

**SUPREME COURT OF NIGERIA**  
19TH JANUARY, 2001. SC. 120/1995  
**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE,**  
**S. U. ONU, O. ACHIKE, S. O. UWAIFO, JJSC**

SEA TRUCKS NIGERIA LIMITED ..... APPELLANT  
AND  
PANYA ANIGBORO ..... RESPONDENT

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**ACTIONS** - *Fundamental Rights Procedure - Justiciability - Cannot be sustained - Where alleged breach of fundamental right is incidental to the main complaint.*

**APPEALS** - *Jurisdiction - Non compliance with order of Court - As regards payment of judgment debt - Does not divest court of jurisdiction to determine appeal.*

**ACTIONS** - *Justiciability - Fundamental Rights Procedure Rules 1979 - Justiciability of a cause under the Rules - Is not exclusively the preserve of trial judge.*

**ACTIONS** - *Wrongful dismissal - Relief should be obtained by writ of summons in High Court - Not by application under Fundamental Rights (Enforcement Procedure) Rules.*

**COURTS** - *Fundamental Rights Procedure - Competence of a court to exercise jurisdiction - Avails only when the main application is for enforcement of a fundamental right.*

**STATUTES** - *Trade Disputes (Amendment) Decree No 47 of 1992 - Cannot apply in a claim for wrongful dismissal.*

The Respondents had filed a motion in the High Court of Bendel State praying for certain reliefs against the Appellant. The appellant/defendant is a private company and the respondent was working for the defendant. The respondent and some other workers for the appellant declared for a workers union known as National Union of Petroleum and National Gas workers (NUPENG). The appellant refused to accept their membership of this union on the grounds that it was a breach of the applicable Union Laws. From the affidavits deposed to by the Appellants the respondent and others refused to come to work but rather engaged in acts and agitation aimed at disrupting the business of the appellant. After certain warnings the Respondent and others were summarily dismissed and he thus filed a motion claiming that his purported summary dismissal was a breach of his fundamental rights to belong to any association of his own (s. 37 of the 1979 Constitution ) and his right to fair hearing (s. 33). He also prayed the court to reinstate him to his said employment and benefits and entitlement from the date of the purported dismissal or in the alternative N20,000 compensation for the said breach of his fundamental rights. The Appellant filed a motion praying the Court to dismiss Respondent's suit on the ground that it was statute barred.

At the trial the learned judge struck out the suit having found that the suit was statute- barred for having been brought outside the one year period allowed by the Fundamental Rights (Enforcement Procedure) Rules, as well as various other findings. Both parties dissatisfied with the decision appealed to the Court of Appeal which upheld Respondent's appeal, holding that his suit was not statute barred. It therefore dismissed Appellant's cross appeal and granted the relief sought by the Respondent. The Appellant with leave of the Supreme Court has appealed to the Supreme Court raising a number of issues. But the case was decided on the issue of the competence of the suit.

#### **ISSUES FOR DETERMINATION**

1. *Whether or not the jurisdiction of the Court of Appeal was affected by the validity or otherwise of grounds "b" and "c" of the Notice of appeal to the Court.*

2. *Whether the provisions of the Trade Disputes (Amendments) Decree*

*No. 47 1992, particularly the ouster clause, applies to the instant case.*

3. *Whether in the circumstances of this case, Respondent's grievance against his summary dismissal by Appellant was or could be validly challenged by way of an action under the Fundamental Rights (Enforcement Procedure) Rules 1979?*

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

#### ***Appeals - Jurisdiction***

1. I agree with the Appellant's submission above. I cannot see how partial or noncompliance with the order of Court as regards payment of a judgment debt robs an appellate court of jurisdiction to hear and determine the appeal before it. If the appellants failed to comply with the order of court as regards payment of the judgment debt, the Respondent has his remedy which if he fails to take, he has himself to blame. (p. 151 E)

#### ***Actions - Justiciability***

2. I think it is a wrong approach to the issue on hand to say that the power to determine the justiciability of a cause of action under the Fundamental Rights (Enforcement Procedure) Rules 1979 lies with the trial judge and that once he has given leave to bring in an application, justiciability can no longer be questioned. (p. 155 G)

#### ***Fundamental Rights Procedure - Justiciability***

3. I think the proper approach is to examine the reliefs sought by the applicant, the grounds for such reliefs and the facts relied upon. If they disclose that breach of fundamental right is the main plank, redress may be sought through the Fundamental Rights (Enforcement Procedure) Rules, 1979. But where the alleged breach of fundamental right is incidental or ancillary to the main complaint, it is incompetent to proceed under the Rules. So this Court decided in Tukur v. The Government of Taraba State (1997) 6 NWLR 549 and in Egbuonu v. Borno Radio Television Corporation (1997) 12 NWLR 29. (p. 155 H)

**Courts - Fundamental Rights Procedure**

4. In Borno Radio Television Corporation v. Egbuonu (1991) 2 NWLR 81 at p. 90 Adio J.C.A. (as he then was) observed:

"The competence of a court to exercise jurisdiction in relation to an action before it depends on certain conditions which Bairamian, F.J. (as he then was) set out in Madukolu & ors v. Nkemdilim. (1962) 2 SCNLR 341; (1962) 1 All NLR 587, at p.595. His Lordship stated, *inter alia*, as follows:

'Before dismissing those portions of the record, I shall make some observations on jurisdiction and the competence of a court. ....

The combined effect of the second and third conditions mentioned above is that when the main or principal claim in an application is not the enforcement or securing the enforcement of a fundamental right, the court has no jurisdiction to entertain it under the Fundamental Rights (Enforcement Procedure) Rules, 1979. That is the position in the case of the present application of the respondent. The respondent's application is not properly before the court".

I cited the above passage, with approval, in Tukur v. Government of Taraba State (supra) at page 577 of the report. That passage, in my respectful view, represents the correct position of the law. (p. 156 B)

**Actions - Wrongful dismissal**

5. Turning to the facts of the present case, there can be no difficulty in ascertaining the principal complaint of the respondent which is, a claim for wrongful dismissal. The principal relief is for his reinstatement which the Court below ordered. The alleged breaches of his fundamental rights flowed from this main complaint. In the circumstance, therefore, the proper procedure for him to seek redress is by a writ of summons in the High Court and not, by application under the Fundamental Rights (Enforcement Procedure) Rules. This is the decision of this Court in Egbuonu v. Borno Radio Television Corporation (supra) which is similar to the case on hand. The two Courts below are, with respect, clearly in error when they held that Respondent's action was properly brought under the Fundamental Rights (Enforcement Procedure) Rules. The proceedings in the High Court of Warri Judicial Division are incompetent and are, therefore, null

and void. (p. 157 F)

**Trade Disputes (Amendment) Decree**

6. In view, also, of the conclusion I reach in this judgment that Respondent's claim is essentially for wrongful dismissal it follows that Question II must be answered in the negative. Being not a trade dispute, the Trade Disputes (Amendment) Decree (now Act) No. 47 of 1992 would not apply. (p. 158 C)

**NOTABLE POINT OF INTEREST****UWAIFO JSC**

1. *Grievances for breach of contract should be redressed by common law and not constitutional action*

On the facts of this case, the plaintiff's grievance, if any, which he may seek to redress is by a common law action not a constitutional action. The grievance is none other than breach of contract. The action brought by the plaintiff was therefore incompetent. (p. 167 C)

**REPRESENTATION**

M. T. Onigbanjo (M. Akinboro with him) for the Appellant.  
No appearance for the Respondent.

**CASES REFERRED TO**

A. G. - Anambra v A. G. FED (1993) 6 NWLR (Pt. 302), 692  
Egbuonu v Borno Radio Television Corporation (1977) 12 NWLR 29  
Obot v CBN (1993) 3 NWLR (Pt. 310), 140  
Ajayi v Texaco (Nig) Ltd (1987) 3 NWLR (Pt. 62), 577  
Shugaba v Minister of Internal Affairs (1982) 3 NLR 915  
Tukur v The Government of Taraba State (1997) 6 NWLR 549  
Borno Radio Television Corporation v Egbuonu (1991) 2 NWLR 81  
Madukolu & Ors v Nkemdilim (1962) 2 SCNLR 341  
Udoh v OHMB (1993) 7 NWLR (Pt.304) 139  
Peterside v IMB (Nig) Ltd (1993) 2 NWLR (Pt.278) 712

**STATUTES REFERRED TO**

Fundamental Rights (Enforcement Procedure) Rules 1979

Trade Dispute (Amendment ) Decree No 49 1992.

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**LEAD JUDGMENT BY OGUNDARE JSC**

This is an appeal against the judgment of the Court of Appeal (Benin Division) wherein the appeal of the applicant (now Respondent before us) was allowed and judgment was entered in his favour in terms of his prayers before the trial High Court which had earlier refused those prayers.

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The Respondent, as applicant, had in a motion filed on 26/2/87 in the High Court of the now defunct Bendel State, in the Warri Judicial Division prayed the Court pursuant to section 42(1) of the Constitution of the Federal Republic of Nigeria 1979 and Order 1 rule 2 of Fundamental Rights (Enforcement Procedure) Rules 1979, for leave to bring an application:-

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*"For redress of the breach of the rights of Assembly and Association of the Plaintiff/Applicant when he was unlawfully and summarily dismissed from work by the defendants on the 28th of February 1986 by locking him out and by notice at the gate of the defendant's premises at Enerhen.....for his declaring to belong to a particular trade union NUPENG....."*

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(Underlining is mine for emphasis)

In the statement in support of the application the Respondent sought the following reliefs from the Court, to wit:

**"2. Relief Sought**

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*The Plaintiff claims (a) that his purported summary dismissal from the said employment of Sea Truck Nigeria Limited (the defendant) on the 28th of February 1986 is a breach of his fundamental rights under the Constitution of the Federal Republic of Nigeria 1979 when the Defendant locked the Plaintiff out of the premises of the Defendant and thereby preventing the Plaintiff from entering the premises and carrying out the duties of his employment for the Defendant and when the Defendant pasted the notice of the summary dismissal of the Plaintiff written on the*

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*notice board at the gate of the premises of the Defendant at Enerhen within the jurisdiction of this Honourable Court on the ground that the Plaintiff declared along with the other workers of the Defendant for NUPENG (b) order of this Honourable Court to reinstate the Plaintiff to his said employment and benefits and entitlements as from the 28th of February 1986; and/or in the alternative N20,000.00 compensation for the said breach of the fundamental rights of the Plaintiff under the Constitution of the Federal Republic of Nigeria 1979"*

And the grounds for the relief were stated in paragraph 3 of the statement as

**"3. Ground on which Reliefs are sought:**

*(a) The summary dismissal is a breach of the fundamental rights of the Plaintiff to belong to an association of his own which is NUPENG - National Union of Petroleum and Natural Gas Workers - as entrenched in Section 37 of the Constitution of the Federal Republic of Nigeria.*

*(b) The summary dismissal is a further breach of the fundamental right of the Plaintiff to a fair hearing (or to be heard) before any punitive action can be taken against him under section 33(1) of the Constitution of the Federal Republic of Nigeria.*

*(c) The summary dismissal is contrary to the current Sea Truck (Nig.) Limited conditions of service as at the 28th of February 1986 as applied to a confirmed employee of the Defendant in articles 13 and 14 thereof"*

There was an affidavit filed in support of the application and in which the Respondent deposed, inter alia, as follows:

*"2 That the causes of action are for a declaration that a summary dismissal by the Sea Truck (Nig.) Ltd. (the Defendant) on the 28th of February, 1986 is unconstitutional; reinstatement to my employment as from 28th of February 1986 and/or N20,000.00 compensation for the breach of my said fundamental rights under the Constitution of the Federal Republic of Nigeria.*

*3. That on the 28th of February 1986 the Defendant summarily dismissed my employment under the Defendant without any reasonable cause by simply locking me along with other employee of the Defendant*

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out of the premises of the Defendant and by a notice written at the Notice Board at the gate of the premises announcing that all workers of the Company were sacked en mass and thereby prevented me to enter into the premises of the Defendant to carry out my work and without any notice and without any query or granting me audience for any allegation against me.

4. That since that time the Defendant had not allowed me to perform my duties nor earn my salaries, and other entitlements, increment, leave and leave bonus and medical treatment.

5. That I was employed by the Defendant on the 15th of August, 1984 as Marine Engineering Assistant on probation.

6. That I was confirmed on the 15th of February 1985 on satisfactory performance vide copy of the letter of confirmation of employment dated 8th May 1985 reference No. STW/CA/9/12/85 annexed hereto and marked Exhibit A.

7. That I was granted my annual leave due on the 15th of August 1985 which was deferred till 23rd October 1985 for 18 days with leave allowance (bonus) of N60.00 - vide copy of the Leave Certificate annexed hereto marked Exhibit B.

8. That since my employment with the Defendant I had no query and had been performing very well and making steady progress.

9. That the Defendant and its workers had been on disagreement as to which Trade Union the workers would belong. The Defendant wanted its workers to belong to the Nigerian Union of Seamen and Water Transport Workers but the workers declared for the National Union of Petroleum and Natural Gas Workers (NUPENG) vide copies of the declaration dated November 1985 and the letter of the NUPENG dated 13th January 1986 and the letter the Defendant's worker at Port Harcourt of 1/1/86 marked Exhibit C, C1 and C2 respectively annexed hereto.

10. That the Defendant on the 27th of January 1986 terminated the appointment of the leader of the workers in their declaration for the NUPENG namely Philip Agageche, John Odu, Williams Ogriyan and Ayo Pony for leading the workers to declare for the NUPENG.

11. That NUPENG protested and gave the Defendant ultimatum

to reinstate the 4 leaders but heretofore the Defendant had not done so.  
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23. That on the 28th of February 1986 when I reported for duties at the gate of the premises of the Defendant I saw on a notice board thereat a written notice saying that all workers were sacked and they should report for their payoff on the 4th of March 1986; but I do not accept this action of the Defendant.

24. That since the date the security men at the gate became hostile and drove me and other workers affected by the notice from the gate, and I thereupon cease to go there.

25. That I was never given any notice of termination or dismissal of any appointment as required by the conditions of service of the Defendant.

26. That by the said condition of service I am entitled to one month's salary in lieu of the notice.

27. That my basic salary was N270.00 a month as at 27th October 1985 and I am due for increment in my salary.

28. That I had been without employment since 28th of February 1986 though I am very much eager to continue with my work with the Defendant.

29. That I am entitled to end of service benefit of one month salary every completed year of service payable to an employee who has served for a minimum continuous period of 5 years and wished to leave the company.

30. That I am young and hope to work for a longer period; I was born in 1958.

31. That the sudden dismissal of my appointment by the Defendant brought untold hardship to me.

32. That I did nothing to disrupt the work of the Defendant nor to cause any danger to the life and property of the Defendant.  
Exhibit A annexed to the affidavit reads thus:

"Mr. Anigboro Panya,  
(Marine Eng. Assistant).

Dear Sir,

CONFIRMATION OF APPOINTMENT

*We are pleased to confirm your appointment as Marine Engineer Assistant based in Warri Base with effect from 15th February, 1985. With this your confirmation of appointment, either party is bound to give a month's notice or a month's salary in lieu of notice, before such appointment can be terminated.*

*You are however, entitled to two weeks paid leave on completion of 12 months unbroken service, and all other terms and conditions remain unchanged.*

*This letter is to be signed by the employee and employer as evidence that these terms are understood, and agreed upon by both parties". There are other documentary exhibits annexed to the Respondent's affidavit but as these are not relevant to the issues posed in this appeal, I say no more on them.*

*Leave was granted as prayed. The Respondent then put the Defendants on notice. They are now Appellants in this appeal and shall henceforth be referred to as Appellants. On being served with the motion papers, the Appellants filed a counter-affidavit sworn to by their Senior Security Officer, Christopher Pibowei and had annexed to it a number of documentary exhibits. Annexure 1 reads:*

*"The Chief Labour Officer,  
Federal Ministry of Employment,  
Labour and Productivity,  
Benin-City,  
Bendel State.*

*Mass withdrawal from the Nigerian Union of Seamen and Water Transport Workers by the Junior Workers of Niger Benue Transport Company (NBTC) and Sea Trucks Nigeria Limited, Warri.*

*I am directed to refer to your letter reference No. IB/288/1/291 of 15th January, 1986 and to inform you that the Junior Workers of Niger Benue Transport Company Warri and Sea Trucks Nig. Ltd. Port-Harcourt and Warri cannot opt for National Union of Petroleum and Natural Gas workers (NUPENG) because the economic activities of the Companies under reference are not oil prospecting. (sic)*

*(Sgd.)*

*J. A. Banjo*

*for: Permanent Secretary"*

*In the counter-affidavit, Pibowei deposed, inter alia, as hereunder:*

*"4. Save that the Plaintiff/Applicant was never summarily dismissed on 28/2/86 paragraph 1, 2, 5, 6, 7, 19, 20, 21 of the Plaintiffs affidavit are hereby admitted. And that was on 23/2/86 and not 28/2/86 that Plaintiff lost his job.*

*5. The following paragraphs are however denied and same have been traversed seriatim by me hereunder: to wit:- paragraphs, 3, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33.*

*6. In reply particularly to paragraphs 3, 4, 9, 10, 11, and 12 of the said affidavit, I depose hereto that the true facts of the matter as that:-*

*(a) The Plaintiff and other workers of the Defendants who were recognised and classified as members of the Nigerian Union of Seaman and Water Transport Workers and duly so recognised by the Defendants,... of Petroleum and National Gas workers (NUPENG) and accordingly resorted to lawless acts and agitation aimed at disrupting the business or work of the Defendants herein.*

*(a)1. That I am advised by counsel S.A.J. Emessiri Esq., and I verily believe same to be true that such action was contrary to Law and in breach of the Trade Union Amendment Decree 1978 Schedule I and also Federal Military Government Notice No. 92 of 8th February, 1978.*

*(b) That the Plaintiff and his group were told by the Defendants that the Company merely acted as carriers of supplies to oil company without being in any way involved in oil exploration activities and as such they were not in position to recognise the Plaintiff's chosen new Trade Union; the Plaintiff and others refused to come to work.*

*(c) That at no time was the Plaintiff locked out.*

*(d) That prior to that the Defendants had received directives from the Permanent Secretary Federal Ministry of Employment, Labour and Productivity in a letter dated 5/2/85; reference No. ML. IB/14/111/577 to the effect that:*

*"The Niger Benue Transport Company Warri and Sea Trucks Nigeria Limited Port-Harcourt and Warri cannot opt for National Union*

*of Petroleum and Natural Gas Workers (NUPENG) because the economic activities of the Companies under reference are not oil prospecting'*

*That a copy of the said letter is annexed hereto and marked annexure "I".*

B *(e) That when the Plaintiff and others refused to return to work at the invitation of the Defendants but chose to be roaming about the premises of the Defendants threatening workers and destroying property securing the gates of their yard from these marauders and by reporting to the Police for necessary protection in this regard.*

C *(f) That Notice requiring the Plaintiff and others to return to work were issued and photocopy of same are hereto annexed and marked annexure "2" and "2a" hereto (dated 22/2/86).*

D *(m) The Defendants shall contend therefore, that the Plaintiff's writ which was filed on or about 26/2/87 was statute barred having regard to Order 1 Rule 3(1) of the Fundamental Rights (Enforcement Procedure) Rules 1979. That I am so advised by our Solicitor S.A.J. Emessiri Esq; and I verily believe same to be true. And that this will be taken up as a preliminary objection at the trial of this action.*

E *(n) The Defendants finally aver that as from the time of the illegal strike Plaintiff has NEVER bothered to show up at Defendant's offices in connection with his employment. He simply vacated his post"*

F The Appellants, following paragraph 6 (m) of the counter-affidavit filed a motion praying the trial court to dismiss Respondent's "matter or suit" on the ground that it was statute-barred. The motion was supported by an affidavit the purport of which was to show that Respondent's cause of action, if any, arose on 23/2/86 and not 28/2/86. The Respondent replied with a counter-affidavit contending to the contrary. This motion was subsequently withdrawn and was struck out but was substituted by another similar motion filed on 3/6/87. This motion was argued and dismissed on 10/12/87.

G The Respondent's motion came on for hearing. The learned trial Judge took evidence from both sides and heard learned counsel address him. In a reserved judgment given on 19/10/89, the learned judge found that the Respondent was summarily dismissed along with others

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on 23/2/89 and not on 28/2/86 and that in consequence Respondent's suit was statute- barred being outside the one year period allowed by the Fundamental Rights (Enforcement Procedure) Rules. He struck out the suit.

The learned trial Judge notwithstanding this conclusion also considered, in the alternative, other issues raised by both sides and found-

1. *That the dispute between the parties is not a trade dispute for the National Industrial Court to resolve; the High Court has jurisdiction in the matter.*

2. *"On the peculiar facts of this case, I hold that the applicant has establish his personal and private interest to sustain his standing in instigating this action"*

3. *"On the facts of this case, I hold, that the applicant and other workers were locked out and summarily dismissed, because, he and his co-workers refused to accept the dictate of the respondent on which Trade Union they should join"*

4. *That the powers of the High Court are wide enough to grant the Respondent the reliefs sought by him.*

Both parties were dissatisfied with the decision of the trial Court and they each appealed to the Court of Appeal. The Court of Appeal upheld Respondent's appeal holding that his suit was not statute-barred. It dismissed Appellant's cross appeal and granted the reliefs sought by the Respondent. The Court, per Akpabio JCA, concluded:

*"This appeal therefore, succeeds, and is hereby allowed. The decision of the learned trial Judge that the application of Plaintiff under the Fundamental Rights (Enforcement Procedure) Rules 1979, was statute-barred is hereby set aside.*

*The purported summary dismissal of the Plaintiff w.e.f. 23/2/86 which was not put into any formal letter is hereby set aside. In its place the Defendant is hereby ordered to reinstate the Plaintiff forthwith into his former post, as a Marine Engineering Assistant and paid all his arrears of salaries. He should also be allowed to join any trade union of his choice without let or hindrance as guaranteed to him under s. 37 of the Constitution of Nigeria, 1979".*

The Appellants have now, with leave of this Court further appealed

to this Court upon 10 original and 2 additional grounds of appeal.

The Respondent was not represented by counsel at the oral hearing of the appeal. Being satisfied that his counsel was served, we considered it that the appeal was argued on Respondent's brief. In that brief Respondent raised a preliminary objection to the effect that-

*"This Honourable Court has no jurisdiction to entertain this appeal in view of the partial disobedience of the said order of the Lower Court"*

Respondent also raised two other objections in his brief. They run as follows:

*"It is pertinent to note that the said motion did not contain prayer for the leave sought to file and argue grounds 3, 4, and 9 of the original grounds of appeal and to file additional grounds of appeal which were exhibited to the motion be deemed as properly filed and served on the Respondent and that failure to include such prayer is fatal to the competency of the grounds of appeal and the Court should discountenance the grounds of appeal as incompetent. The Respondent shall raise this issue as a preliminary issue at the hearing of this appeal."*

*Besides the said additional grounds of appeal (Exhibit S TNIV) was not dated nor signed by the Appellant or its legal practitioner. It is my submission that failure to date and sign the said additional grounds of appeal is fatal to the validity of the said document. This Honourable Court shall at the hearing of this appeal be moved to discountenance the said grounds of appeal mentioned herein-above as a preliminary issue"* The objections raised by the Respondent necessitated the Appellants filing a reply brief. In that brief the Appellants argued that-

*"Quite apart from the absence in the records of any facts having a bearing to the Respondent's contention that the partial noncompliance with order for stay of execution oust this Honourable Court's jurisdiction, the contention is also hamstrung by the fact that it cannot come within any of the recognised instances where a court's jurisdiction will be deemed ousted, in the case of A. G.- ANAMBRA V. A. G. FED. (1993) 6 NWLR (Pt. 302), 692 it was expressly stated that the jurisdiction of courts can only be ousted in following instances:*

*(a) Where for example the court is not properly constituted as*

*regards the numbers and qualification of its members and a member is disqualified for one reason or another;*

*(b) Where the subject matter of the case is not within the jurisdiction of the court.*

*(c) And also when the case does not come to the court through the due process of law and conditions precedent to the exercise of the said jurisdiction have not been fulfilled.*

*The respondent's submission at para. 2.03 obviously not in alignment with the law as reiterated above must be rejected, we so urge"*

**I agree with the Appellant's submission above. I cannot see how partial or noncompliance with the order of Court as regards payment of a judgment debt robs an appellate court of jurisdiction to hear and determine the appeal before it. If the appellants failed to comply with the order of court as regards payment of the judgment debt, the Respondent has his remedy which if he fails to take, he has himself to blame.**

I have considered the Appellant's submissions in respect of the other objections raised. I think those submissions are well founded. Respondent has not claimed that the documents were not subsequently filed by the Appellants. I find the objections raised lacking in merit and I unhesitatingly dismiss them.

In the Appellant's brief of argument in this Court filed pursuant to the Supreme Court Rules, the following questions are formulated for determination, to wit

*"i. Whether or not the jurisdiction of the Court of Appeal was affected by the validity or otherwise of grounds "b" and "c" of the Notice of Appeal to the Court.*

*ii. Whether the provisions of the Trade Disputes (Amendments) Decree No. 47 1992, particularly the ouster clause, applies to the instant case.*

*iii. Whether the Plaintiff's claim was instituted within 12 months from the time the cause of action arose prescribed by the Fundamental Rights (Enforcement Procedure) Rules 1979.*

*iv. Whether in the circumstances of this case, Respondent's grievance against his summary dismissal by Appellant was or could be*



*validly challenged by way of an action under the Fundamental Rights (Enforcement Procedure) Rules 1979?*

*v. Is a Court entitled to proceed further and pronounce on the merits of a case having already held that it has no jurisdiction?*

*vi. Whether the Respondent is entitled to be reinstated into his former employment as the Court of Appeal has decreed?"*

The questions as raised in the Respondent's brief are similar to those posed in the Appellant's brief. Question IV above which is similar to question (b) in the Respondent's brief, is rather fundamental as it touches on the competence of Respondent's suit. I shall, therefore, consider it first. If the question is resolved in the Appellant's favour, Respondent's case must then be struck out and there will be no need to proceed to the consideration of the other issues raised in the appeal. If the answer to the question is otherwise, there will be need to consider the other questions.

Question IV - Competence of Respondent's Suit.

I have taken pains to set out earlier in this judgment the reliefs sought by the Respondent, the grounds for such reliefs and the facts relied on in the affidavit in support. All these are relevant to the determination of this question.

Mr. Onigbanjo, for the Appellants, both in his written brief and in oral argument, has submitted that the Respondent's claim is, in essence, for wrongful dismissal and should not, therefore, have proceeded under the Fundamental Rights (Enforcement Procedure) Rules but rather by way of an action under the High Court rules. He cited in support (Egbuonu v. Borno Radio Television Corporation (1977) 12 NWLR 29. It is argued in the brief thus:

".....nowhere is it stated in the entire provisions of chapter IV of the 1979 constitution of the Federation of Nigeria that any person is entitled to be employed in perpetuity .....

*It is also trite that our labour law recognises the right of an employer to terminate an employment for good or bad reasons or for none at all. The remedy available to an aggrieved party sounds in damages, see OBOT V. CBN (1993) 3 NWLR (Pt. 310), 140 and AJAYI V. TEXACO (NIG.) LTD. (1987) 3 NWLR (Pt. 62), 577. Respondent's claim, we submit is caught by this principle. The only remedy thus available for the respondent is a*

*common law action for damages.*

The case of SHUGABA V. MINISTER OF INTERNAL AFFAIRS (1982) 3 NLR 915 is only authority for the proposition that a common law action/claim can be joined together with a claim to enforce a fundamental human right and definitely not authority to the effect that Chapter IV of the 1978(sic) Constitution guarantees any right of employment in perpetuity or that rights not included in Chapter IV (supra) can be dexteriously included by the framing of an action to have the semblance of an action brought to enforce a Constitutional right. The cases of BRTC V. EGBUONU (1991) 2 NWLR (pt. 171), 81 and PETERSIDE V. IMB (supra) are applicable to the facts of the instant case.

In conclusion, we submit that for an application to be validly and properly categorised as an application under the Fundamental Rights (Enforcement Procedure) Rules 1979, such application must seek to enforce or protect a right guaranteed by Chapter IV. Where no such constitutionally guaranteed right is the subject matter of any proceedings under the Fundamental Rights (Enforcement Procedure) Rules, such as in this case, the adjudicating Court must not hesitate to halt the proceedings instantly for it is gravely defective. Your Lordships are thus urged to hold that Respondent's claim is not founded on any right guaranteed by Chapter IV and is thus incompetent".

The Respondent, in his own brief, argued thus:

*"The source of right to file the application before the trial Court by the Respondent was section 42 of the Constitution of the Federal Republic of Nigeria 1979 which provides in subsections (1) and (3) thus:*

*42(1) Any person who alleges that any of the provisions of this chapter has been or is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress.*

*(3) The Chief Justice of Nigeria may make rules with respect to the practice and procedure of a High Court for the purposes of this section.*

*The Fundamental Rights (Enforcement Procedure) Rules 1979 was made in pursuance of the section 42(3) of the Constitution by the Chief Justice of Nigeria.*

The power of determining the justiciability of cause of action under the Fundamental Rights (Enforcement Procedure) Rules 1979 is with the learned trial Judge who grants the leave to file the application. At the hearing of the application, the learned trial Judge has another opportunity to determine whether the Applicant proves his case (i.e. the violation of his alleged rights).

This application passed through these two stages of the hearing successfully. The Court of Appeal found that the Appellant violated the said right under Section 37 of the 1979 Constitution. In other words the issue being argued is based on appeal against concurrent findings of facts whether the causes of action are based on the aberration of S. 37 of the 1979 Constitution. There is no fresh argument proffered in the brief to validly challenge the concurrent findings of facts by the trial Court and the lower Court. Besides reference to Peterside v. IMB Nig. Ltd. and BRTC V. EGBUONU in the brief do not show such valid challenge. The argument in the circumstance is academic.

I shall restate for purpose of emphasis the first relief in the statement in support of the application which the Appellant reproduces in its brief. The clear complaint made in the relief is an allegation of breach of the fundamental right to belong to a trade union under Section 37 of the Constitution of the Federal Republic of Nigeria 1979. This is the requirement under Section 42(1) of the said Constitution and Order 1 rule 2(1) of the said Rules and upon satisfaction by the trial Court leave was granted. The issue of jurisdiction to hear/try the case therefore becomes a non-issue in the circumstances. Besides the Appellant did not challenge the leave when he was served the application of the Respondent. Appellant's preliminary application challenging the application for want of cause of action was dismissed by the trial Court on the 10/12/87.

The second relief of reinstatement is ancillary to the substantive relief alleging violation of S. 37 of the Constitution. The justiciability of the relief along with the substantive relief has been confirmed by the cases of Shugaba and Egbuonu referred to by the Appellant in its Brief. The Appellant also confirms the procedure to join the second relief of reinstatement to a relief seeking to enforce a fundamental right. The Re-

spondent has not by his application and the reliefs sought therein claimed any right of employment. While the Appellant agreed that it resisted the Respondent to belong to a trade union he chose (NUPENG) it fails to appreciate the fact that the Respondent can bring application under Fundamental Rights (Enforcement Procedure) Rules 1979. I also refer to the case Akande v. Araoye (supra) to emphasise the right to sue in the manner the Respondent did"

and concluded that-

"the reliefs sought are justiciable under the Fundamental Rights (Enforcement Procedure) Rules 1979 and SS.37 and 42 of the Constitution of the Federal Republic of Nigeria, 1979"

I have given careful consideration to the respective submissions of the parties. I think it is a wrong approach to the issue on hand to say that the power to determine the justiciability of a cause of action under the Fundamental Rights (Enforcement Procedure) Rules 1979 lies with the trial judge and that once he has given leave to bring in an application, justiciability can no longer be questioned. I think the proper approach is to examine the reliefs sought by the applicant, the grounds for such reliefs and the facts relied upon. If they disclose that breach of fundamental right is the main plank, redress may be sought through the Fundamental Rights (Enforcement Procedure) Rules, 1979. But where the alleged breach of fundamental right is incidental or ancillary to the main complaint, it is incompetent to proceed under the Rules. So this court decided in Tukur v. The Government of Taraba State (1997) 6 NWLR 549 and in Egbuonu v. Borno Radio Television Corporation (1997) 12 NWLR 29.

In Borno Radio Television Corporation v. Egbuonu (1991) 2 NWLR 81 at p. 90 Adio J.C.A. (as he then was) observed:

"The competence of a court to exercise jurisdiction in relation to an action before it depends on certain conditions which Bairamian, F.J. (as he then was) set out in Madukolu & ors v. Nkemdilim, (1962) 2 SCNLR 341; (1962) 1 All NLR 587, at p.595. His Lordship stated, inter alia, as follows:

'Before dismissing those portions of the record, I shall make some observations on jurisdiction and the competence of a court. Put

briefly, a court is competent when:-

1. It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another, and.

B 2. The subject matter of the case is within jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction, and.

C 3. The case comes before the court initiated by due process of the law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.'

D *The combined effect of the second and third conditions mentioned above is that when the main or principal claim in an application is not the enforcement or securing the enforcement of a fundamental right, the court has no jurisdiction to entertain it under the Fundamental Rights (Enforcement Procedure) Rules, 1979. That is the position in the case of the present application of the respondent. The respondent's application is not properly before the court."*

E I cited the above passage, with approval, in Tukur v. Government of Taraba State (supra) at page 577 of the report. That passage, in my respectful view, represents the correct position of the law.

JSC In Egbuonu v. Borno Radio Television Corporation (supra) Kutigi at page 40 C - E of the report had this to say:

F *"I think learned counsel is right when he said the facts of this case are quite distinguishable from the facts in Tukur's case above. But I say straight away that there are similarities and that the principle involved is the same in both cases. In Tukur's, the claims were partly Chieftaincy and partly fundamental right. And this court held that the main or principal claim, being a chieftaincy claim which ought to have been initiated by a writ of summons and heard on pleadings and not on affidavit evidence, all the claims, principal and accessory or subsidiary, which flowed from it ought to have been struck out as incompetent. The claims were there struck out. In this appeal the claims are partly for wrongful dismissal or termination of appointment and partly for breach of fundamental right.*  
H *But here as in Tukur, the principal claim being wrongful termination of*

*appointment which ought to have been commenced by a writ of summons, which was not, then all the claims principal and subsidiary which flow directly from it, are incompetent and ought to be struck out. That was what the Court of Appeal did in this case. I believe it was right"*

Turning to the facts of the present case, there can be no difficulty in ascertaining the principal complaint of the Respondent which is, a claim for wrongful dismissal. The principal relief is for his reinstatement which the Court below ordered. The alleged breaches of his fundamental rights flowed from this main complaint. In the circumstance, therefore, the proper procedure for him to seek redress is by a writ of summons in the High Court and not, by application under the Fundamental Rights (Enforcement Procedure) Rules. This is the decision of this Court in Egbuonu v. Borno Radio Television Corporation (supra) which is similar to the case on hand. The two Courts below are, with respect, clearly in error when they held that Respondent's action was properly brought under the Fundamental Rights (Enforcement Procedure) Rules. The proceedings in the High Court of Warri Judicial Division are incompetent and are, therefore, null and void.

Having held as above, it follows that I must hold that Respondent's suit in the trial High Court is incompetent and must be struck out. I answer Question IV in the negative.

F As the proceedings in the trial High Court are a nullity, those in the Court below are equally a nullity. In view of this conclusion, it is unnecessary to determine questions 1, 111, V and V1 which, as basis, presuppose the competence of these proceedings.

G In view, also, of the conclusion I reach in this judgment that Respondent's claim is essentially for wrongful dismissal it follows that Question 11 must be answered in the negative. Being not a trade dispute, the Trade Disputes (Amendment) Decree (now Act) N0. 47 of 1992 would not apply. The issues raised by the Appellants in their Reply brief for this Court to depart from its decision in Udoh v. OHMB (1993) 7NWLR (Pt. 304) 139 no longer arises.

Finally, this appeal succeeds and it is hereby allowed. The judgment of

the Court below is set aside. That of the trial High Court striking out Respondent's action is restored though for a different reason. I award N 10,000.00 costs of this appeal and N1,000.00 costs in the Court below in favour of the Appellants against the Respondent. The costs of N100.00 awarded in favour of the Appellants in the trial High Court shall stand.

### KARIBI-WHYTE JSC

I had the privilege of reading the judgment of my learned brother Ogundare, JSC in this appeal. I agree entirely with the reasoning therein and the conclusion that the appeal succeeds and the judgment of the Court of Appeal set aside.

The facts of the case have been comprehensively stated in the leading judgment of my learned brother Ogundare, JSC. I need not repeat them.

The main ground on which the appeal has been argued, and the basis for setting aside the judgment of the Court below is that the action before the High Court being in respect of a claim for wrongful termination of employment which is a claim which falls in the realm of an action by an employee against his employer, cannot be brought under the procedure for the enforcement of fundamental rights.

Relying on this view, both Appellants and Respondents formulated similar issues for determination which touch on the competence of the suit. The issue reads,

*"iv. Whether in the circumstances of this case, Respondent's grievance against his summary dismissal by the Appellant was or could be validly challenged by way of an action under the Fundamental Rights (Enforcement Procedure) Rules 1979"*

The resolution of this issue which concerns the competence of the action brought by the Respondent will determine the appeal. Accordingly it will not be necessary to consider the other issues formulated.

Mr. Onigbanjo for the Appellant has submitted that the claim of the Respondent is in essence one for wrongful dismissal and therefore should not have been brought under the Fundamental Rights (Enforcement Procedure) Rules, but rather by way of an action under the High Court

Rules. Learned Counsel relied on Egbuonu v. Borno Radio Television Corporation (1987) 12 NWLR 29, and Peterside v. IMB (Nig.) Ltd. (1993) 2 NWLR (Pt. 278) 712.

On their part, the Respondents argued that the source of the application was made pursuant to rules under section 42(3) of the Constitution 1979, now section 46(3) of 1999 Constitution. The power to determine the justiciability of cause of action under the Fundamental Rights (Enforcement Procedure) Rules 1979 is with the learned trial Judge who grants the leave to file the application. At the hearing of the application, the learned trial judge may now determine whether the applicant has proved the violation of his alleged rights. It was submitted that the application before us has passed through these two stages of hearing successfully. The Court below found that Appellant violated the said right under section 37 of the 1979 Constitution.

I think Learned Counsel to the Respondent has misconceived and misconstrued the provisions of the Fundamental Rights (Enforcement Procedure) Rules 1979 under which the claim was rested in High Court. There is no doubt and the law is well settled that a claim for the enforcement of the rights prescribed under Chapter IV of the Constitution 1979 may be brought in High Court in that state for redress - See S. 42(1).

It is important to read the section as a whole in relation to Chapter IV to appreciate the scope and amplitude of the jurisdiction vested in the courts. The power of the Chief Justice to make rules under S. 42(3) is expressly to be with respect to the enforcement of the rights in Chapter IV and is accordingly limited and confined to the fundamental rights prescribed in the Chapter. This follows upon the construction of the provisions - expressio unius est exclusio alterius. The reliefs prescribed in Chapter IV are those in section 30-40 now section 33-44 of the 1999 Constitution.

The correct approach in a claim for the enforcement of fundamental rights is to examine the relief sought, the ground for such relief, and the facts relied upon. Where the facts relied upon disclose a breach of the fundamental right of the applicant as the basis of the claim, there is here a redress through the enforcement of such rights through the Fundamental Rights (Enforcement Procedure) Rules 1979. However, where the

alleged breach of right is ancillary or incidental to the main grievance or complaint, it is incompetent to proceed under the Rules. This is because the right, if any violated, is synonymous with the substantive claim which is the subject matter of the action. Enforcement of the right per se cannot resolve the substantive claim which is in any case different.

Learned Counsel was therefore wrong in his submission that the power to determine the justiciability of a cause of action under the Fundamental Rights (Enforcement Procedure) Rules 1979 lies with the trial Judge, and having given leave to bring an application, justiciability can no longer be questioned. As I have pointed out the rights sought to be enforced are not necessarily synonymous with the substantive claim the subject matter of the action. Where the fundamental right is ancillary to the substantive claim, it is incompetent to proceed under the Rules. Tukur v. The Government of Taraba State (1999) 6 NWLR. 549. Egbuonu v. Borno Radio Television Corporation (1997) 12 NWLR. 29.

There is no dispute in the instant case that the complaint of the Plaintiff/Respondent is a claim for wrongful dismissal, and the principal relief is for his reinstatement which the Court ordered. The claim for wrongful dismissal is clearly not one of the rights prescribed under Chapter IV and cannot be a claim brought under the Rules. Even if it is conceded that the alleged breach of the fundamental right flowed from the main complaint, they are not synonymous and cannot support an application under the Fundamental Rights (Enforcement Procedure) Rules.

In the circumstances, the substantive action to which the violation of Chapter IV right is ancillary is for wrongful dismissal. The proper procedure therefore is for the aggrieved to seek redress by writ of summons in the High Court and not by application under the Fundamental Rights (Enforcement Procedure) Rules which is here concerned with the ancillary remedy.

The Courts below are clearly in error for holding that Respondent's action brought under the Fundamental Rights (Enforcement Procedure) Rules 1979 was properly before the Court. The proceedings in the High Court of Warri, Judicial Division are incompetent and therefore accordingly null and void.

Similarly, the proceedings in the Court below founded on the proceedings in the High Court are equally a nullity. It therefore answer question IV in the negative. It is therefore not necessary to consider question 1, 11, 111, V and VI.

This appeal therefore succeeds and it is allowed. The judgment of the Court below is set aside. The judgment of the trial High Court striking out Respondent's action is restored for a different reason. Appellant shall be paid N10,000 by the Respondent as costs in the Court below. The cost N100, awarded Appellants in the trial Court stands.

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#### ONU JSC

Having been privileged to read in draft the judgment of my learned brother Ogundare, JSC just delivered, I am in entire agreement with his reasoning and conclusion that the appeal succeeds. Accordingly, I allow it and endorse all the consequential orders made pursuant thereto.

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#### ACHIKE JSC

I had before now had the privilege of reading the judgment in this appeal of my learned brother, Ogundare, JSC. I am entirely in agreement with his reasoning and conclusions therein that the appeal has merit and the same succeeds.

The Respondent, as applicant had approached the trial court through the procedure pursuant to section 42(1) of 1979 Constitution and Order 1 Rule 2 of Fundamental Rights (Enforcement Procedure) Rules 1979. After obtaining the relevant leave of the trial court he supported his application with an affidavit deposed to by him. For my brief judgment the following paragraph of the affidavit are sufficient to elicit the complaint that led to the Respondent's cause of action:

*"2 That the causes of action are for a declaration my purported summary dismissal by the Sea Truck (Nig.) Ltd (the defendant) on the 28th of February 1986 is unconstitutional; reinstatement to my employment as from 28th February 1986 and/or N20,000.00 compensation for the breach of my said fundamental rights under the Constitution of the Federal Republic of Nigeria.*

3. That on the 28th of February 1986 the Defendant summarily dismissed my employment under the Defendant without any reasonable cause by simply locking me along with employees of the Defendant out of the premises of the Defendant and by a notice written at the Notice Board at the gate of the premises announcing that all workers of the company were sacked on mass and thereby prevented me to enter into the premises of the Defendant to carry out my work and without any notice and without any query or granting me audience for any allegation against me.

5. That I was employed by the Defendant on the 15th of August 1984 as Marine Engineering Assistant on probation.

9. That the Defendant and its workers had been disagreement as to which Trade Union the workers would belong. The Defendant wanted its workers to belong to the Nigeria Union of Seamen and Water Transport Workers but the worker declared for the National Union of Petroleum and Natural Gas workers (NUPENG).....

10. That the Defendant on the 27th of January 1986 terminated the appointment of the leader of the workers in their declaration for the NUPENG namely Philip Agageche, John Odu, Williams Ogriyan and Ayo Pany for leading the workers to declare for the NUPENG.

24. That since that date the security men at the gate became hostile and drove me and other workers affected by the notice from the gate, and I thereupon cease to go there.

25. That I was never given any notice of termination or dismissal of any appointment as required by the conditions of service of the Defendant.

In the Respondent's application, he sought the following relief:

"The Plaintiff claims (a) that his purported summary dismissal from the said employment of Sea Truck Nigeria Limited (the Defendant) on the 28th of February 1986 is a breach of his fundamental rights under the Constitution of the Federal Republic of Nigeria 1979 when the Defendant locked the Plaintiff out of the premises of the Defendant and thereby preventing the Plaintiff from entering the premises and carrying out the duties of his employment for the Defendant and when the Defendant pasted the notice of the summary dismissal of the Plaintiff written on the notice board at the gate of the premises of the Defendant at Enerhen within the

jurisdiction of this Honourable Court on the ground that the Plaintiff declared along with the other workers of the Defendant for NUPENG (b) order of this Honourable Court to reinstate the Plaintiff to his said employment and benefits and entitlements as from the 28th of February 1986; and/or in the alternative N20,000.00 compensation for the said breach of the fundamental rights of the plaintiff under the Constitution of the Federal Republic of Nigeria 1979"

The Appellant/Defendant through their Senior Security Officer, Christopher Pibowei, reacted to the Applicant's aforesaid affidavit by deposing to a counter-affidavit dated 13/4/87.

The foregoing clearly shows that the complaint of the Respondent, as Plaintiff at the trial court was really a claim for wrongful termination of his appointment with the Appellant under the relationship of master and servant is common ground that the Plaintiff was employed as a Marine Engineering Assistant, along with some other workers of the Defendant and declared for the National Union of Petroleum and Natural Gas Worker (NUPENG) contrary to the Defendant's directive that by the nature of the work carried on by the Plaintiff and his co-employed the appropriate Union they should belong was the Nigerian Union of Seamen and Water Transport Workers. The Defendant also made it clear that to declare for NUPENG which the Defendant refused to acknowledge. The Plaintiff and others failed to come to work, which in turn led to their summary dismissal by the Defendant. It is in respect of the alleged wrongful termination of the Plaintiff's employment that he sought relief under the Fundamental Rights (Enforcement Procedure) Rules 1979. The Defendant submitted both at the trial Court and the Court of Appeal that the Plaintiff's action was not well-founded in that the procedure adopted by him was incompetent and therefore null and void.

The defendant's submission found no favour in the two lower courts and hence the appeal to this Court.

The Defendant, now Appellant, formulated six issues for determination. His fourth issue which is similar to Respondent's question (b) reads thus:

"iv. Whether in the circumstances of this case, Respondent's grievance against his summary dismissal by the Appellant was or could

*be validly challenged by way of an action under the Fundamental Rights (Enforcement Procedure) Rule 1979"*

The parties issues (iv) and (b) respectively clearly relate to the competence of the action initiated by the Respondent and their determination, in my judgment, will be sufficient to give a resolution to the appeal. Relying on Egbuonu v. Borno Radio Television Corporation (1987) 12 NWLR 29, learned Appellant's counsel Mr. Onigbanjo, submitted that the claim of the Respondent was principally predicated and founded on common law action for wrongful dismissal and ought not to have been brought pursuant to the Fundamental Rights (Enforcement Procedure) Rules, but rather through an action by writ of summons for the claim for wrongful dismissal.

For the Respondent, in his brief, but unrepresented at the hearing of the appeal, it was contended that the action rooted through the Fundamental Rights (Enforcement Procedure) Rules was competent, more so as the trial judge having granted the initial leave to proceed under the rules without opposition, there was no right in the Appellant thereafter to question the competence of the court to proceed to determine the claim under the Rules.

The Respondent's submission is, undoubtedly very attractive. On close examination, the question of leave of the trial court having been duly obtained does not, in my judgment, determine or necessarily foreclose the fundamental issue as to the competence of the action regarding the state; it was even after the grant of leave to proceed under the Rules. In my view, one has to go back to first principles. The proper way to determine the correct approach to the court, in circumstances similar to those in this case, is first, to characterise the nature of the principal or main claim as may be gathered from the surrounding circumstances and thereafter subsume the claim under common law action or proceeding predicated on the special Rules under the Constitution.

It is manifest that on the facts of the case that the Respondent's grievance is based on wrongful summary dismissal and can be redressed by an action at common law. There is no doubt that the Respondent's grievance also, as it were, wears an elusive colouration that could be

redressed as a breach of fundamental right under the Rules. The pitfall in the Respondent's claim-as in many similar claims including those on Chieftaincy matters-is the deliberate and disingenuous act of overlooking the restricted frontiers of Chapter IV of the 1979 Constitution and the specified fundamental rights therein which are enforceable under the Rules. Once such pretence is dismantled the clear limits of the constitutional provisions under chapter IV will negate the apparent right of a Plaintiff to initiate actions under the Rules in relation to matters outside the purview of the provisions of Chapter IV of the Constitution.

In this case, as we have shown, the Respondent's principal claim which is for wrongful dismissal was initiated under the Fundamental Rights (Enforcement Procedure) Rules 1979. The proper procedure is undoubtedly by way of action by writ of summons and not under the Rules. The proceedings under the Rules were misconceived and incompetent and therefore the respective proceedings in the trial court and the court below were a nullity.

To the question (iv), therefore, I turn in a negative answer and accordingly set aside the judgment of the Court of Appeal. In effect, the order striking out the Respondent's action is restored for a different reason. It is unnecessary to consider the five other issues for determination in the light of my resolution of issue (iv).

I abide by the orders as to costs made in the leading judgment.

#### UWAIFO JSC

I read in advance the judgment of my learned brother Ogundare, JSC and agree with it for the reasons gives. I wish only to add a few words.

There was absolutely no need for the action to be brought under the fundamental rights procedure. This was a clear case of mere master and servant relationship. It is upon that relationship that the plaintiff/respondent complained of wrongful dismissal. The defendant/appellant is a private company running ordinary business undertaking. The plaintiff was working for the defendant as a Marine Engineering Assistant. The plaintiff

and some other workers of the defendant declared for a Union known as National Union of Petroleum and Natural gas workers (NUPENG). The defendant made it clear to them that as its business activities had nothing to do with oil and gas prospecting, their declaration for NUPENG was inappropriate. The relevant Union which the plaintiff and the said workers belonged to, and to which the defendant had no objection, was the Nigerian Union of Seamen and Water Transport Workers and that joining another Union was a breach of the trade union law applicable. The defendant accordingly refused to acknowledge and recognise the new union now opted for.

The plaintiff and others refused to come to work but rather engaged in acts and agitation aimed at disrupting the business of the defendant. After due warning which was unheeded, the defendant wrote to the plaintiff and others that the consequence was summary dismissal unless they resumed duty within a given date. Thereafter they would have to apply for reemployment for consideration at the discretion of the Management. The plaintiff was adamant and so he lost his job.

On the facts of this case, the plaintiff's grievance, if any, which he may seek to redress is by a common law action not a constitutional action. The grievance is none other than breach of contract. The action brought by the plaintiff was therefore incompetent. The trial court was right to have struck it out. The lower court was wrong to have reversed that decision.

I also come to the conclusion that this appeal has merit and therefore succeeds. It is allowed by me as my learned brother Ogundare JSC has done. I abide by the order for costs.

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