arrest after three decades of Nigeria's independence to arrest and detain innocent citizens of this country for offences committed by their relations. That is a most uncivilized conduct and one that any person with a democratic mind should thoroughly detest and condemn. I detest and condemn the uncouth practice. (p. 392 G)

H REPRESENTATION

E. C. Ibe with E. A. Ngene for the Appellant

C. O. Z. Obiekwe for the Respondent/Cross-appellant

CASES REFERRED TO

Akinsete v. Akindutire (1996) 1 All NLR 147

Odumosu v. A.C.B. Ltd. (1976) 11 S.C. 55

A.G. Oyo State v. Fairlakes (No.2) (1989) 5 NWLR (pt. 121) 255

Peterside v. International Merchant Bank (Nigeria) Ltd. (1993) 2 NWLR B (pt. 278) 712

Agunwa v. Onukwe (1962) 2 SCNLR 275

Bazil v. Fajebe (1990) 6 NWLR (pt. 155) 172

Horst Sommer v. F.H.A. (1992) 1 NWLR (pt. 219) 548

C

STATUTE REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, ss 31, 33, 40 and 220 (2) (c)

D

LEAD JUDGMENT BY EJIWUNMI JCA

This appeal is against the judgment of the Enugu High Court, coram Edozie J., holden at Enugu in Suit No. E/MISC. 29M/94.

In that suit the plaintiff, now 1st respondent commenced this E action against the appellant and the 2nd and 3rd respondents to this appeal. Before that court the 1st respondent and the 2nd and 3rd respondents had acted in breach of her Fundamental Rights commenced proceedings having first received leave to that effect, for the following reliefs:- F

An order of court for the enforcement of the fundamental rights of the applicant which said Fundamental Rights guaranteed by sections 31, 33 and 40 of the Constitution of the Federal Republic of Nigeria and which said rights have been and are being infringed and unless restrained G by an order of the Honourable Court will continue to be infringed by the respondents by their following acts, seizure and detention of the following personal properties, viz:-

- (1) Second Hand Toyota Corrola Saloon Car No. LAA 1912 A.
- (2) Second Hand Peugeot 404 Saloon Car No. ECC 3294 H
- (3) Second Hand Mazda Saloon Car No. AB-8-5.
- (4) One Debo Refrigerator bought on 9/12/87.
- (5) One 2 candle Ben Water filter purchased on 25/10/87.

(6) One Table fan bought in 1987.

(7) One Phillip electric pressing iron bought in 1989. Thereby depriving the applicant of the use of the properties for private and commercial purposes.

B (a) The use of the positions and officers of the Nigeria Police Force to intimidate, subdue and frighten the 1st respondent in respect of crime she did not commit or a co-accused or an accomplice.

(b) The complete violation of the applicant's constitutional rights of privacy and dignity of her person.

C 2. A declaration that the respondents seizing and detaining of the applicant's above mentioned moveable properties with out recourse to court and due process of the law and an order of the court was wrongful and unlawful.

D 3. An order setting aside the order of High Court 5, Enugu made on 1st November, 1993 on ground of lack of jurisdiction, fraud and merit.

E 4. An order that the respondents jointly and severally release all applicant's moveable properties stated herein above.

F 5. An order that the respondents jointly and severally replace all damaged or removed parts of the said properties or in the alternative payment of expenses assessed to be incurred or incurred in repairing the damages or effecting replacement.

6. N2,000.000.00 (Two million naira) being exemplary, compensation and punitive damages against the respondents jointly and severally.

G The applicant, now 1st respondent also attached to the said motion her grounds for seeking the reliefs stated above.

H It does not appear from the printed record that the 2nd and 3rd respondents, namely the Commissioner of Police and Isaac Aigbe, the (DPO) Ogui Police Station took part in the proceedings in the lower court. But the appellant who was represented by its learned counsel, E.C. Ibe took part fully at the hearing before that court. The learned trial Judge after listening to the submission of learned counsel for the appellant and the 1st respondent delivered a ruling in favour of the 1st respondent.

The ruling was concluded thus:-

"In the present case, there is no conflict in the affidavit evidence as respondents are deemed to have admitted all the facts in the affidavit in support of the application. An interim order can be discharged when there is no reason for its continue existence as in this case. And I must stress that the use of positions and officers of Nigeria Police to intimidate, subdue and frighten the applicant in respect of an alleged crime she did not commit or an accomplice is very reprehensible and should be discontinued forthwith. As the respondents have failed to establish that the alleged stolen money was used to buy the applicants vehicles released to her. Therefore the respondents are hereby ordered to release the following vehicles to the applicant forthwith."

1. Mazda Saloon Car No. AB-8-5
2. Toyota Corrolla Saloon Car No. LAA 1912 A.
3. Peugeot Saloon Car No. ECC 3294.

Being dissatisfied with the ruling and orders of the lower court, the appellant has appealed to this court. Pursuant thereto, three original grounds of appeal were filed and a fourth ground with the leave of this court was filed.

The 1st respondent, not being satisfied with the orders as to damages, also filed a cross-appeal. Briefs of argument were filed and exchanged.

At the hearing before us learned counsel adopted and placed reliance on their respective briefs. In the main appeal the learned counsel to the appellant identified the following issues for the determination of the appeal:

(i) Was the trial court right to entertain the respondents' complaint brought under the Fundamental Right Procedure Rules for the return to her of the property seized by the police in the course of their investigation when the respondent should have originated the action by way of a writ of summons?

(ii) Was the trial court right in making an award of N200,000.00 general damages against the appellant when all the appellant did was a report it made to the police on the theft of its money by one Kenneth

Okonkwo (presumably the respondent's son) without any evidence of damage to the respondent resulting directly from that report and without calling evidence on the substantiality of the damage claimed and the subsequent award?

B (iii) Was it proper for the trial court to vacate an order made in an earlier suit on the ground that the order was made Ex parte when in fact it was made in the course of the court's judgment in that suit and in the presence of the parties thereto?

In respect of the cross-appeal, the issues raised are as follows:-

C (1) Was the court right in not awarding costs to the successful litigant, the 1st respondent.

(2) Whether the amount awarded was adequate damages suffered by the 1st respondent in the circumstances.

D The cross-respondent also filed a brief and the issues identified therein read thus:-

(1) Is the cross-appellant entitled to any damages from the cross-respondent when it has not been shown or established that the cross-respondent caused any legal injury to the cross-appellant?

(2) Where an application for costs is not made to the court, would it be a wrong exercise of judicial discretion if the court makes no order on that issue?

F (3) Can an appeal on costs be entertained by an appellate court without leave of the trial court or the appellate court having been first sought for an obtained?

The issues raised above on damages awarded to the 1st respondent cross appellant would be considered with the issue raised by the appellant in the main appeal. The issue as to costs would also be considered later in this judgment. The first issue in the appellant's brief will now be considered.

H On that first issue, the question is whether the learned trial Judge was right to have upheld the claim of the 1st respondent under the Fundamental Rights Procedure Rules. Put briefly the contention made for the appellant in its brief by its learned counsel E. C. Ibe Esq., is that it is not every infringed right that falls within the Fundamental Rights

provision. It is also argued for the appellant that for the 1st respondent must comply with the provisions of section 40 of the Constitution of Nigeria (1979) to sustain her claim. By virtue of that section, the 1st respondent is obliged to establish that possession was taken of her property compulsorily, and her right over or interest in the property has been acquired compulsorily. In support of the above reference is made to Peterside v. I. M. B (Nig) Ltd. (1993) 2 NWLR (pt. 278) 712 at 730. It is conceded, however, that while the 1st respondent may have a right of action the cause of action does not lie under the Fundamental Right Provisions of the Constitution of 1979. She ought to have proceeded by a Writ of Summons, it is argued and not by way of the Fundamental Rights Enforcement Procedure Rules. For that submission, the case of Aliyu v. Ibrahim (1992) 7 NWLR (pt. 253) 361 was cited. And having proceeded wrongly under the Fundamental Procedure rules, it is submitted for the appellant that her action ought to have been struck out.

For the 1st respondent, the thrust of the submission argued in her behalf in the 1st respondents' brief is that the 1st respondent was right to have commenced her action under the Fundamental Right (Enforcement Procedure) Rules. With regard to the provisions of section 40 (1) of the Constitution, it is argued for the 1st respondent that the appellant acted in flagrant breach of its provisions. That the 1st respondent was therefore well within her rights to have commenced this action as she did. It is further contended for the 1st respondent that the appellant is not by virtue of the provisions of section 40(2), empowered to detain and take compulsorily the property of any person whose conduct is under police investigation. It is the police who has that right, and in any event, the appellant is not the person whose conduct was under investigation by the police. The 1st respondent concedes that in construing the provisions of s. 40 of the Constitution, the word "and" occurring in the said provisions ought to be read conjunctively, but contends that the 1st respondent gave her consent to the taking of her properties as established against the appellant. For the meaning to be ascribed to "right" and "interest", reference was made to Jowitts Dictionary of English Law, 2nd Edition by John Burhe. And also to David-Osuagwu v. A.G. Anambra State (1993) 4

384 A.C.B. v. Okonkwo (1999) 2 KLR Ejiwunmi JCA
NWLR (pt. 285) at page 13; Bello v. A.G., Oyo State (1986) 5 NWLR
(pt. 45) 828, and Shugaba Darman v. Minister of Internal Affairs (1982)
3 NCLR 915.

Having considered the issues raised and the arguments of learned
B counsel in the briefs filed on behalf of the parties, **the first issue that
falls for consideration is whether the 1st respondent was right to
have commenced this action under the Fundamental Rights
provisions of the Constitution.**

C **The right question is whether the issue was properly raised
by the pleadings of the defence. I think the answer to that question
is singular. It is right to raise it, and the Judge was right to have
taken the objection and ruled thereon. See Akinsete v. Akindutire
(1966) 1 All NLR 147; I. K. Martins (Nig) Ltd. v. U.P.L. (1992) 1
D NWLR (pt. 217) 322; Okere v. Nlem (1992) 4 NWLR (pt. 234) 132.**

With regard to whether the action was properly commenced
under the Fundamental Rights (Enforcement Procedure) Rules under the
Constitution, it is noted that the appellant has placed heavy reliance on the
E observation of my learned brother Niki Tobi, J.C.A. in Kevin Peterside v.
International Merchant Bank (Nigeria) Ltd. (1993) 2 NWLR (pt. 278)
712 where at page 730, His Lordship said thus:-

*"It is not my understanding of the law that the expression "civil
F rights and obligations" under the subsection covers all civil actions
available to a plaintiff, whether they are founded on tort, contract, property
law, commercial or mercantile law, admiralty law and what have you. If
it were to be so, then all civil actions could have found legitimacy under
the Fundamental Rights (Enforcement Procedure) Rules, 1979.*

G *But that is never the intention of the Rules."*

I cannot take any objection to the above observation of my learned
brother on when the Fundamental Rights (Enforcement Procedure) Rules
apply in the determination of the right of a person. However, it seems to
H me that in view of the principle that every case depends on its own facts,
I should be wary of reaching a conclusion that the instant case on appeal
cannot be considered under the Fundamental Rights (Enforcement
Procedure) rules. This is because I need to examine the facts in the

content of the law and the claim. In the Peterside case (supra) the facts disclosed that the dispute arose from the dismissal of the appellant by his employers, i.e. the respondent. There was nothing to show in that case that any of the personal properties of the appellant was unlawfully detained or compulsorily acquired. Nor was there anything to suggest that the appellant was himself unlawfully detained or any undue assault on his person. Hence, I entirely agree with the decision in that case that the appellant was wrong to have commenced his action under the Fundamental Rights (Enforcement Procedure) Rules.

However in the instant case on appeal, the facts show that the properties of the 1st respondent were compulsorily ordered to be removed from her, and it is uncontroverted that the properties were removed. It is also clear that upon the facts deposed to in the affidavit evidence filed in the matter that it is not shown that the 1st respondent had anything to do with the offence of stealing alleged against her son.

Was it right for the appellant to have seized what are clearly the properties of the 1st respondent in the circumstances. I think not. And on whether the appellant was right to have proceeded under the Fundamental Rights (Enforcement Procedure) Rules, permit me to refer to the unreported decision of his court in Theresa Onwo v. Nwafor Oko & 12 Ors. (CA/E/80/93), (1996) 6 NWLR (pt. 456) 584 (Coram Okay Achike, Ejiunmi, Niki Tobi, JJCA) decided on 15th day of January 1996, this court held that the appellant was right to have sought for reliefs for the breach of her fundamental rights under the Fundamental rights (Enforcement Procedure) Rules. In that case the appellant had her head shaven forcefully by the respondents as part of the ceremony ordered by the native community following the death of her husband.

The appellants' claim was that before her husband, he had and with her became Christians, as they became "Born again into Christianity". For that reason she was not prepared to mourn her husband as an unbeliever. But the respondents would not have any of that as an excuse. After her hair was forcibly shaved off her head, she commenced the action against the respondents as aforesaid. The lower court ruled against her on the premise that she cannot commence her action as presaged.

On appeal to this court, the appeal was allowed. Okay Achike, J.C.A., in the course of delivering the lead judgment, said inter alia thus- pages 18-19:

"Undoubtedly, satisfied by the averments therein the lower court, and without hesitation, his Lordship granted the appellant leave to institute proceedings against the respondents for the enforcement of her fundamental rights guaranteed by the 1979 Constitution. It is, however, amazing for the same trial learned Judge to somersault thereafter and decline jurisdiction on the ground that the Fundamental Rights (Enforcement Procedure) Rules 1979 does not operate between individuals inter se, rather than that the appellant had not made out a case on the preponderance of affidavit evidence placed before him. I do not share that view of learned Judge. That view is not supported by the unambiguous wordings of sections 30 to 40 of the 1979 Constitution.

In reaching his decision, the lower court placed reliance on Onwuama Madu v. Aaron Onuaguluchi & 4 ors (1985) 5 NCLR 365, wherein Ozobu J, (as he then was) opined that Fundamental Rights (Enforcement Procedure) Rules do not operate against private individuals inter se but only against public persons. It is interesting to observe that Ononiba J, was far from being satisfied with the judgment in Madu v. Onuaguluchi (supra) because he noted that no "exhaustive reasons" were given why the rules should not apply between individuals inter se. I am also satisfied that that case was not a reasoned judgment in so far as the pronouncement on non-applicability of the rules between individuals inter se is concerned. In any event, even if it was an "exhaustively" considered judgment I shall decline to follow it as it is not binding on me particularly for the reason given above.

I am clearly of opinion that the current and better view of the shape of the law in this regard must be read in the light of the Court of Appeal decision in Chief Onu Uzoukwu v. Igwe Chukwudebelu Ezike Ezeonu II (1991) 6 NWLR (pt. 200) 708. The opinion of the court is that from the wordings of some of the provisions of Chapter IV, to wit, sections 30 to 40 of the 1979 Constitution, that violation of fundamental rights may entitle an individual to seek redress against an individual or state,

having regard to the circumstances of the right violated. To this view, and for reasons earlier stated in this judgment, I respectfully subscribe."

And in my own judgment in the same case after a review of such cases as Ransome-Kuti & Ors. v. A-G. of the Federation and Ors. (1985) 2 NWLR (pt. 6) 211; (1985) 6 S.C. 246 I said thus:- See page 17. B

"From what I have said above, it is patent that the learned Judge was wrong in reaching that conclusion. His decision would therefore be reversed. Another argument which was canvassed in this court for up-holding the judgment of the lower court deserved to be considered. This is the contention that the fundamental human rights provisions of the Constitution can only be called in aid by a party who is seeking redress against the Government and or its agents. I think that notion of the rights entrenched in the Constitution of 1979 is wrong, when those rights are reviewed against the provisions of section 6 (6) of the 1979 Constitution." C D

Before concluding this issue, **I must refer to the argument as to whether the 1st respondent fulfilled the provisions of s. 40(1) of the Constitution to bring herself within the provisions of the Fundamental Right (Enforcement Procedure) rules. s. 40(1) of the Constitution reads:-** E

"No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over, or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law, that among other things:- F

(a) requires the prompt payment of compensation thereof; and G

(b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in that part of Nigeria". H

(Other provisions in the section are here, generally, very relevant for the purpose of determining the issues on this section).

The above provisions fell for consideration in A.J.A. Adewole

& Others v. Alhaji Jakande & Others (1981) 1 NCLR 262 and at p. 282-283 Omololu Thomas J (as he then was) said thus:-

"The effect of the provisions of the section is mainly to require that there shall not be acquired compulsorily any property or interest in property, movable or immovable, without prompt payment of compensation. The provision also guarantees right of access to the court for determining the amount of compensation.

From the words used in the section, there is the implication, in my opinion, that the right to private property or interest in private property is preserved, having regard particularly to the provisions of sections 32 and 40(2) and (3). In coming to the conclusion, the full effect of the whole of Chapter II, particularly sections 16 and 17, is in my view to guarantee the right. The principle that such right may be properly implied has been long established.

In judicially construing the 'law of the land' as inserted in the Magna Carta in the thirty-ninth Chapter thereof to mean that no power was delegated to the legislature to invade the natural rights of the individual, and that where express limits were lacking implied checks must be found to protect these rights, Justice Green in Bank of State v. Cooper, 2 Verg. 599, 603 (1831) said:-

"There are eternal principles of justice which no government has a right to disregard. It does not follow therefore, because there may be no restriction in the Constitution prohibiting a particular act of the legislature that such act is therefore constitutional. Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. "The common law" says Coke (8 Coke, 118) "adjudgeth a statute so far void."

I adopt with great respect this interpretation of s. 40 of the Constitution by Omololu Thomas J, who later became a member of this court, and where he continued to contribute immensely to the development of the law of the Constitution. That in the instant case, the 1st respondents' right was undoubtedly invaded when the appellant caused her properties to be detained, was not shown that she was in a way involved with the criminal activities of her son,

Kenneth Okonkwo who was an employee of the appellant. The conduct of the appellant is clearly reprehensible. I ask must the sin of a son be visited on the mother simply because of that relationship. I think not. To do that without any reason is inimical to justice.

It follows from all I have said that the question as to whether the 1st respondent was right to have commenced against the appellant under the Fundamental Rights (Enforcement Procedure) Rules must be resolved against the appellant.

I now turn to the consideration of the issue of damages. The 1st respondent having cross-appealed. The butt of her appeal being whether the sum of N200,000 awarded in her favour as general damages awarded is inadequate as her claim fell under three major heads, namely (i) Special damages which include loss of income and parts of the said cars. (ii) Labour and repairs of the cars and (iii) General damages. The 1st respondent appellant then gave the following as particulars of her loss, and I quote:

"Total loss of income as averred at page 7 of the record and supported by affidavit in respect of the three cars was N163,6000 from 30/7/93 to 31/10/93 but the period from 1/11/93 - 25/10/95 (inclusive of date of judgment) totalling 329 days was not taken into account in the court's decision. The amount left out is N604,600.00

as show below:-

(a) ECC 329 at N500.00 each day	N164,000.00
(b) LAA 1912 A at N700.00 each day	220,300.00
(c) AB 85 at N700.00 each day	220,300.00

Loss of parts of the three cars

(a) In ECC 329 total loss was	14,100.00
(b) In LAA 1912 A the total loss was	9,400.00
(c) In AB the loss was	<u>14,800.00</u>

N38,300.00

Labour costs at the time of instituting the action were:

- (a) In ECC 329 N3,500.00
- (B) In LAA 1912 A. 2,500.00

(c) *In AB 85* 1,700.00
 N7,600.00

The appellant as the cross-respondent contests this issue. It is the submission of learned counsel to the appellant/cross-respondent that the 1st respondent is not entitled to any award in damages. Submits further that the trial court gave no reasons for even the sum of N200,000 awarded to the 1st respondent as general damages. Cites Ibeanu v. Ogbeide (1994) 7 NWLR (pt. 359) 697.

I have in the course of the preparation of this judgment read the ruling of the learned trial Judge. It is clear that she did not give any reasons for making the award ordered in favour of the 1st respondent. There can be no doubt that the claim under the head of special damages cannot even be countenanced. The rule in respect of the claim in special damages is that special damages are items of loss which the plaintiff must particularize in his pleading to enable him give evidence thereof and recover thereon. These must be strictly proved. See Odumosu v. A.C.B. Ltd. (1976) 11 S.C. 55; A.G., Oyo State v. Fairlakes (No.2) (1989) 5 NWLR (pt. 121) 255; Agunwa v. Onukwe (1962) 2 SCNLR 275; Bazil v. Fajebe (1990) 6 NWLR (pt. 155) 172; Horst Sommer & Ors. v. F.H.A. (1992) 1 NWLR (pt. 219) 548.

It is manifest from the printed record that the 1st respondent did not give evidence to support any of the various items of her claim she pleaded as special damages. It is not sufficient or even right for the learned trial Judge to have taken the view that as there is no counter affidavit from the appellant, then the claim must be deemed to have been accepted. That is not the applicable principle of law in considering whether special damages ought to be awarded. In any event as her Lordship of the lower court specially said that the award is for general damages, I will take it that in awarding that sum of N200,000.00 she had not taken into consideration the claim in special damages. The attempt by the learned counsel for the 1st respondent/appellant to update the claim in special damages in this court is otiose, and betrays, with due respect a lack of

the knowledge of the applicable principle in this area of law. Be that as it may **if even general damages ought to be awarded in favour of the 1st respondent, care must be taken not to make unreasonable award in this area. From what can be gathered from the printed record, the seizure of the 1st respondent's vehicle was ordered by the court on 1/11/93 upon an ex-parte order to that effect. The 1st respondent was not a part to that order. So it would appear that it was after her vehicles were seized that she became aware of what had befallen her. It was upon being so award that she commenced the present proceedings against the appellant and two others. The order releasing her vehicle was made on the 25th of October 1994. I think that given the circumstances of this case, a sum of N50,000 is condign as general damages, and I so order.**

The other complaint concerning the failure of the learned trial Judge to award costs is properly met by the learned counsel for the appellant. The 1st respondent to succeed ought to have obtained the leave of this court or the lower court to appeal against the refusal of the lower court to award costs in her favour. See s. 220(2) (c) of the Constitution. And as there is no evidence that such leave was obtained, the ground of appeal is struck out. And the issue raised thereon becomes a non-issue.

In the result, this appeal has in the main failed. The cross-appeal has also failed on the issue of enhanced damages and on costs. The cross appeal is dismissed with N250.00 costs. And the main appeal is also dismissed in part as the 1st respondent is now awarded N50,000.00 as general damages. Cost in favour of 1st respondent N1,000.00.

UBAEZONU JCA

I agree.

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TOBI JCA

I agree with the judgment of my learned brother, Ejiwunmi, J.C.A. I want to add this bit on two areas. The first is whether the action could be brought under the Fundamental Rights (Enforcement Procedure) Rules
B 1979. It is the submission of learned counsel for the appellant that the action ought to have been brought by writ of summons. He cited the case of Peterside v. International Merchant Bank (Nigeria) Ltd. (1993) 2 NWLR (pt. 278) 712 in support of his submission.

C The action was brought for alleged violation of sections 31,33 and 40 of the Constitution of the Federal Republic of Nigeria, 1979. Section 31 provides for the right to dignity of the human person. Section 33 provides for the right of fair hearing. Section 40 provides for compulsory acquisition of property and the prompt payment of compensation and the
D right of access to court for the determination of the applicant's interest in the property and the amount of compensation.

An examination of the reliefs clearly shows that they are donated by or based on the constitutional provisions. Therefore the action is
E within the constitutional regime of the Fundamental Rights (Enforcement Procedure) Rules, 1979. The case of Peterside v. International Merchant Bank (Nigeria) Ltd. (supra) cited by learned counsel for the appellant, is quite a distance from the facts of this case. Since my learned brother has
F brought out the distinction between the facts of that case and the present one, I should not repeat the exercise here, but not before I ask this question: how can a case of master and servant which resulted in the dismissal of the latter be legal basis for the principle of stare decisis in a matter which clearly deals with the breach of fundamental rights entrenched in the
G Constitution? While Peterside dealt with the former situation the present appeal deals with the latter situation. There is therefore no relationship, legally or factually between the two situations.

The second area is the arrest of the 1st respondent by the police.
H I know of no law which authorizes the police to arrest a mother for an offence committed or purportedly committed by the son. Criminal responsibility is personal and cannot be transferred. While I am aware of cases of vicarious liability in criminal law, the instant case is certainly not

one. A police officer who arrests 'A' for the offence committed by 'B' should realize that he has acted against the law. Such a police officer should, in addition to liability in civil action, be punished by the police Authority.

As a matter of fact, it bothers us so much for the Police operating the law of arrest after three decades of Nigeria's independence to arrest and detain innocent citizens of this country for offences committed by their relations. That is a most uncivilized conduct and one that any person with a democratic mind should thoroughly detest and condemn. I detest and condemn the uncouth practice.

Having said that, I endorse all the orders made by my learned brother in his judgment including the orders as to costs.

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