

SUPREME COURT OF NIGERIA
28TH SEPTEMBER, 2001. SC. 169/1996
CORAM:- M. E. OGUNDARE, U. MOHAMMED, S. U. ONU, S. O.
UWAIFO, E. O. AYOOLA, JJSC.

DR. TIMOTHY N. MENAKAYA PETITIONER/RESPONDENT
AND
ANN OKWUCHUKWU MENAKAYA RESPONDENT/APPELLANT

***COURTS - Discretion - Evidence - An exercise of discretion by a court
- Must be guided by evidence (H8)***

***COURTS - Hearing in chambers - Based on consent of both counsel -
Contrary to mandatory statutory provision - The proceedings and judgment - Are a nullity (H5)***

***ESTOPPEL - Meaning - Statutory provision - Of a public nature -
Cannot be compromised by estoppel - Any decision contrary to such provision - Is a nullity (H4)***

***FAMILY LAW - Dissolution of marriage - Proceedings - It is mandatory
that proceedings in respect of petition for dissolution of marriage - Shall
be in public (H2)***

***JUDGMENTS - Awards - Evidence - Misdirection - It is a misdirection
for a trial judge - To give judgment on an issue on which there is no
evidence adduced (H6)***

***JUDGMENTS - Nullity - Estoppel - Mandatory statutory provision -
Decision made contrary to such a provision - Is a nullity (H4)***

***JUDGMENTS - Vacation period - Judgment delivered during vacation
period - To be a nullity - There should be evidence to that effect (H1)***

JUDGMENTS - *Void decision - Evidence - Judgment written without any evidence supporting the decision - Is void (H7)*

WAIVER - *Statutory Provision - Procedure - A mandatory statutory provision directing a procedure to be followed in the performance of any duty - Cannot be waived (H3)*

FACTS

In the Onitsha Judicial Division of the High Court of Anambra State, the Petitioner/Respondent presented a petition praying for a decree of dissolution of his marriage. The Respondent/Appellant in her answer and cross-petition prayed for (a) an order dismissing the petition (b) a decree of judicial separation (c) custody of the children of the marriage (d) maintenance for the respondent and the children of the marriage and (e) costs of the petition and respondent's legal expenses. Thereafter counsel on both sides reported to the learned trial judge that there was a move to settle the matter out of court. The matter was accordingly adjourned for report of settlement. Before the adjourned date proposals and counter proposals were ordered by both sides. The parties were not agreed on many issues. On the adjourned date, at the request of both counsel the proceedings moved from open court to chambers. The learned counsel for the parties addressed the court explaining the parties' conflicting proposal for settlement. The matter was thereafter adjourned for judgment.

In his judgment, the learned trial judge decided to dissolve the marriage based on the proposals of the parties. In regard to the items on which the parties could not agree, he proceeded to apply his discretion to resolve them and make orders and monetary awards. Dissatisfied with the judgment, the Respondent/Appellant appealed to the Court of Appeal. In a split decision of the Court of Appeal, Coram, Niki Tobi and Ubaezonu JJCA, dismissed the appeal and affirmed the decision of the trial judge, Ejiwunmi, JCA (as he then was) dissented and allowed the appeal. Both parties aggrieved by the judgment have now appealed to the Su-

preme Court.

The Respondent/Appellant raised five issues, but the appeal was determined on one issue.

ISSUE FOR DETERMINATION

"(1) Is the judgment of the court below null and void?"

HELD (Unanimously allowing the appeal and dismissing the cross-appeal per lead judgment of **MOHAMMED JSC**)

Judgments - Vacation period

1. Learned Counsel for the appellant, Mr. Anyamene SAN, opened his submission on issue I based on the 1st ground of appeal. He argued that the judgment of the court below was a nullity because it was delivered during vacation period. But there was no evidence to show that 8th of August was vacation period for the Court of Appeal. The case of Itaye and Ors. V. Union Bank of Nigeria Ltd. (1978) 9 & 10 S.C. 35 which the learned counsel referred is not helpful to the appellant on the issue of giving judgment during vacation period. (p. 3052 B)

Family law - Dissolution of marriage

2. The law is that it is mandatory that proceedings in respect of petition for dissolution of marriage shall be in public. Neither the parties nor the court can decide otherwise. (p. 3055 D)

Waiver - Statutory provision

3. A mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a party's personal right to be waived. (p. 3055 E)

Estoppel - Meaning - Statutory provision

4. You cannot resort to estoppel to compromise a statutory provision of a public nature. Estoppel is the inhibition to assert a personal right, benefit or advantage in consequence of previous conduct, admission or in consequence of a final adjudication of the matter in a court of law. Any decision made by a court contrary to a mandatory statutory provision is

a nullity. (p. 3055 E)

Courts - Hearing in Chambers

5. Although the court recorded that both Senior Counsel had given consent to hearing in chambers but since the statute had made it mandatory that such proceedings must be in open court the consent of counsel is immaterial and of no consequence. The court should not succumb to such call to conduct illegal proceedings. For this reason the proceedings conducted by Ononiba J, in chambers and the judgment delivered thereto are a nullity. (p. 3055 H)

Judgments - Awards - Evidence - Misdirection

6. As I reproduced the facts earlier in this judgment, the learned trial judge did not receive any evidence before he wrote his judgment. When counsel appeared before him in chambers and put forward the parties' proposals and counter proposals it was clear to the court that the parties were not ad idem. Now it is a big question to ask; where did the learned trial judge find the evidence which guided him to exercise his discretion to decide on the issues of disagreement between the parties?

It is not for the court to embark on assessment and awards without evidence supporting such exercise. See Shodeinde V. Ahmadiyya Movement in Islam (1983) 2 SCNLR 284.

The trial court's judgment which the majority justices of the Court of Appeal affirmed was written without any evidence supporting the decision. It is a misdirection for a trial judge to give judgment on an issue on which there is no evidence adduced whatsoever. (pp. 3056 B/3057 A/F)

Judgments - Void decision

7. It is plain therefore that the judgment of Ononiba J having been written without any evidence supporting the decision is void. Equally, the majority judgment of the Court of Appeal which affirmed a void decision is also a nullity. (p. 3058 F)

Courts - Discretion

8. An exercise for discretion by the court must be guided by evidence adduced. I therefore answer the question in issue I as formulated by Anyamene SAN in the affirmative. (p. 3058 G)

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NOTABLE POINTS OF INTEREST

MOHAMMED JSC

1. Counsel ought not be vilified for exercising a constitutional right

Niki Tobi, JCA, was unhappy with the decision of Anyamene SAN, in filing an appeal against the decision of the trial judge to hear this divorce petition in chambers when as a matter of fact Mr. Anyamene jointly with Chief Umeh SAN, applied to the court to hear the proceedings in chambers. Niki Tobi, JCA used many pages of his judgment to hurl insulting strictures on the persons of Anyamene SAN, and his professional integrity. With respect the learned justice is wrong to vilify the learned counsel for exercising a constitutional right which the law permits him to do. (p. 3054 F)

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2. Matrimonial proceedings - That shall be conducted in open court

The law is very clear that proceedings for a decree of:

- (i) *Dissolution of marriage;*
- (ii) *nullity of marriage;*
- (iii) *Judicial separation;*
- (iv) *Restitution of conjugal rights; or*
- (v) *jactitation of marriage;*

F

shall be conducted in open court. See Order 1 Rule r.9(4) (a) of Matrimonial Causes Rule. (p. 3055 F)

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UWAIFO JSC

3. When waiver can be successfully raised

When therefore it is argued that a statutory provision has been waived, it has to be considered whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is the

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latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of public or constitutional policy. The competence of a court of the proceeding in court is a fundamental issue which cannot be waived even if the reason for seeking the waiver is based on the argument that it is in the interest of substantial justice. Once the incompetence is established, the consent of the parties cannot validate what took place under it and preclude the inevitable result of nullity. Similarly, waiver cannot be successfully raised in connection with a person discharging a public duty which the law prescribed shall be done in a particular manner but he adopts another inconsistent with the relevant statutory provisions. The policy of the Act in question is certainly that proceedings for the dissolution of marriage should be heard in open court. (p. 3082 F)

AYOOLA JSC

4. What consent judgment means

For there to be a consent judgment there must have been an agreement of the parties on all aspects of the matter to be covered by the consent judgment. Where the parties agree on some aspects and have not agreed on others, they should be permitted to reach an agreement on the latter, or resolve the points of disagreement by evidence before judgment is pronounced. (p. 3086 A)

REPRESENTATION

A.N. Anyamene, SAN; Ogundele and W. Gbadamosi with him, for Appellant/Cross-Respondent.
 Dr. J. O. Ibik, SAN; M. C. Okonkwo, with him, for the Respondent/Cross-Appellant.

CASES REFERRED TO

Itaye and Ors. V. Union Bank of Nigeria Ltd. (1978) 9 & 10 S.C. 35
 Oviasu V. Oviasu (1973) 11 S.C. 315
 Chief Ikpuku and Ors. Vs. Chief Ikpuku (1991) 5 NWLR (part 193) 571
 Iga & Ors. V. Amakiri & Ors. (1976) 2 S.C. 1

Ude V. Nwara (1993) NWLR (part 287) 638

Shodeinde V. Ahmadiyya Movement in Islam (1983) 2 SCNLR 284

Muhammadu Duriminy V. Commissioner of Police (1961) NRNLR 70

J.B. Soboyede & Ors. V. Minister of Land and Housing, Western Nigeria (1974) ALL NLR 369

Nigeria-Arab Bank Ltd V. Barri Engineering Nigeria Ltd. (1995) NWLR 257

Adegoke Motors Ltd. V. Adesanya (1989) 3 NWLR (part 109) 250

Craig v. Kanseen (1943) 1 ALL E.R. 108

A.G Bendel State v. A.G. of the Federation (1982) 10 SC 1 at 54

Ogbonna v. A.G. Imo state (1992) 1 NWLR (pt 220) 647 at 696

Odofin v Agu (1992) 3 NWLR (pt229) 350.

STATUTES & RULES REFERRED TO

Matrimonial Causes Rules, O. 1 r. 9(4)

Matrimonial Causes Act, SS.103(1) & (2)

LEAD JUDGMENT BY MOHAMMED JSC

This appeal came up for hearing on Tuesday the 3rd of July 2001. After reading the briefs of argument and hearing the oral submissions of counsel this court unanimously allowed the appeal and dismissed the cross-appeal filed by the petitioner. This court, thereafter ordered that the petition and cross-petition be reheard de novo before another judge of the High Court of Anambra State. I then reserved my reasons for the judgment till today. I now give my reasons.

The petitioner, Dr. Timothy Ndubisi Menakaya was lawfully married to the respondent, Ann Okwuchukwu Menakaya on 21st July, 1979 at the Marriage Registry, Barnet, London England. The couple cohabited at Barnet, London, England and Onitsha. There three children of the Marriage, Chinyelu Uchechukwu, born in June 1980, Chinedu Obiora, born in January, 1982 and Obianuju Ifeoma, born in October, 1983.

On the 15th of January, 1993 Dr. Timothy Menakaya, hereinafter referred to as the petitioner, in this judgment, presented a petition to

the High Court of Anambra State in the Onitsha Judicial Division praying (from the court) for a decree of dissolution of his marriage with the respondent and for an order for the custody of the children of the marriage. His reasons for asking for the above reliefs are as follows:

- B "(a) That the marriage has broken down irretrievably
 (b) That the respondent has been in constructive desertion for the past four years, in that ever since, the respondent has denied conjugal rights to the petitioner.
 (c) That the respondent has ever since aforesaid refused even to
 C talk to the petitioner and has completely abandoned all domestic responsibilities of a wife.
 (d) That consequently the respondent has behaved in such a way
 that the petitioner cannot reasonably be expected to live with the respon-
 D dent".

On the 23rd of January, 1993 the respondent acknowledged that a copy of the petition had been served on her. In her answer to the petition the respondent denied being in constructive desertion. She also
 E denied depriving the petitioner of conjugal rights. Contrary, the respondent asserted that it was the petitioner who had shunned any physical contact, sexual or otherwise, with the respondent since May 1992. In January, 1992 the petitioner and the respondent attended the wedding
 F ceremony of petitioner's daughter by a previous married, named Chioma and they chatted together and took photographs. The respondent averred that in July 1992 she attended the Medical Women's Association of Nigeria night together with the petitioner where the petitioner was installed as
 G patron of the Association.

In December the petitioner barred the respondent from touching him. His two sons by his previous marriage, named Ndubuisi and Kenechukwu joined the petitioner in making her life uncomfortable in the matrimonial home. On 8th January 1993 the petitioner told his nephew
 H P.O Balonwu SAN to tell the respondent to pack out of the matrimonial home or he would throw her property out. He threatened that if she did not he would invite the dreaded "*long juju*" to show her the way out. This was the last straw. The respondent who is a Chief Magistrate by

profession reported the matter to the police. When the couple could not be reconciled the respondent filed a cross-petition based on the following particulars:

"(i) *The petitioner has since May, 1992, deprived the respondent of her conjugal rights including sexual intercourse;*

(ii) *Since 1992, the petitioner has refused to give the respondent money to cater for feeding and other household expenses. Instead, the petitioner has been sending the nurses at his hospital to buy foodstuffs for the household to the utter embarrassment and humiliation of the respondent;*

(iii) *On 1st January, 1993, the petitioner ordered the respondent to vacate the marital bedroom on the 3rd of January, 1993, or be ejected with force;*

(iv) *On 8th January, 1993, the petitioner gave the respondent till the 12th of January, 1993, to leave the matrimonial home or be thrown out by force. The respondent is living in the matrimonial home only because of the stand of the police;*

(v) *Since the said 1st January, 1993, the respondent has been living in fear of her life;*

(v) *The petitioner has set his two sons from a previous marriage, Ndubuisi and Kenechukwu, against the respondent and the two boys have continuously harassed and shamed the respondent as outlined supra. They have turned away visitors to the respondent by telling them that the respondent was no longer living in the premises.*

The respondent has not condoned or connived at the facts specified above and is not guilty of collusion in presenting this answer and cross-petition.

The respondent seeks the following orders:-

(a) *An order dismissing the petition;*

(b) *A decree of judicial separation on the ground that the petitioner has behaved in such a way that the respondent cannot reasonably be expected to live with him.*

(c) *Custody of the children of the marriage with reasonable access to the petitioner;*

(d) *Maintenance for the respondent and the children of the*

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marriage;

(e) That the petitioner be made to pay the costs of this petition including the respondent's legal expenses."

On 18th May, 1994 counsel on both side reported to the learned trial judge, Ononiba J that there was a move to settle the matter out of court. The learned trial judge recorded thus:

"By consent the petition is adjourned to 6/7/94 for report of settlement."

Before the adjourned date the following correspondence of proposals and counter proposals were exchanged by the parties;

"1/93 28th June, 1994

Dr. Chief Ejike Ume, SAN.,

Petitioner's Counsel,

D Chancery Mansion,

14/15, Enugu Road,

Onitsha.

Dear Sir,

E Suit No. 0/4D/93

Dr. T. Menakaya V. Menakaya

Below are my proposals for settlement of the above suit out of court.

F 1. Reimbursement of rent of N120,000.00 for two years for accommodation for wife and children from January, 1993.

2. Reimbursement of expenses for maintenance and education of three children for 11/2 years at the rate of N9,000.00 per mensem (sic) (i.e. N3,000.00 per child)

G 3. Reimbursement of cost of transportation for wife and children from January to December, 1993, when wife obtained alternative transport at the rate of N5,000.00 per month.

H 4. Lump sum once-for-all payment on dissolution of marriage N1,000,000.00.

5. Dr. Menakaya will have access to the children at all reasonable times and the children at his request will spend part of their holidays with him.

6. Dr. Menakaya will provide transport to take the children and from

school on school days.

7. Menax Hospital or any other hospital of the choice of their father to see to the medical needs of the children.

8. Mrs. Menakaya to have custody of the children.

Yours faithfully,

(Sgn.) A.N. Anyamene

Respondent's Counsel

B

CC: The Hon. Justice C. Olike,

Your Ref.

1st July, 1994

A.N. Anyamene Esq. S.A.N.,

120 Chime Avenue

New Haven,

Enugu.

Dear Sir,

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Re Suit No. 0/4D/93

Dr. T.N. Menakaya V. Ann Menakaya

May I refer to your letter Ref. 1/93 of 28th June, 1994. After due consultation with my client, Dr. T.N. Menakaya, the following are our proposals in the light of yours.

To wit:

1. Your No. 1 proposal is not accepted; because the respondent being a Chief Magistrate is entitled to Government quarters like other Magistrate here in Onitsha/Ogidi; where no such quarters or accommodation is provided, which is rare, rent is paid by the Government.

2. With regard to paragraph 2 of the said proposal, the petitioner has offered N20,000.00 for the whole period for maintenance of the children and their education.

3. As regard paragraph 3, re transportation of the respondent and the children, the petitioner offers N12,000.00 for the period spelt out.

4. In respect of proposal No. 4, there is no justification for a N1,000,000.00 claim for dissolution of marriage. However, the petitioner offers a handsome and generous sum of N100,000.00 as a show of his goodness.

5. With respect to custody of the children, the petitioner concedes that up to the age of 16 years in each case. Both parents will share the children's holiday periods.

6. Proposal No. 6, that is to say, petitioner to provide means of transport to take the children to and from school on school days is accepted. However, all the children must be in boarding schools to be determined by Mr. Menakaya.

7. Menax Hospital or any other hospital of Dr. Menakaya's choice will see to the medical needs of the children.

Yours faithfully,

(Sgd.) Chief Dr. F. Ejike O. Ume SAN.

Petitioner's Counsel.

CC. The Hon. Justice C. Olike.

D 1/93

Dr. Chief Ejike Ume, SAN.,
Chancery Mansion,
14/15, Enugu Road

E Onitsha.

Dear Sir,

Suit No. 0/4D/93

Dr. T. Menakaya V. Ann Menakaya

F Thank you for your letter No. FEOU/VC/30073 of 1st July, 1994.

The type or class of accommodation which Mrs. Menakaya and the children to her marriage with Dr. Menakaya are entitled to is one approximating to the standard of the accommodation which Dr. Menakaya provided for them during the subsistence of the marriage. I am not aware that any Chief Magistrate is entitled to such type of accommodation or to rent allowance of N60,000.00 per annum which will provide such accommodation.

The N1,000,000.00 lump sum payment is not "a claim for dissolution of marriage". It is payment which the husband makes to his divorced wife to bring her standard of living after divorce to that approximating the standard she enjoyed during the marriage. In the circumstance of this case the offer of N100,000.00 is very meagre.

Whether the children will be in boarding schools is a matter to be discussed by both parents. I say this because many parents are having second thoughts about sending their children to live in boarding schools, a lot depending on the reputation of any particular boarding school.

I have noted your counter proposals in respect of the quantum B of other heads of claim.

Yours faithfully,
(Sgd.) (A.N. Anyamene)

CC. Hon. C. Olike, Onitsha."

The case was called on 6th July, 1994. Both Chief Ejike Umeh, C SAN, and A.N. Anyamene, SAN, were present. The court recorded that both Senior Advocates filed a joint application under Edict No 16 of 1987 Section 43 and prayed the court to hear the petition in Chambers. The learned trial judge accordingly granted the application. He then retired to D his chambers to take the case. While in chambers each counsel described the extent of his client's proposals. The learned trial judge recorded thus:

"By consent, respondent's proposal is admitted in evidence and E marked exhibit "A", whilst petitioner's reply or response to exhibit A is admitted and marked Exhibit "B". Respondent's further reply is admitted as Exhibit "C".

Mr. Anyamene explained to the judge the proposals where the F parties did not agree at all in the following submission:

"Whilst we are claiming N5,000 a month they are offering 1 thousand a month. The wife has been maintaining the children since their separation in January 1993. This period is 11/2 years. She claimed G N3,000.00 per child per month for the 18 months. They offered N20,000 for the whole period.

A lump sum payment to enable the divorced wife to a level of living she had whilst the marriage was subsisting. This eliminates period payment. They accept the principle of payment, whilst we claim 1 mil- H lion and they offered N100,000.00.

(i) Accommodation for the divorced wife and children. We say she is entitled to the type of accommodation the husband gave her whilst

they were living together. The one she occupies now commends rent of N60,000. per annum. They are saying she should get Government Quarters or get housing allowance given to public officers".

Thereafter, and without any request from any of the counsel the learned trial judge recorded; "Court: Judgment is adjourned to 18/7/94".

The learned trial judge, Ononiba J. delivered his judgment on 18/7/94. In the judgment, Ononiba J. made the following observations:

"There is no agreement at all on the reimbursement of accommodation expenses for which the respondent is claiming N120,000 but totally rejected by the petitioner. Having outlined the position of the parties, it is now my responsibility and, I should add, a painful duty to use judicial discretion make awards or accept any of the proposals in the areas of disagreement".

This gives the insight that the judgment is not a consent judgment. Yet the learned trial judge, without receiving any sworn evidence went about filling the gaps of disagreement between the parties and making monetary awards. At the conclusion of his judgment the learned trial judge made the following orders:

"(1) Decree nisi dissolving the marriage celebrated between the petitioner - Timothy Ndubisi Menakaya and respondent - Ann Okwuchukwu Menakaya (nee Orakwue), on the 21st day of July 1979 at the Marriage Registry, Barnet, London.

(2) I grant custody of each of the children of the marriage to the respondent, Ann Okwuchukwu Menakaya until he or she attains the age of sixteen years.

(3) The petitioner, Dr. Timothy Ndubisi Menakaya to determine-

(a) The choice of school for the children to attend.

(b) Whether the children will live within or outside the boarding house.

(4) The petitioner will have access to the children at all reasonable times and in particular the children will spend the Christmas holidays and the long vacation less two weeks with him.

(5) The respondent will spend Easter Vacation plus two weeks of

the long vacation with the children.

(6) *The petitioner will provide transport to take the children to and from school on school days.*

(7) *The petitioner will be responsible for the medical care of the children either at the Menax Hospital or any other hospital of his choice.* B

(8) *The petitioner will make a lump sum once and for all payment of N150,000.00 (one hundred and fifty thousand naira) to the respondent.*

(9) *The petitioner will reimburse the respondent a sum of N12,000 being transportation expenses for wife and children before respondent got an alternative transport.* C

(10) *The petitioner will pay the respondent a sum of N30,000 being reimbursement for maintenance of the three children including their school fees and upkeep for 18 months.* D

(11) *The petitioner will pay the respondent a sum of N60,000 (sixty thousand naira) being the reimbursement for rent for a period of one year after leaving the matrimonial home".*

Dissatisfied with the judgment the respondent appealed to the Court of Appeal. In a split decision of the Court of Appeal, the majority justices, coram, Niki Tobi and Ubaezonu JJCCA, dismissed the appeal and affirmed the decision of the trial judge. Ejiwunmi, JCA (as he then was) dissented and allowed the appeal. He ordered for a retrial of the petition de novo before another judge. F

The respondent, armed with eight ground of appeal, came finally before this court challenging the decision of Niki Tobi and Ubaezonu JJCA. Anyamene SAN, for the respondent/appellant, identified the following issues for the determination of the appeal: G

"(1) *Is the judgment of the court below null and void?*

(2) *Whether the new-found exception to the application of the rule of estoppel by conduct on which Justice Niki Tobi grounded his judgment is tenable in law?* H

(3) *Was the court below right in confirming the dissolution of a marriage based on no ground for dissolution known to law?*

(4) *Whether the monetary awards of the court below were based*

on any relevant facts and evidence to make them good in law.

(5) *Whether the majority judgment of the court was not bad in law for failing to comply with the duty of an appellate tribunal hearing appeals and for failing to consider all the appellant's grounds of appeal".*

Learned Senior Advocate, Dr. J.O. Ibik for the petitioner, adopts the questions as formulated by the appellant's counsel. Dr. Ibik, SAN, filed a cross appeal against the majority judgment of the Court of Appeal. **Learned Counsel for the appellant, Mr. Anyamene SAN, opened his submission on issue I based on the 1st ground of appeal. He argued that the judgment of the court below was a nullity because it was delivered during vacation period. But there was no evidence to show that 8th of August was vacation period for the Court of Appeal. The case of Itaye and Ors. V. Union Bank of Nigeria Ltd. (1978) 9 & 10 S.C. 35 which the learned counsel referred is not helpful to the appellant on the issue of giving judgment during vacation period.** Dr. Ibik, SAN, is right to submit that there was a specific rule of court in force in the then Mid-Western State of Nigeria regulating proceedings during annual vacation. No such rule of court is contained in the Court of Appeal Rule 1981 (as amended). I have looked at the Midwestern State Notice No.131 of 26th March, 1975. It was published at page 163 of the Mid-Western State of Nigeria, Gazette No. 20, Vol 12 of 10th of April, 1975. It is a Notice under Order 25, Rule 5 of the High Court (Civil Procedure) Rules, 1958 issued by the Chief Justice of Mid-Western State of Nigeria. The notice reads:

*"IN THE HIGH COURT OF JUSTICE
MIDWESTERN STATE OF NIGERIA
NOTICE UNDER ORDER 25 RULES OF THE HIGH
COURT (CIVIL PROCEDURE) RULES 1958
ANNUAL VACATION*

**OBOREUBORI ITAYE & 7 ORS. V CHIEF OKUOWE
EKAIDERE & 4 ORD.**

The High Court of Midwestern State of Nigeria will be on vacation as from Thursday, 31st July, 1975 until Saturday 30th August, 1975

(both dates inclusive).

1. *The Legal Year 1975/76 will commence on the 1st day September 1975.*

2. *During the vacation, their Lordships will deal with urgent civil criminal matters, the civil actions may be heard only by leave of a judge on the application of both parties to the suit or their counsel.*

Dated at Benin City this 26th day of March, 1975.

Mason Begho

(Chief Justice)

Midwestern State of Nigeria".

There is no similar notice in the Court of Appeal Rules 1981 (as amended).

Mr. Anyamene SAN raised a second argument on issue 1 which states that the judgment of the court below was null and void, because the majority judgment of the court below cannot confirm a judgment that is itself null and void. This is the crux of this appeal. Mr. Anyamene SAN, submitted that both the majority and minority judgments of the court below found fundamental irregularities and errors in the judgment of the High Court. Learned Counsel referred to an extract in the judgment of Niki Tobi, JCA., where the learned justice opined as follows:

"Although section 103(2) of the Matrimonial Causes Act seems to vindicate Order 1 Rule 9(1) of the Matrimonial Causes Rules, the intention of both the Act and the Rules is that proceedings for a decree of dissolution of marriage should be heard in public. This is clear from a community interpretation of section 103(1) of the Act and Order 1 Rule 9(4) of the rules. The legal effect of all the above analysis which sound abstract and technical is that the procedure the learned trial Judge was led to adopt violated or infringed the provisions of both the Act and the Rules".

In the minority judgment, Ejiwunmi JCA, (as he then was) held that the learned trial judge was wrong to allow a matrimonial cause or matter to be heard in Chambers.. Learned justice referred to the case of Oviasu V. Oviasu (1973) 11 S.C. 315 in which trial judge heard the whole proceedings for the dissolution of marriage in chambers. On appeal to

Supreme Court the judgment was set aside and retrial ordered because of fundamental irregularity. The Supreme Court said;

"We regard the irregularity as being fundamental, which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the judge's chambers did not constitute a regular hearing of an action in court".

I will go back to the provisions of section 103(1) and (2) of Matrimonial Causes Act which Niki Tobi JCA, referred to in his judgment. The learned justice held that the intention of both Section 103(2) of the Matrimonial Causes Act and Order 1 Rule (4) of the Matrimonial Causes Rules is that the proceedings for a decree of dissolution of marriage should be heard in public. Yet the learned justice came with an opinion that estoppel by conduct will be an answer to the requirement of the law that the proceedings of this case should be in open court. Learned justice cited many cases on estoppel. The learned justice explained that if a man whatever his real meaning may be so conducts himself that a reasonable man would take his conduct to mean a certain representation of fact and the latter was intended to act upon it in a particular way, and he with such belief, does act in that way to his damage, the first is estopped from denying the fact as represented. He referred to *Chief Ikpuku and Ors. Vs. Chief Ikpuku (1991) 5 NWLR (part 193) 571*, *Iga & Ors. V. Amakiri & Ors. (1976) 2 S.C. 1* *Ude V. Nwara (1993) NWLR (part 287) 638*. Niki Tobi, JCA, was unhappy with the decision of Anyamene SAN, in filing an appeal against the decision of the trial judge to hear this divorce petition in chambers when as a matter of fact Mr. Anyamene jointly with Chief Umeh SAN, applied to the court to hear the proceedings in chambers. Niki Tobi, JCA used many pages of his judgment to hurl insulting strictures on the persons of Anyamene SAN, and his professional integrity. With respect the learned justice is wrong to vilify the learned counsel for exercising a constitutional right which the law permits him to do.

Now I may ask; *"Is the action of the judge to hear this petition in chambers and his judgment worth the defence given to it by the learned*

justice of the Court of Appeal"? The action of the judge is an open violation of the provision of Section 103(1) & (2) of Matrimonial Causes Act. The section reads:

"103. (1) Except to the extent to which rules of court make provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercised in open court.

(2) Where in proceedings under this Act the court is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceedings or any part of the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of the proceedings, as the case may be".

The provision of the statute is therefore very clear. **The law is that it is mandatory that proceedings in respect of petition for dissolution of marriage shall be in public. Neither the parties nor the court can decide otherwise. A mandatory statutory provision directing a procedure to be followed in the performance of any duty is not a party's personal right to be waived. You cannot resort to estoppel to compromise a statutory provision of a public nature. Estoppel is the inhibition to assert a personal right, benefit or advantage in consequences of previous conduct, admission or in consequence of a final adjudication of the matter in a court of law. Any decision made by a court contrary to a mandatory statutory provision is a nullity. The law is very clear that proceedings for a decree of:**

- (i) Dissolution of marriage;*
- (ii) nullity of marriage;*
- (iii) Judicial separation;*
- (iv) Restitution of conjugal rights; or*
- (v) jactitation of marriage;*

shall be conducted in open court. See Order 1 Rule 9(4) (a) of Matrimonial Causes Rule. **Although the court recorded that both Senior Counsel had given consent to hearing in chambers but since the statute**

had made it mandatory that such proceedings must be in open court the consent of counsel is immaterial and of no consequence. The court should not succumb to such call to conduct illegal proceedings. For this reason the proceedings conducted by Ononiba J, in chambers and the judgment delivered thereto are a nullity.

Another irregularity which the majority decision of the Court of Appeal upheld is the judgment of the learned trial judge. It is agreed by both the majority justices and the minority that the judgment of Ononiba J. is not a consent judgment. As I reproduced the facts earlier in this judgment, the learned trial judge did not receive any evidence before he wrote his judgment. When counsel appeared before him in chambers and put forward the parties' proposals and counter proposals it was clear to the court that the parties were not *ad idem*.

Now it is a big question to ask; where did the learned trial judge find the evidence which guided him to exercise his discretion to decide on the issues of disagreement between the parties? Ejiwunmi, JCA in his minority judgment made a correct observation where he said; "It is also pertinent that I should refer too the provisions of 70(1) of the Matrimonial Causes Act, which provides:

"S. 70(1) subject to this section, the court may in proceedings with respect to the maintenance of a party to the marriage other than proceedings for an order for maintenance pending the disposal of proceedings, make such order as it thinks proper, having regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances."

In the case in hand, the court was certainly faced with conflicting proposals for maintenance etc., but it did not consider it necessary to take evidence to resolve the conflicts before reaching conclusions thereon".

Niki Tobi JCA, was conscious of the fact that there was no evidence upon which the judgment of the trial court, was based, yet the learned justice embarked on assessment and monetary awards. In his judgment the learned justice said:

"I shall be very much guided by the above random principles, as well as the provisions of section 69 to 73 of the MCA, 1990 in my assess-

ment of awards, and I will involve myself in some arithmetical calculations; although my arithmetic is not the best".

With respect, the learned justice is wrong. **It is not for the court to embark on assessment and awards without evidence supporting such exercise.** See Shodeinde V. Ahmadiyya Movement in Islam (1983) 2 SCNLR 284. Muhammadu Duriminy V Commissioner of Police (1961) NRNLR, page 70. This was a case of fraudulent false accounting and stealing where the trial magistrate conducted some investigation of account books without any evidence supporting such exercise. The appellate Division of the High Court of Northern Nigeria, in allowing the appeal and ordering for a retrial held as follows:

"The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested. What was demonstrated in court at this trial failed to support the prosecution case, and the magistrate should have dismissed the case. It was no part of his duty to do cloistered justice by making an inquiry into the case outside court - not even by the examination of documents which were in evidence, when the documents had not been examined in court and the magistrate's examination disclosed things that had not been brought out and exposed to test in court or were not things that, at least, must have been noticed in court. We will not do it ourselves; neither will we allow the respondent to demonstrate now in this court what as prosecutor he had the opportunity of demonstrating at the trial. The appeal will be allowed".

The trial court's judgment which the majority justices of the Court of Appeal affirmed was written without any evidence supporting the decision. It is a misdirection for a trial judge to give judgment on an issue on which there is no evidence adduced whatsoever. In the case of J.B. Soboyede & Ors. V. Minister of Land and Housing, Western Nigeria (1974) ALL NLR 369 the respondents took out an originating summons for the determination by the court of persons entitled to be paid compensation in respect of portions or all of lands compulsorily acquired by them. The learned trial judge decided this issue, and then proceeded on his own to decide the amount of compensation, and to make awards. On appeal, the Supreme Court held:

"We have come to the conclusion that the contention of counsel on all sides is well founded. As it will be seen in the case of Ashamu, there was an application followed by a general agreement of all counsel concerned that the amount of compensation payable should be assessed by the court. Hence, even though that was not an issue on the originating summons, the learned trial judge was entitled, as he did, to proceed to a determination of that issue. In the present case, there was, as learned counsel complained, no such application and/or agreement and, worse still, none of the parties led any evidence touching upon the amount of compensation either demanded by the claimants or offered by the respondents. The learned trial judge had taken as a basis for his assessment a figure arrived at in respect of an adjacent portion of land but he had no evidence whatsoever with respect to the value of the land on which he purported to pronounce a value. We think it right to observe that this is particularly risky especially in matters commenced by originating summonses since the purpose of such a summons is usually stated on the application and almost always no pleadings are required or filed. In the present case, the error of such a procedure is manifest. These parties gave no evidence concerning the issue on which the judge pronounced judgement and we cannot imagine a clearer cases of misdirection than that in which he judgment of the court had proceeded on an issue in respect of which evidence was singularly non-existent". (Underlining is mine)

It is plain therefore that the judgment of Ononiba J having been written without any evidence supporting the decision is void. Equally, the majority judgment of the Court of Appeal which affirmed a void decision is also a nullity. An exercise for discretion by the court must be guided by evidence adduced. I therefore answer the question in issue I as formulated by Anyamene SAN in the affirmative. It is because of these reasons that I allowed the appeal, set aside the majority judgment of the Court of Appeal and ordered the retrial of the petition and cross-petition de novo before another judge of Anambra State. The cross-petition is also dismissed being brought against a nullity judgment. I award N10,000.00 costs in favour of the Respondent /

Appellant.

OGUNDARE JSC

The two appeals in this matter came before us for hearing on B
3rd July 2001 and after going through the record of appeal and reading
the briefs filed by the parties and hearing learned counsel for the parties
in oral argument, I allowed the appeal of the Respondent/ appellant, set
aside the judgment of the two courts below and ordered that the petition C
of the Petitioner/Respondent (hereinafter is referred to as the petitioner
simpliciter) and that of the Respondent be heard *de novo* before another
judge of the High Court of Anambra State. I dismissed the cross-appeal
of the petitioner. I indicated then that I would give my reasons for so D
deciding today. I now give my reasons.

I have had the privilege of a preview of the reasons given by my
learned brother Mohammed JSC for he too allowing the appeal of the
respondent, dismissing the appeal of the petitioner and ordering a retrial
for the petition. I agree entirely with the reasons given by him. I will, E
however, add a few comments of my own.

The facts have been fully set out in the reasons for judgment
given by my learned brother; I need not go over them again. Suffice it to
say that when the matter came before the trial court on 18/5/94, the F
presiding judge, Ononiba J, as he then was, adjourned it to 6/7/94 "*for
report of settlement*". I need out hereunder the Court's note for that day
as appearing in the record of appeal before us. The record for 18/5/94:

"Between

Dr. Timothy Ndubisi Menakaya Petitioner

vs

Ann Okwuchukwu Menakaya Respondent

Petitioner present. Respondent absent.

*Dr. Chief Ejike Umeh SAN for the petitioner (Miss A. Achionu H
with him).*

*C.A. Anozie Esq. (Ikenna Egbuna Esq., I. I. Anuobi Esq. with
him for the Respondent.*

Umeh: *There is a move to settle out of court and I think we should give this move a chance.*

Anozie: *I am aware of it. I agree we should give it a chance. I am instructed to ask for 6/7/94 for report of settlement.*

B Umeh: *I will take that date in his (sic) interest of settlement.*

Court: *By consent the petition is adjourned to 6/7/94 for report of settlement*

(Sgd.) G.U. Ononiba

Judge

18/5/94

C In the period between 18/5/94 and 6/7/94 there was exchange of correspondence between learned counsel for the parties setting out their respective terms of settlement. These terms are already set out in the
D reasons for judgment given by my learned brother; I shall not set them out here again. One thing appears clear from the exchange and that is that the parties were not agreed upon many issues. Thus it cannot be
E said that they had settled their difference by the time they came before Ononiba J. on 6/7/94.

On 6/7/94 the petitioner was present in court but the respondent was absent. Both were however represented by counsel. At the request of both counsel the proceedings moved from open court to Chambers.
F Again, in order to clearly show why I allowed this appeal on 3/7/01 I shall set out below the court's proceedings for that date. The record reads:

"Suit No. 1/4D/93

Between:

G *Dr. Timothy Ndubisi Menakaya Petitioner*

Vs.

Ann Okwuchukwu Menakaya Respondent

Petitioner present. Respondent absent.

H *Dr. Chief Ejike Umeh SAN (E. Chobala Esq. and Miss B. Achinonu with him).*

A. N. Anyamene SAN for the Respondent/cum petitioner (Ikenna Egbuna Esq. and C.O. Okonkwo Esq. with him)

Anyamene SAN and Ejike Umeh SAN. This is a joint application brought under Edict No. 16 of 1987 S. 43 that this matter be taken in chambers.

Court: Application to take this petition in chambers is hereby granted. Court will now retire to chambers to take the case. B

Umeh: When we met here there was indication that the matter will be amicably settled out of court. This was argued (sic) to intervention of Hon. Justice C. Olike. Sequent to that I had a little conference with Anyamene Esq. SAN. Thereto he sent proposals. I then sent my own reply to his proposals which he proffered. The issues appear to have been narrowed down where we fail to agree. Court can then use its judicial discretion to make an amend or accept any of the proposals. The most important agreement are: C

(a) The parties have agreed that the marriage be dissolved. D

(b) We have agreed that the Respondent could have custody of the children subject to these conditions. The custody should terminate at the age of sixteen in each case. The both parties should share the children's holiday periods. E

(c) The petitioner should have access to the children and the children of secondary school ages should be in boarding school for better upbringing. The petitioner should also have the right to chose what schools to be attended by own children. F

(d) That Menax hospital or any other hospital of petitioner's choice should attend the children for their medical needs.

(e) Petitioner should provide transport to and from school for a child not in secondary school.

As for other proposals e.g. No. 1, we rejected it on the ground that as a Chief Magistrate the Respondent is entitled to Government Quarters and where no accommodation is provided, the Government pays rents. G

(2) With regard to No. 2 proposal we offered N20,000.00 H

(3) We offered N12,000 with respect to proposal No.3.

(4) In respect of proposal No. 4 we have offered a lump sum grant of N100,000. as a show of goodness to the Respondent. I submit

we have come to a meeting point.

Anyamene:

The proposals fall under three categories

A. Where we agreed on all the specific proposals

B *(1) These are: Dissolution of the marriage which means the Respondent will withdraw her petition for Judicial Separation*

(2) Medical attentions for the children is the sole responsibility of the petitioner.

C *(3) transportation for the children to and from the school - petitioner's sole responsibility.*

(4) Custody of the children - respondent to have them. There is legal sealing of 16 years.

D *(5) Access by the father of the children - it will be at all reasonable times and notably during the holidays and the sharing their holidays.*

SECOND GROUP

E *B. Subject to further discussion between parents. This is whether the children will be in boarding institution, which ones. We know the boarding houses are not healthy these days. We suggest parents should meet and agree on the particular boarding school or not at all. For example, one of them is attending D.M.G.S. from the house whilst the other in Girls Federal Government College, Onitsha.*

F *C. (i) This is where we have agreed on principle but we are not ad idem in quantum. This include reimbursement of costs of transportation for wife and children from January 1993 to December 1993 where the wife obtained private transport .*

G *Dr. Umeh: I seek to tender our own proposals.*

Anyamene: I should tender first my proposal.

Court: By consent, Respondent's proposal is admitted in evidence and marked Exhibit A. whilst petitioner's reply or response to Exhibit A is admitted and Exhibit B. respondent's further reply is admitted as Exhibit C.

Anyamene: Whilst we are claiming N5,000 a month they are offering 1 thousand a month.

(ii) *The wife has been maintaining the children since their separation in January 1993. This period is one and a half years. She claimed N3,000.00 per child per month for the 18 months. They offered N20,000.*

(iii) *A lump sum payment to enable the divorced wife to a level of living she had whilst the marriage was subsisting. This eliminates period payment. They accept the principle of payment, whilst we claim 1 million and they offered N100,000.00*

(D) *This is where there is no agreement at all.*

(i) *Accommodation is for divorced wife and children. We say she is entitled to the type of accommodation the husband gave her whilst they were living together. The one she occupies now commends rent of N60,00.00 per annum.*

They are saying she should get Government quarters or get housing allowance given to public officers.

Court: Judgment is adjourned to 18/7/94.

(Sgd.) (G.U. Ononiba)

Judge

6/7/94"

From the above it can be seen that all that happened in court on 6/7/94 was that learned counsel for the parties addressed the court explaining the parties' conflicting proposals for settlement. It was on these explanations that the learned trial Judge based his judgement given on 18/7/94/

In that judgment after setting out the conflicting proposals of the parties, the learned Judge remarked:

"From the foregoing, and, in consonance with the discussions in chambers with counsel for both sides, and, in the presence of the petitioner, it is safe to say, that there was total agreement on the following issues:

(1) That the marriage should be dissolved and Respondent's petition for judicial separation withdrawn.

(2) That medical attention for the children of the marriage should be the sole responsibility of the petitioner.

(3) that transportation of the children of the marriage to and

from school is the sole responsibility of the petitioner.

(4) *That the respondent will have custody of the children until the age of sixteen years.*

(5) *that the petitioner will not only have access to the children during holidays but at all reasonable times.*

(6) *That the children will spend part of their holiday period with the petitioner and part with the respondent.*

The parties are not fully agreed that the children who are in secondary school should live in as boarders. The petitioner's stand is that they should be boarders whilst the respondent says that this should be subject to discussion by both parents.

The parties agreed on principle but are not ad idem in respect of quantum in the following areas:

(a) *Transportation expenses of N5,000 a month from January to December 1993. Petitioner offered N12,000 for the period.*

(b) *Maintenance of children from January 1993 to June 1994 - a period of one and a half years at the rate of N3,000 per child per month. The petitioner offered N20,000 for the whole period.*

There is no agreement at all on the reimbursement of accommodation expenses for which the respondent is claiming N120,000 but totally rejected by the petitioner."

He considered what, in his view, was a fair deal for each party and finally ordered:

"(1) Decree nisi dissolving the marriage celebrated between the petitioner- Timothy Ndubisi Menakaya and respondent - Ann Okwuchukwu Menakaya (nee Orakwe), on the 21st day of July, 1979 at the Marriage Registry, Barnet, London.

(2) I grant custody of each of the children of the marriage to the respondent, Ann Okwuchukwu Menakaya until he or she attains the age of sixteen years.

(3) The petitioner, Dr. Timothy Ndubisi Menakaya to determine -

(a) the choice of school for the children to attend.

(b) whether the children will live within or outside the boarding

house.

(4) *The petitioner will have access to the children at all reasonable time and in particular the children will spend the Christmas holidays and the long vacation less two weeks with him.*

(5) *The respondent will spend Easter vacation plus two weeks of the long vacation with the children.* B

(6) *The petitioner will provide transport to take the children to and from school on school days.*

(7) *The petitioner will be responsible for the medical care of the children either at the Menax Hospital or any other hospital of his choice.* C

(8) *The petitioner will make a lump sum once and for all payment of N150,000.00 (one hundred and fifty thousand Naira) to the respondent.*

(9) *The petitioner will reimburse the respondent a sum of N12,000 being transportation expenses for wife and children before respondent got an alternative transport.* D

(10) *The petitioner will pay the respondent a sum of N30,000 being reimbursement for maintenance of the three children including their school fees and upkeep for 18 months.* E

(11) *The petitioner will pay the respondent a sum of N60,000 (sixty thousand Naira) being the reimbursement for rent for a period of one year after leaving the matrimonial home.* F

The respondent to the petition (who is also a cross-petitioner and is the Appellant in this appeal but shall hereafter be referred to as respondent simpliciter) was dissatisfied with the judgment and appealed to the Court of Appeal. The latter Court by a majority decision (Tobi and Ubaezonu JJ.CA), Ejiwunmi JCA., as he then was, dissenting) dismissed the appeal but varied upwards some of the awards made by the trial court. Both parties have now appealed to this Court; the respondent appealed against the majority judgment while the petitioner appealed against only that part of it that varied upwards the awards made by the trial court. H The issues for determination are already contained in the reasons for judgment of my learned brother, Mohammed JSC. As it is the first issue - Is the judgment of the court below null and void? - that determined the

appeal, I will only concern myself with it.

The question that arose was whether the judgment of Ononiba J. given following proceedings in chambers and without any evidence led, was a void judgment. It is self evident from the judgment that the B proceeding leading to it were as a result of *"discussions in chambers."*

Section 103 of the Matrimonial Causes Act states:

C *"103.(1) Except to the extent to which rules of court makes provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercised in open court.*

D *(2) Where in proceedings under this Act the court is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceedings or any part of the proceedings should no be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of the proceedings, as the case may be."*

E Order 1 rule 9 of the Matrimonial Cause Rules provides:

"9. (1) Proceedings of a kind referred to in paragraph (c), (d) or (e) of the definition of "matrimonial cause" may be heard by a court sitting

F *(2) A court sitting in open court may adjourn proceedings of a kind referred to in sub-rule (1) of this rule for consideration by the court sitting in chambers.*

G *(3) A court sitting in chambers may adjourn proceedings of a kind referred to in sub-rule (1) of this rule for consideration by the court sitting in open court.*

H *(4) This rule shall not authorise a court sitting in chambers to hear proceedings that relate to proceedings for an act of a kind referred to in paragraph (a) of the definition of 'Matrimonial cause' where it is practicable for the court to hear those proceedings at the same time as the proceeding for such act."*

And "matrimonial cause" is defined in section 11 4(1) of the Act as meaning -

"(a) Proceedings for a decree of-

i) dissolution of marriage;

ii) nullity of marriage;

iii) judicial separation.

(iv) restitution of conjugal rights; or

B

(v) Jactitation of marriage;

(b) Proceedings for a declaration of the validity of the dissolution or annulment of a marriage by decree or otherwise or of a operation of a decree of judicial separation, or for an order discharging a decree of judicial separation;

C

(c) proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) of this subsection, including proceedings of such a kind pending at, or completed before, the commencement of this Act;

D

E

(d) any other proceedings (including proceedings) with respect to the enforcement of a decree, the service of process or costs) in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a), (b) or (c) of this subsection; including proceedings of such a kind pending at, or completed before, the commencement of this Act; or

F

(e) proceedings seeking leave to institute proceedings for a decree of dissolution of marriage or of judicial separation, or proceedings in relation to proceedings seeking such leave;"

G

There is also section 54(4) which provides that -

"The court shall so far as is practicable, hear and determine at the same time all proceeding instituted by the one petition."

The cumulative effect of all these provisions is that hearing of a petition is to be in open court. What Ononiba J did on 18/5/94 in retiring to chambers was in breach of the Act and Rule. Consequently, the proceedings for that date were a nullity see: Oviasu v. Oviasu (1973) 1 ANLR

H

730. The statutory provisions apart there is also section 33(3) of the constitution of the Federal Republic of Nigeria 1979 (in force at the time of the proceedings in the trial court) (now section 36(3) of the 1999 Constitution) which enjoined proceedings of a court or tribunal for the determination of civil rights and obligations to be in open court - see: Nigeria-Arab Bank Ltd v. Barri Engineering Nigeria Ltd. (1995) NWLR 257. As the learned trial judge sat in a place other than as authorised by the Constitution, the Act and the rules made thereunder, the proceedings leading to his judgment suffered from such a fundamental vice that vitiated the entire proceedings and rendered the judgment delivered null and void. Neither Order XX1 rule 2 of the Matrimonial Cause Rules which deals with the effect of non-compliance with the Rules nor Order XXIII rule 1 which reads:

"1. Nothing in these rules shall be taken to prevent the court from making, with the consent of the parties to proceedings and in accordance with the practice of the court, an order (not including an order of a kind referred to in paragraph (a) or (b) of the said definition of matrimonial cause") determining the proceedings or relating to the proceedings."

is of any assistance to cure the defect.

Tobi JCA delivering the majority decision of the Court below with which Ubaezonu JCA agreed, observed; and quite rightly too, in my respectful view;

"The reliefs or orders sought in the petition are: (a) a decree of dissolution of the marriage and (b) an order for the custody of the children. These two reliefs cut across section 114(a) and (c) of the Matrimonial Causes Act.

In the language of Order XXIII Rule 1 of the Matrimonial Causes Rules, while the procedure adopted by the learned trial Judge could be justified as it relates to the relief for the custody of the three children of the marriage, it is not so in respect of the relief for the dissolution of the marriage. This is because Order XXIII Rule 1 excludes the choice of procedure by the court with the consent of the parties in respect of proceedings for a decree of dissolution of marriage. In view of the fact that

the major relief sought was the dissolution of the marriage, the trial Judge ought not to have allowed himself to be led to hear the matter by the unique procedure."

The learned Justice criticised the wording of Order 1 rule 9 of the Matrimonial Causes rules when he said:

"I have since on my own tumbled at Order 1 Rule 9 of the matrimonial Causes Rules. Sub-rule (1) and (4) are relevant. By sub-rule (1), proceedings of a kind referred to in paragraphs (c), (d) or (e) of the definition of 'matrimonial cause' may be heard by a court sitting in chambers. Sub-rule (4) provides that the Rule shall not authorise a court sitting in chambers to hear proceedings that relate to proceedings for an act of a kind referred to in paragraph (a) of the definition of matrimonial cause where it is practicable for the court to hear those proceedings at the same time as the proceedings for such an act. Confused as the sub-rule is, this much is clear that it seems to forbid or prohibit the hearing of proceedings at the same time as the proceedings for such an act", whatever that may mean. In the language of such-rule (1) the only matters which could be heard in chambers are those enumerated under section 114(c), (d) and (e) of the matrimonial Cause Act. In the context of the reliefs sought in this matter, the custody of the children could be heard in chambers." (Underlining is mine)

I pause here to comment briefly on the above observation. With profound respect to the learned Justice of the Court of Appeal, I do not share his view that Order I rule 9 is in any way confused. I have already set out the rule earlier in this judgment. It empowers the court to take certain proceedings referred to in paragraphs (c) - (e) of the definition of matrimonial cause in section 114(1) of the Act in chambers or in open court. In respect of proceedings of the kind referred to in paragraphs (a) and (b) however, proceedings must be in open court. And where proceedings of the first kind are taken along with proceedings of the second kind such proceedings can only be in open court.

Following on his observation quoted above, the learned Justice further observed;

"Although section 103(2) of the matrimonial Causes Act seems

to vindicate Order 1 Rule 9(1) of the Matrimonial Causes Act Rules, the intention of both the Act and the Rules is that proceedings for a decree of dissolution of marriage should be heard in public. This is clear from a community interpretation of section 103(1) of the Act and Order 1 rule 9(4) of the Rules."

Had he stopped there, the logical conclusion he would have reached would be to vitiate the proceedings of the trial court and order a retrial. Unfortunately, he saw the legal effect of the Act and rule and 'abstract and technical'. What is abstract and technical in complying with the provisions of the Constitution, statute and rule of court, I cannot fathom.

Rather than give effect to the clear provisions of the law, as rightly found by him, the learned Justice embarked on a treatise on the law of estoppel a most inappropriate exercise in the circumstances of this case. He singled out counsel for the respondent. Mr. Anyamene SAN for one of the worst vitriolics I have ever read in a judgment, all because learned Senior Advocate, on the instruction of his client lodged an appeal against the judgment of the trial court! I have earlier set out the court's records for 18/5/94 and 6/7/94. On 18/5/94, counsel for the petitioner informed the court that moves were on to reconcile the parties and asked for adjournment to give the moves a chance. Counsel for the respondent agreed. The judge adjourned to 6/7/94 for report of settlement. On 6/7/94, learned counsel for the parties jointly applied to have the matter, that is, the report of settlement taken in chambers. This was precisely what took place in chambers on that day as borne out by the record. There was no hearing of the petition and cross-petition but "discussions" as the learned trial judge rightly put it in his judgment. It was the trial judge on his own, that decided to adjourn for judgment rather than for hearing. The respondent, who was dissatisfied with the judgment instructed her counsel to appeal and counsel carried out the instruction. Wherein lies counsel's crime to justify his hanging? With respect to the learned Justice of Appeal, I think he was most unfair and very intemperate in his attack on Mr. Anyamene, SAN whose conduct in this matter I consider very professional and blameless. I am not alone in commending Mr. Anyamene for the way he conducted himself in this

matter. The learned trial judge had this to say about the counsel for the parties, who incidentally, are both Senior Advocates of Nigeria. He wrote:

"Having outlined the position of the parties, it is now my responsibility and, I should add, a painful duty to use judicial discretion to make award or accept any of the proposals in the areas of disagreement. Before doing this, I would like to put down on record, my appreciation of the high professional decorum and maturity displaced (sic) by the learned Senior Advocates of Nigeria for the two parties. Without their commitment and level-headedness, this rapprochement would not have been possible."

What a contrast from the observation of Tobi JCA! I think we judges owe it a duty to be restrained and civilized in dealing with those - counsel, parties and members of the public - who appear in our courts.

Coming back to the meets of the matter before us, having considered the issue of estoppel raised in the judgment of Tobi JCA as unnecessary and inappropriate, I will refrain from commenting on the correctness or otherwise of some pronouncement made by him. Suffice it to say that the parties cannot by conduct or consent alter the Constitution or a statute. And where the parties through their counsel request the court to adopt a procedure or course of action not authorised by law or specifically prohibited by it, the court is under a duty to turn down such a request. By sitting in chambers rather than in open court, the irregularity is not a mere one but fundamental. The cases of OVIASU V. OVIASU and NIGERIA-ARAB BANK LTD. V. BARRI ENGINEERING NIGERIA LTD. bear this out.

There is yet another vice which appears to escape the attention of their Lordships of the Court below who constituted the majority. Was there a hearing of the petition and cross-petition before judgment was given by the trial Judge? The learned trial judge did not make any pretence about the proceedings before him being a hearing. I say this because he wrote in his judgment thus:

"From the foregoing, and in consonance with the discussions in chambers with counsel on both sides, and in the presence of the petitioner, it is safe to say that there was total agreement on the following

issues....." (*Underlining is mine*)

Now, the question arises: can a judge proceed to judgement in a matter before him without a hearing and in the absence of the parties arriving at terms of settlement? I rather think not. The parties here made moves to settle but could not agree on the terms of settlement. In a situation such as this, the judge is enjoined to proceed to trial by calling on the parties to adduce evidence in support of their respective case. The trial judge did not do that. He undertook to resolve the areas of disagreement between the parties without resort to any evidence. He claimed to be exercising his discretion - and the Court below agreed with him. But a court does not exercise its discretion *in vacuo* but on legal evidence or materials placed before it by the parties. The learned trial Judge dissolved the marriage between the parties without any evidence. On what then had the petitioner satisfied the learned judge as required by section 15(2) of the Act? On what then was the Judge satisfied that the marriage had broken down irretrievably? None whatsoever. Had their Lordships addressed their minds to these questions they would have unhesitatingly set aside the judgment of the trial court and order a proper hearing of the petition and cross-petition.

It is for the reasons I give above and the other reasons given by my learned brother, Mohammed JSC that I allowed this appeal on 3rd July 2001, dismissed the cross-appeal and ordered a rehearing before another judge of the Anambra State High Court. The rehearing is to be undertaken expeditiously.

G **ONU JSC**

When we heard this appeal on Tuesday the 3rd of July 2001, we unanimously allowed it while dismissing the cross-appeal filed by the petitioner. Having thereafter ordered that the petition be heard de novo before another Judge of the High Court of Anambra State, I reserved my reasons still today. I now proffer those reasons as follows:

From the standpoint alone that the learned trial Judge heard the whole proceedings for the dissolution of the marriage between the par-

ties herein in Chambers and not by taking oral evidence in open Court, a fundamental irregularity necessitating the setting aside of the proceedings in both the trial Court and the Court of Appeal, was precipitated. Indeed, a similar situation arose in the case of Oviasu v. Oviasu (1973) 11 SC. 315 where the trial Judge heard the entire proceedings for the dissolution of the marriage in Chambers. On appeal because of the vitiating fundamental irregularity that occurred therein. There, this Court had this to say:

"We regard the irregularity as being fundamental, which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the Judge's Chambers did not constitute a regular hearing of an action in Court."

Indeed, for a trial Judge to accede to a request to try a divorce case in chambers except where the circumstances so warrant, is to allow a flagrant violation of the provisions of Section 103(1) and (2) of the Matrimonial Causes Act, 1970 (subject to certain exceptions therein specified) which states:

103(1) "Except to the extent to which rules of Court make provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercised in open court."

(2) Where in proceedings under this Act the Court is satisfied that there are special circumstances that make it desirable in the interest of the proper administration of justice that the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or part of the proceedings, as the case may be."

The law being mandatory therefore, it goes without saying that the proceedings in respect of the petition for the dissolution of the marriage in the instant case, should have been heard in public, to wit, in open court, as neither the parties nor the court can decide otherwise. This is because a mandatory statutory provision directing a procedure to be followed in

the performance of any duty is not a party's personal right to be waived.

It is pertinent to point out therefore that in arriving at his decision of 18th July, 1994, the learned trial Judge (Ononiba, J), at a forum (his chambers) in which the parties rendered no oral evidence, relied on his discretion to make what he erroneously regarded as findings to dissolve the marriage. He purportedly acted on Section 43 of High Court Edict No. 16 of 1987 of Anambra State which provides:

"43. A Judge may subject to any written law or rules of Court, exercise in Court or in chambers all or any part of the jurisdiction, authority or powers vested in the Court by virtue of Section 10 of this Edict or otherwise."

In dissenting from the majority decision of the Court of Appeal (per Tobi and Ubaezonu, JJ.C.A) Ejiwunmi JCA (as he then was) held, rightly in my view, that the clear intention of Section 103(2) of the Matrimonial Causes Act read with Order 1 Rule 9(1) of the Matrimonial Causes Rules is that proceedings for a decree of dissolution of marriage should be heard, not in chambers, but in public. In effect, the Matrimonial Causes Act and Rules allow for proceedings to be held in court with the public excluded in certain circumstances; but not in chambers as happened in the instant case.

Thus, the proceedings embarked upon in the Chambers of the trial court culminating in the resultant judgment of the court below and now on appeal, both of which were by no means consent judgments, amounted to a nullity and I so hold. See the case of Itaye & Ors. v. Ekaidere & Ors. (1978) 9 and 10 SC. 35, a case in which this Court held that where the logical conclusions from the findings and judgments (as herein) are held to be null and void, they will be so declare - the position of the law being settled that where an order (including a judgment of a court) amounts to a nullity, the court that made that order in its inherent jurisdiction is empowered to set the same aside and an appeal is not necessary for the purpose. See Adegoke Motors Ltd. V. Adesanya (1989) 3 NWLR (part 109) 250 and Craig v. Kanseen (1943) 1 ALL E.R. 108. The judgment of the Court below now being impugned has, rightly in my view, been faulted.

In the light of the foregoing, the stricture passed on the conduct of learned Senior Advocate, Mr. A.N. Anyamene for the Appellant by Tobi JCA in his leading judgment, I must say with the emphasis it deserves in passing, was misdirected, unfair, diversionary and unwarranted since he committed no wrong to merit same. As counsel, his conduct is B
unimpeachable.

It is for the above reasons and those more articulately set out in the leading judgment of my learned brother, Mohammed JSC, that I too allowed the appeal, dismissed the cross-appeal and awarded N10,000 C
cost in favour of the respondent/appellant.

UWAIFO JSC

On 3rd July, 2001 when this appeal came on for hearing, I gave D
a peremptory judgment allowing it having earlier perused the record and considered the briefs of argument in addition to hearing oral submissions of counsel that day. In the same manner I dismissed the cross-appeal by the petitioner. I ordered that the petition and cross-petition be heard *de E
novo before* another judge of the High Court of Anambra State. I then reserved my reasons for the judgment till today and which I now give.

I have since had the opportunity of reading the reasons for judgment given by learned brother Mohammed JSC. I agree with them being F
in consonance with my view on the matter. I do not intend to go over all the facts of this case already stated by my learned brother Mohammed JSC; only those necessary for my comments. The petitioner has in his petition sought three orders namely (1) a decree of dissolution of marriage (2) custody of the children of the marriage and (3) other orders. G
The respondent on the other hand in her answer and cross-petition has asked for (a) an order dismissing the petition (b) a decree of judicial separation (c) custody of the children of the marriage (d) maintenance for the respondent and the children of the marriage and (e) costs of the H
petition and respondent's legal expenses.

There was a move at a point in the litigation to have the dissolution of the marriage and matters relating thereto resolved without much

recrimination. In this regard proposals were made by both sides. These included an agreement that the marriage be dissolved. There were other items in each of the proposals upon which the parties could not agree. The learned trial judge (Ononiba, J) purporting to act under section 43 of the High Court Edict No. 16 of 1987 of Anambra State decided to take the matter in chambers. The parties did not give oral evidence. In fact the respondent was not present although represented by her counsel. The learned trial judge reached a decision to dissolve the marriage in reliance on the proposals contained in the documents presented to him. In regard to the items on which the parties could not agree, he proceeded to apply his discretion to resolve them and make orders and monetary awards. In the end he embodied what he considered his findings and orders in a judgment delivered on 18 July, 1994.

The respondent was dissatisfied with the judgment and appealed. One of the issues raised was whether the judgment given by Ononiba J was valid in law. Arising from the arguments by the appellant's counsel in the court below was whether it was proper to dissolve a marriage without oral evidence and to do so in the chambers of a judge. Learned counsel for the respondent argued that the judge was justified to rely on the proposals made by the parties to reach a decision and that he had jurisdiction to conduct the proceedings in chambers by virtue of s.43 of the High Court Edict No. 16 of 1987 of Anambra State. The said section reads:

"43. A judge may subject to any written law or rules of Court, exercise in Court or in chambers all or any part of the jurisdiction, authority or powers vested in the Court by virtue of section 10 of this Edict or otherwise."

In a majority judgment given on 8 August, 1996 [Tobi and Ubaezonu JJCA, Ejiwunmi JCA dissenting], it was observed by Tobi JCA in his leading judgment:

"Although section 103(2) of the Matrimonial Causes Act seems to vindicate Order I Rule 9(1) of the Matrimonial Causes Rules, the intention of both the Act and the Rules is that proceedings for a decree of

dissolution of marriage should be heard in public. This is clear from a community interpretation of section 103(1) of the Act and Order 1 Rule 9(4) of the Rules.

The legal effect of all the above analysis which sound abstract and technical is that the procedure the learned trial Judge was led to adopt violated or infringed the provisions of both the Act and the Rules." B

The lower court then affirmed the decree nisi dissolving the marriage between the parties, the custody order of the children of the marriage and some of the ancillary reliefs made by the learned trial judge. C Other orders made by the trial judge were adjusted by the lower court as follows: (a) Transportation expenses for January to December, 1993 from N12,000 to N40,000; (b) Maintenance and education of the three children for 18 months, from N30,000 to N81,000; and (c) Lump sum award, from N150,000 to N500,000. Both parties were dissatisfied. D The respondent appealed while the petitioner cross-appealed. Among the issues raised by the appellant, put in paraphrase, is whether the court below was right in affirming the trial court's judgment when the judgment was incompetent since the proceedings were held in chambers and E the judgment was given upon no evidence permitted by law.

Now, section 103 of the Matrimonial Causes Act, 1970 (the Act) provides as follows:

"103. (1) Except to the extent to which rules of court make F provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercised in open court.

(2) Where in proceedings under this Act the court is satisfied G that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceedings or any part of the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of H the proceedings, as the case may be."

Under section 114(1) of the Act, matrimonial causes are defined and specified in paragraphs (a), (b), (c), (d) and (e) thereof. Paragraph

(a) deals with proceedings for a decree of -

(i) dissolution of marriage;

(ii) nullity of marriage;

(iii) judicial separation;

B (iv) restitution of conjugal rights; or

(v) jactitation of marriage.

Paragraph (b) deals with proceedings for a declaration or annulment of a marriage by decree or otherwise or of a decree of judicial separation, or for a declaration of the continued operation of a decree of judicial separation, or for an order discharging a decree of judicial separation. Paragraphs (c), (d), and (e) deals with ancillary proceedings. By Order 1, rule 9(1) of the Matrimonial Causes Rules (the Rules) proceedings concerning (c), (d) and (e) above may be heard in chambers. But rule 9(4) specifically provides that proceedings in respect of (a) shall not be heard in chambers. It therefore follows that sections 103 and 114(1) of the Act and Order 1, r.9(1) and (4) of the Rules read together make it mandatory for proceedings for dissolution of marriage to be heard in public in open court except where special circumstances make it desirable to order persons or their counsel not parties to the proceedings to leave the court so that the proceedings will be heard *in camera*.

There can be no doubt that the so-called proceedings leading to the dissolution of marriage in the present case where not conducted in accordance with the provisions of the appropriate law and rules of court. Those proceedings, not being in accordance with the law, must be regarded as either unlawful or illegal or in any event incompetent. A similar situation occurred in *Oviasu v. Oviasu* (1973) N.S.C.C. (vol.8) 502, The proceedings for dissolution of marriage took place in chambers. At page 506, this court observed:

"The hearing of this matrimonial case took place in the Judge's Chambers. Neither the Counsel nor the parties requested for the hearing of the divorce proceedings 'in camera'. A Judge's Chamber is not a court hall to which the public will normally have any right of access. The petition and answer did not contain such matters, which by law, ought to be heard 'in camera' in a court room."

This court went further to conclude at page 508 as follows:

"We regard the irregularity as being fundamental which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold all that happened in the Judge's Chambers did not constitute a regular hearing of an action in a court." B

In view of the conclusions we have reached, we do not think any useful purpose will be served in examining the points canvassed before us. The trial held in the Chambers of the Judge is not in accordance with the law and we shall therefore set aside the judgment and orders made by the trial judge." C

In view of the above, it must be taken to be a complete waste of time, with due respect to the learned Justice of the Court of Appeal, to have embarked upon a marathon discourse of estoppel in relation to the conduct of Mr. Anyamene SAN in conceding to the proceedings in Chambers. This is particularly so as Ejiwunmi JCA in his dissenting judgment made reference to *Oviasu v. Oviasu* (supra) and also *N.A.B. Ltd v. Barri Engr. (Nig.) Ltd* (1995) 8 NWLR (pt. 413) 257, another decision of this court relating to proceedings in Chambers. It was on the issue of estoppel by conduct that Tobi JCA made very lengthy comments in the form of strident strictures which considered Mr. Anyamene to have been unreasonable to raise on appeal the competency of the proceedings in Chambers since he had applied for and taken part in the proceedings in Chambers. F

The appellant in one of the issues raised has complained that the approach of the learned Justice of the Court of Appeal to and decision in respect of the mandatory requirements of the law by relying on the concept of estoppel by conduct and in the process castigating her counsel led to her appeal not having been given proper consideration. This is because according to the argument, estoppel by conduct or waiver cannot operate to undermine a statutory provision conferring public rights as opposed to individual rights. G H

The court below in its majority decision per Tobi JCA, concurred in by Ubaezonu JCA, did not see much impropriety in the pro-

ceedings that took place at the trial court. The learned Justice of the Court of Appeal held the view that counsel for the respondent had created estoppel by his conduct in the case. He appeared quite unable to restrain himself in his witticism which underlaid his comments on the said counsel, Mr. Anyamene SAN, and indeed making them appear as sarcasm, when he observed:

"I now take the entire conduct of Mr. Anyamene in the proceedings before the learned trial Judge and see whether it can pass or fail the test of the hypothetical reasonable man who, if allowed into the chambers of Ononiba, J. at the material time on 6th July, 1994, watched the proceedings: (1) He made a joint application with Dr. Ume for the hearing of the matter in chambers. (2) He competed with Dr. Ume for the first place to tender his client's proposal. (3) He participated in the proceedings by displaying his professional advocacy skills of persuasion in favour of his client's proposal as against that of the adverse party. (4) This he did on two occasion: one before the proposals were admitted in evidence and the other after the proposals were admitted in evidence. (5) Each time he forcefully and in the tradition of good advocacy put forward his clients's case as ably as he could. (6) After his submission, the learned trial Judge adjourned for judgment in the presence and to the hearing of Mr. Anyamene. (7) He did not object and therefore deemed to have accepted not only the date for the delivery of the judgment but also the need for the delivery of the judgment.

Is the above conduct of Mr. Anyamene which I had earlier stated more comprehensively in this judgment, not caught by the plea of estoppel? There is no doubt about this. It is clearly caught by section 151 of the Evidence Act. In the language of the Act, Mr. Anyamene, by his declaration, act of omission intentionally caused or permitted his colleague, Dr. Ume to believe that the proceedings in chambers were lawful and to act upon that belief. By his subsequent conduct of resilience, Mr. Anyamene, in the words of Nnaemeka Agu, JSC, tries 'to blow hot and cold, to affirm at one time and deny at the other, or... to approbate and reprobate. He cannot be allowed to mislead another person into believing in a state of affairs and then turning round to say to that person's

disadvantage that the state of affairs which he had represented does not exist at all or as represented by him.' See Ude v. Nwara, [(1993) 2 NWLR (pt. 278) 638 at 662].

It is my humble view that a reasonable man who happened to be present at the chambers proceedings of 6th July, 1994 would come to the conclusion that Mr. Anyamene not refer the court to Order played therein (sic) was a representation meant by him to be acted upon and which, in fact, was acted upon both by Dr. Ume and the learned trial Judge. Why did Mr. Anyamene not refer the Court to Order XXIII Rule 1 of the Matrimonial Causes Rule immediately the proceedings of 6th July 1994 commenced? Was the rule not in existence on 6th July 1994? Was it obliterated? And if so, was the rule resuscitated when the appellant decided to go on appeal? Or did he forget the existence of the rule and suddenly remembered its existence at the point his client took the appeal decision. I still have some questions but I think I can stop here, hoping that I have made the point. The events are sad, very sad indeed. While I do not want to say that counsel lured, tantalised, and petted the learned trial Judge to accommodate not only the parties in his chambers but also the procedure adopted by him with their full consent and support, I want to say, and I do say, that the learned trial Judge did not suo motu and in limine take a decision to recess into his chambers and hear the matter in the procedure he adopted. Counsel in the matter supported the Judge. As a matter of fact, they applied jointly that the mater be heard in the chambers. They also supported the procedure by fully participating in it. Mr. Anyamene was one of the counsel. He is a Senior Advocate of Nigeria."

The submission made by Mr. Anyamene to the lower court on the competency of the proceedings was on the basis that what is invalid in law, particularly as a matter of public policy, cannot be waived by the parties to litigation. He was absolutely right. He submitted further in the brief of argument:

"In civil proceedings the parties can waive procedural requirements but not substantive law or requirements of public policy. Parties cannot ask the court to decide a case where issues are joined based on the whims and caprices of the presiding judge. It is against public policy.

Moreover Order XXIII Rule 1 of the Matrimonial Causes Rules is sternly against the dissolution of marriage of the type the court below granted in this case - divorce in which the matrimonial offence which grounded the dissolution is not stated nor evidence taken, and which therefore savoured B of collusion in law."

This is a submission which, in my view, a court confronted with the sort of facts and circumstances of the present case should calmly consider, devoid of any sentiment. It is not an unusual submission nor is C it misplaced.

It must be realised that what is in issue is that there is non-compliance with mediatory statutory provisions [sections 103 and 114 of the Act] and also a mandatory rule [Order 9, r.(1) and (4) of the Rules] all of which have already been referred to by me. The said Order 23 (XXIII), D r.1 of the Rules alluded to by Tobi JCA limits what the parties can agree to waive or consent to.. It excludes proceedings coming under paragraphs (a) and (b) of section 114 of the Act which I earlier adumbrated in this judgment. It states:

E "Nothing in these Rules shall be taken to prevent the court from making, with the consent of the parties to proceedings and in accordance with the practice of the court, an order (not including an order of a kind referred to in paragraph (a) or (b) of the said definition of 'matrimonial F causes') determining the proceedings or relating to the proceedings."

When therefore it is argued that a statutory provision has been waived, it has to be considered whether the statute confers purely private or individual rights which may be waived or whether the statutory provision confers rights of a public nature as a matter of public policy. If it is G the latter, the provision of such statute cannot be waived as no one is permitted to contract out of or waive a rule of public or constitutional policy: see *A.G Bendel State v. A.G. of the Federation (1982) 10 SC 1 at 54*; *Ogbonna v. A.G. Imo state (1992) 1 NWLR (pt 220) 647 at 696*. The H competence of a court or the proceeding in court is a fundamental issue which cannot be waived even if the reason for seeking the waiver is based on the argument that it is in the interest of substantial justice. Once the incompetence is established, the consent of the parties cannot vali-

date what took place under it and preclude the inevitable result of nullity. Similarly, waiver cannot be successfully raised in connection with a person discharging a public duty which the law prescribed shall be done in a particular manner but he adopts another inconsistent with the relevant statutory provisions. *See Odofin v Agu (1992) 3 NWLR (pt229) 350; Olarenwaju v. Governor of Oyo State (1992) 9 NWLR (pt.263) 335.* The policy of the Act in question is certainly that proceedings for the dissolution of marriage should be heard in open court.

I think if Tobi JCA had born the principles stated above in mind he would have acknowledged that no amount of adverse comments against the counsel who consented to the incompetent proceedings could be of any moment. My learned brother Mohammed JSC has observed that those strictures by Tobi JCA were unwarranted. I agree with that observation. In fact I would add that the manner in which the learned Justice took up Mr. Anyamene for submitting that the learned trial judge made certain orders without the concession of the parties or their counsel and therefore that he descended into the arena thereby, in my view, was in the form of an unduly elaborate acrimonious retort. A judge has and can exercise an undoubted freedom to make comments relevant to the issues before him but I think the best effect of such exercise is achieved when they are measured comments, not those which look dissertational in nature. For example, the learned justice said as follows:

"The second is the attack on the Judge that he descended to the arena. Dissension is one expression advocates are fond of using to discredit the judicial conduct of a Judge in court. Some advocates love it and resort to it indiscriminately. Some do so with all honesty. Yet some others do so mainly to insult and discredit the judicial conduct and person of the Judge. While the former category of advocates deserve the sympathy of the law, the latter category deserve the wrath of the law. Where is the evidence of dissension? I see none and there is none. Mr. Anyamene however saw a dissension when the Judge in his words 'accepted any of the proposal in the areas of disagreement.' Can this be a valid submission in law? I think not. The submission, with the greatest respect to the learned Senior Advocate, undermines the adjudicatory role

of a Judge. When exhibits are admitted in court, it is never the function of the Judge to seek for help from counsel beyond addressing on them. No judge ever, in the language of Mr. Anyamene, persuade counsel for the parties 'to give in here and there'... The proposals were admitted as Exhibits A, B, and C and the learned trial Judge was free to interpret them in the light of their contents and the oral representations made by both Senior Advocates.

When counsel attacks a judge of descending into the arena, it means that the judge abandons his exalted position to flirt with the parties in a manner clearly unbecoming of the holder of such an office of impartiality. It also means that the Judge has abandoned his role as an unbiased and independent umpire to take sides in the litigation. By his parochial judicial conduct, he loves one of the parties and he hates the other party. There are however instances where a Judge could be accused of descending into the arena without taking sides but by merely disturbing or altercating the proceedings at annoying regular intervals to the extent that he could be branded a talkative Judge. With respect, I do not see any evidence of dissension into the arena on the part of the learned trial Judge and I so hold."

Can it be said that the above observations were strictly relevant? I find no reason for the learned Justice to have gone this length when what Mr. Anyamene submitted was that the learned trial judge, without evidence, made orders in respect of contentious matters between the parties. It was in that connection he talked about descending into the arena. In fact when the learned Senior Advocate's submission on the point is properly considered, it will be understood that he defined what he meant by descending into the arena, and not in the way the learned Justice analysed it. Learned counsel said:

"When therefore the learned judge of the court below prefixed his judgment with the remark that it was his painful duty to use judicial discretion to make awards or accept any of the written proposals in the areas of disagreement he completely misconceived what judicial discretion meant..... To the extent therefore that the trial judge accepted any of the proposals in the areas of disagreement he descended into the arena

and did the case for the parties relying on his whims, and arrived at something not based on evidence which was no decision as known to law."

[Emphasis mine]

Over and above what I have drawn attention to, and in relation B to how the case presented by the appellant was dealt with, I am afraid I find myself having painfully to observe that there are other portions and passages of the judgment which are nearly inappropriate in a judgment intended as a sober and sublime reflection. Admittedly, allowance must C be made for the peculiar sense of narrative of individual judges - some make theirs rhapsodical on purpose, as was obviously demonstrated in the judgment in question - but even so, I think it will be of much profit if journeys in light-hearted digressions are not made a prominent feature in any judgment, particularly of a superior court, even to the extent that the D real issues are missed or misunderstood. That was the positions in the present case.

In my view, what Mr. Anyamene submitted to the court below was clear enough. It is that the trial judge could not exercise his discre- E tion upon no evidence. In my opinion if a judge does that he has descended into the arena, for want of a better expression, where only the parties can provide evidence upon which he is to act. I am satisfied that Mr. Anyamene acted within the tenets and tradition of the profession, F and in accord with his expected duty too his client, and that he should have been spared the unfair criticisms to which he was subjected. It was for the reasons I have given that I allowed the appeal and ordered a retrial before another judge of the High Court of Anambra State. I also dis- G missed the cross-appeal for the same reasons and awarded the sum of N10,000.00 as costs in favour of the respondent/appellant.

AYOOLA JSC

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I have had the privilege of reading in advance the reasons for judgment just delivered by my learned brother, Mohammed, JSC, I am in agreement with him that this appeal should be allowed for the reasons he

gives. Niki Tobi, JCA, who delivered the leading judgment of the Court of Appeal was clearly in error in his view that the judgment of the High Court was a consent judgement. For there to be a consent judgment there must have been an agreement of the parties on all aspects of the matter to be covered by the consent judgment. Where the parties agree on some aspects and have not agreed on others, they should be permitted to reach an agreement on the latter, or resolve the points of disagreement by evidence before judgment is pronounced. In this case there was agreement on some "specific proposals" but on some aspects, the matter was left to further discussion while on yet some other aspects the parties did not reach an agreement at all. The trial judge in a judgment which covered about 10 pages did not say he was entering a consent judgment.

In these circumstance, the parties should have been afforded the opportunity of adducing oral evidence. I feel no hesitation in agreeing with Ejiwunmi JSC (as he then was) when in a dissenting judgment he said that in his view the procedure adopted by the learned trial judge in the consideration of the matter was very wrong and that by reason of the procedural error the matter should be remitted to the High Court to be heard de novo.

For these reasons and for the fuller reasons contained in the judgment of my learned brother Mohammed, JSC, I too would the appeal, set aside the judgments of the High Court and Court of Appeal and ordered that the matter be heard de novo by the High Court.

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