

**SUPREME COURT OF NIGERIA**  
19TH OCTOBER, 2001. SC. 267/2001  
**CORAM:- A. G. KARIBI-WHYTE, I. L. KUTIGI, U. MOHAM-  
MED, A. I. KATSINA-ALU, E. O. AYOOLA, JJSC**

1. THE MILITARY ADMINISTRATOR  
OF BENUE STATE
  2. THE ATTORNEY- GENERAL, BENUE STATE
  3. THE CIVIL SERVICE COMMISSION,  
BENUE STATE
  4. THE DIRECTOR- GENERAL  
ESTABLISHMENT AND SERVICE ..... APPELLANTS  
MATTERS, BENUE STATE
  5. MR. TIVLUMU NYITSE PRESS  
SECRETARY TO THE MILITARY  
ADMINISTRATOR, BENUE STATE
  6. RADIO BENUE
  7. BOARD OF RADIO BENUE
  8. BENUE PRINTING AND PUB. COY LTD.  
AND  
O. P. ULEGEDE, ESQ ..... RESPONDENTS  
2. A. U. ABAH, ESQ
- 

***APPEALS** - Ground of appeal - Form - Where no one is misled by the contents - Complaint about its form becomes a mere technicality - Which does not occasion a miscarriage of justice (H4)*

***APPEALS** - Ground of appeal - Issues - Where the complaint is not that the issues do not flow from the grounds of appeal - Any complaint about the grounds of appeal is inconsequential (H5)*

***JUDGMENTS** - Issue - Conclusive determination of - A decision is conclusive as to what it determines - When it can only be set aside on an appeal being brought for that purpose (H1)*

**JUDGMENTS** - Issue - Reconsideration of a predetermined issue - At a later stage in the same proceedings - Primary question - Is whether the court has the power to reopen that issue (H2)

**JUDGMENTS** - Issue - Reopening - Issue that has been conclusively settled by a judgment - Cannot be reopened (H3)

**MASTER & SERVANT** - Retirement - Waiver of right of complaint - Conduct - Which did not suggest that the respondents gave up their right of action - Cannot preclude them from complaining about their retirement (H6)

### **FACTS**

In the High Court of Benue State, the 1st and 2nd Plaintiffs/ Respondents, who were legal practitioners employed at the material time, respectively, as Chief Legal Officer and Principal Legal Officer in the Ministry of Justice (Benue State) sued the Defendants/Appellants. They claimed in that their "Purported retirement" was "Premature, mala fide, improper, unconstitutional, null and void," a declaration that their purported retirement was not done or purported to be done under Decree No. 17 of 1984 or other law applicable to their contract of employment, some consequential reliefs, and certain sums of money which were alleged to have accrued and were due and payable to them. Initially, the case came before Idoko, (C.J., Benue State). Upon a point being taken in limine to the jurisdiction of the High Court to try the suit Idoko, C.J., struck out the declaratory reliefs sought on the ground that by virtue of the Public Officers (Special Provisions) Decree No. 17 of 1984 (Cap 381, LFN 1990) the High Court had no jurisdiction to grant these declarations . The Respondents appealed to the Court of Appeal, which allowed the appeal set aside the decision of Idoko C.J. and ordered that the case should proceed before another Judge upon a statement of defence to be filed by the present Appellants (then respondents).

The rehearing came before Ikongbe. J. At the rehearing the par-

ties amended their pleadings. The case of the Respondents was that by the terms of their employment each of them was entitled to continue in service until he attained the retirement age of 60 years or his employment was terminated by three months notice or three months' salary in lieu therefore and for "no just cause, however, and in utter disregard of the terms and conditions of their employment and of the rules of natural justice relating to fair hearing, they were sent on compulsory and premature retirement without any notice or salary in lieu". Appellants' defence is that their retirement had been effected by the 1st defendant in exercise of his powers to do so under the relevant laws which precludes the court from inquiring into any aspect of his action in that regard.

Ikongbe J, being of the view that fresh evidence had come before him which was not placed before the Court of Appeal when that court gave its judgment in the appeal from Idoko, C.J.'s ruling, rejected the contention that judgment of the Court of Appeal had settled conclusively the question of the jurisdiction of the High Court in favour of the respondents. In the result he proceeded to consider the question afresh and came to the conclusion that he had no jurisdiction to grant the declaratory reliefs sought by virtue of s. 3(3) of the Public Officers (Special Provisions) Act, Cap 331, LFN. Having considered the evidence in regard to the remaining part of the claim, he dismissed the Respondents' case. Respondents' appeal from that decision was allowed by the court of Appeal. Hence, the Appellants have now appealed to the Supreme Court raising four issues but the appeal was determined based on three issues.

### **ISSUES FOR DETERMINATION**

*1. Whether where an issue has been raised and conclusively determined at an earlier stage of a proceedings, the same issue is available for fresh consideration and determination at a later stage.*

*2. What that court should have done in regard to those grounds which it found to have contained narrative or argumentative particulars and those in which he struck out the particulars.*

*3. Whether by accepting three months salary paid to each of them the respondents are precluded from complaining about their retire-*

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

**B Judgment - Issues**

1. A decision is conclusive as to what it determines when it can only be set aside on an appeal being brought for that purpose. This is why there has always been a distinction between orders which can be reviewed by the court which made them and those which it had no power to review or set aside. (p. 3143 G)

**Issues - Primary question**

2. When the question is whether a court can reconsider an issue it had conclusively pronounced upon and determined on a previous occasion at a later stage in the same proceedings, the primary question is not whether on the production of a better evidence it could come to a different conclusion, but whether it had the power even to re-open the issue (p. 3145 C)

**Issues - Reopening**

3. In the decision which led to this appeal, the Court of Appeal held that "the learned trial judge was in error to have re-opened the question of his jurisdiction under the Act when the said issue had been conclusively settled by the Court of Appeal Judgment, which was still subsisting." I feel no hesitation in agreeing that was a correct conclusion. (p. 3145 F)

**G Grounds of appeal - Form**

4. Where the parties to an appeal and the court are not misled by the contents of a ground of appeal, complaint about its form becomes a technicality which does not occasion a miscarriage of justice and which will-becomes a counsel to bring up at this level of appeal. (p. 3146 A)

**Grounds of appeal - Issues**

5. Where the complaint is not that the issues do not flow from the grounds

of appeal, any complaint about the form of the grounds of appeal is inconsequential. (p. 3146 C)

***Master & Servant - Retirement***

6. This is an issue which can easily be disposed of on the authority of B Adeniyi v. Governing Council of Yaba College of Technology (1993) 7 SCNJ (Part 11) 304; [1993] 6 NWLR (Part 300) 426. In that case Karibi-Whyte, JSC, delivering the leading judgment of this court said:

*"The compulsory retirement of the appellant on the grounds of C misconduct under section 12 (1) is void. It cannot be rendered valid because the appellant had applied for benefits thereunder."*

The principle of that case applies with equal force to this case. There was nothing in the case to suggest that the respondents gave up D their right of action by their conduct. Furthermore the case was not a case of mere breach of a contract of employment but one in which the retirement of the respondents was void because of non-compliance with the provisions of the statute which it was claimed, conferred power on the first appellant to retire them. (p. 3146 F) E

**REPRESENTATION**

S. C. Egede, Asst. Director Civil Litigation Benue State, for the Appellants.

Chief A. O. Ogiri, with him, is Miss Ada Ogiri-Okpe for the 2nd Respondent

Ocha Ulegede, for the 1st Respondent.

**CASES REFERRED TO**

Skenconsult (Nig.) Ltd v Ukey 12 NSCC 1.

FCDA v Sule [1994] 3 S.C.N.J.71; (1994) 3 NWLR (Part 332) 257, Adeniyi v. Governing Council of Yaba College of Technology (1993) 7 SCNJ (Part 11) 304; [1993] 6 NWLR (Part 300) 426. H

**STATUTE REFERRED TO**

Public Officers (Special Provisions) Act, Cap 381, LFN, S. 3(3)

**LEAD JUDGEMENT BY AYoola JSC**

In the High Court of Benue State, O.P. Ulegede, Esq and A. U. Abah, Esq, respectively the first and second respondents in this appeal, who were legal practitioners employed at the material time, respectively, as Chief Legal Officer and Principal Legal Officer in the Ministry of Justice of the Benue State ("the State") sued the 8 appellants, the Military Administrator of the State and other agencies and functionaries of the State, claiming in the main, a declaration that their several "purported retirement" were "premature, malafide, improper, unconstitutional, null and void."; a declaration that the purported retirement of the respondents was not done or purported to be done under Decree No. 17 of 1984 or other law applicable to the contract of employment of the respondents; some consequential reliefs; and, certain sums of money which were alleged to have accrued and were due and payable to them.

Initially, the case came before Idoko, (C.J., Benue State). Upon a point begin taken in limine to the jurisdiction of the High Court to try the suit Idoko, C. J., struck out the declaratory reliefs sought on the ground that by virtue of the Public Officers (Special Provisions) Decree No. 17 of 1984 (Cap 381, LFN 1990) the High Court had no jurisdiction to grant those declarations. The respondents appealed to the Court of Appeal which allowed the appeal, set aside the decision of Idoko, C.J., and ordered that the case should proceed before another Judge upon a statement of defence to be filed by the present appellants (then respondents).

The rehearing came before Ikongbe, J., (as he then was). At the rehearing the parties amended their pleadings. In paragraph 41 of their amended statement of claim the respondents averred that:

*"...after reaping the benefits of their hard work and excellent job performance, the 1st defendant on the instigation of the 2nd defendant decided to throw out the plaintiffs to pave the way for the 2nd defendant to come to Ministry of Justice as an Attorney-General in an atmosphere of intimidation, abuse of powers (sic), harassment and the creation of uncondusive atmosphere for the performance of duties."*

By their joint amended statement of defence the appellants did not admit the above paragraph 41. They specifically denied paragraph 41 and went further in relation thereto, to aver as follows in their paragraph 34:

*"The Defendants further aver in answer to paragraph 41 of the claim that the averment apart from being unethical offends Order 25 rule 20 of the High Court rules (sic) and the Defendant will at the trial urge the Court to strike same out for being embarrassing or scandalous as well as an abuse of the Courts (sic) process."*

The case of the respondents as summed up by Ikongbe, J., (as he then was) was that by the terms of their employment each of them was entitled to continue in service until he attained the retirement age of 60 years or his employment was terminated by three months' notice or three month's salary in lieu thereof; and, that for "no just cause, however, and in utter disregard of terms and conditions of their employment and of the rules of natural justice relating to fair hearing, they were sent on compulsory and premature retirement without any notice or salary in lieu."

The learned trial judge summed up part of the appellants' case at the trial thus:

*"The defendants do not deny that plaintiffs were sent on compulsory and premature retirement without being given a hearing and without any notice. Their defence is that their retirement had been effected by the 1st defendant in exercise of his powers to do so under the relevant laws which preclude the Court from inquiring into any aspect of his action in that regard."*

Ikongbe, j., (as he then was), found as a fact that the respondents knew that their removal was at time when the 1st defendant was carrying out a general purge of public service, and that at the time of the ruling of the Court of Appeal, those facts had not come out, and the averment in the amended statement of claim that it was the first appellant that removed the respondents had not been made. Being of the view that fresh evidence had come before him which was not placed before the Court of Appeal when that court gave its judgment in the appeal from

Idoko, C.J's ruling, he rejected the contention that the judgment of the court of Appeal had settled conclusively the question of the jurisdiction of the High Court in favour of the respondents. In the result he proceeded to consider the question afresh and came to the conclusion that he had no jurisdiction to grant the declaratory reliefs sought by virtue of subsection 3 of section 3 of the Public Officers (Special Provisions) Act, Cap 381, LFN 381 ("the Act"). Having considered the evidence in regard to the remaining part of the claim, he dismissed the respondents' case.

On the respondents' appeal from that decision to the Court of Appeal, the respondents put at the forefront of their appeal the question whether Ikongbe, J., was right in re-opening the issue of the jurisdiction of the High Court to entertain the suit. The Court of Appeal answered that question in the negative. Akpabio, JCA, who delivered the leading judgment of that court with which Muhammad and Umoren, JJ.C.A., agreed, held that the question whether the 1st appellant in this appeal had authorised or directed the 2nd appellant, herein, the writer of the letter of retirement, to retire the respondents so as to bring such retirement under the provisions of the Act had become res judicata by the virtue of the decision of the Court Appeal in the judgment of that court, exhibit 4. The court below resolved all the other issues in the case in favour of the respondents. In the event, that court allowed the respondents' appeal, set aside the judgment of the High Court and granted the declarations sought by the respondents. In addition, it gave judgment in their favour on the monetary claims and ordered that they be reabsorbed into the service of the State with payment of their emoluments from the date of the purported retirement to the date of the judgment of the Court below.

The present appeal by the defendants in the High Court ("the appellants") is from that decision of the court below. Of the four issues for determination raised in the appellants' brief, it is expedient to deal, first, with the third and most important issue which was put thus: "*whether the learned Justices of the Court of Appeal were right in holding that the question whether 1st appellant had authorized Engnr. S. N. Torsabo to retire the respondents had become res judicata.*" Counsel for the appellants acknowledged that the determination of the issue revolved on an



interpretation of the judgment of the court below, contained in Exhibit 4. In his understanding of that judgment, what the court below decided was *"that the trial court was wrong in striking out the relevant claim because at the stage evidence had not been led to show that Engr. S. N. Torsabo had been authorized by the 1st Appellant to retire the respondents."* The B appellants put their case on this appeal thus: Estoppel was not created by the decision of the court below because the parties were at liberty to lead evidence to establish the afresh facts at the resumed trial.

The response of the respondents to this issue, put rather more C clearly and succinctly in the brief of the second respondent, was that since the appellants had raised the question whether the respondents had been retired in pursuance of the provisions of the Act and had distinctly put that question in issue and had failed, he could not raise that issue again. Reliance was put on the case of F.C.D.A v. Sule [1994] 3 S.C.N.J D 71; (1994) 3 NWLR (Part 332) 257.

It may well be noted that none of the parties raised the issue of res judicata at the trial. It was the trial judge who by himself invited the parties to address him on the question whether the question of his juris- E diction to entertain the suit was still available for determination. What appears significant is that the trial judge himself acknowledged that the question of the jurisdiction of the High Court to entertain the suit had earlier been raised and dealt with by he High court and the Court of F Appeal. The question, therefore, is *whether where an issue has been raised and conclusively determined at an earlier stage of a proceedings, the same issue is available for fresh consideration and determination at a later stage.* The emphasis is on the conclusiveness of the earlier determination. I venture to think that **a decision is conclusive as to what it G determines when it can only be set aside on an appeal being brought for that purpose. This is why there has always been a distinction between orders which can be reviewed by the court which made them and those which it had no power to review or set aside.** These H matters and the cases related to them are discussed to some extent by this court in Skenconsult (Nig.) Ltd v Ukey 12 NSCC 1. In the more recent decision of this court in FCDA v Sule [1994] 3 S.C.N.J.71; (1994)

3 NWLR (Part 332) 257, the appellant had raised the issue of the jurisdiction of the court to entertain an action on the ground that the jurisdiction of the courts were ousted by the provisions of the Act in limine. The trial court ruled against him. He did not appeal. At a later stage of the proceedings, in the course of the final address, he raised the same point. On the matter coming before this court, Ogundare, JSC, said, at pages 278-9 (NWLR):

*"The defence counsel however, in her address fell back on material used in support of the application to dismiss the action in limine... The defendant's application to dismiss the action in limine was refused by the learned trial Chief Judge and there was no appeal against that ruling. In his ruling on that preliminary application the learned trial Chief Judge had held at pages 50 - 51 of the record:*

*"I therefore hold the view the decision to terminate plaintiff is that of the Chairman FCDA under powers given to FCDA in Decree 6 of 1976 and as Decree 6 of 1976 has not ousted the Chief Judge's jurisdiction, I hold that this court has jurisdiction to entertain the suit."*

*This finding remains subsisting until it is set aside. See - Rossek & Ors v. A.C.B. Ltd (1993) 8 NWLR (Pt. 312) 382. As the finding has not been set aside at time the final addresses were made in this case, it was not open in my respectful view, for the defence to once again contend that the plaintiff was removed from office by the Minister."*

In this case, the relevant judgment to look at is the judgment of the court below delivered on 22nd February, 1996 in the appeal from the decision of Idoko, CJ, declining jurisdiction. Of the two issues on that appeal as formulated by the Court of Appeal the only one directly relevant for the purpose of this appeal is the second issue formulated thus:

*"Whether the compulsory retirement of the appellants was made in compliance with the Public Officers (Special Provision) Act Cap 381 Laws of the Federation of Nigeria to enjoy the protection of the ouster H clause therein."*

The Court of Appeal ruled that it was not so made. Two grounds were given for that conclusion. One was that it had not been shown that the Military Administrator actually authorised the retirement of the re-

spondents. The second, also given by Edozie, JCA, who delivered the leading judgment of the Court of Appeal, was that *"it can hardly be said that from the letters of retirement addressed to the appellants or from the surrounding circumstances in the case as disclosed in the affidavit evidence of the parties that the Military Administrator believed or intended to act under the Act."* It was on these alternative grounds that the Court of Appeal came to the conclusion that the jurisdiction of the court was not ousted. B

Counsel for the appellants on this appeal had proceeded on the footing that the respondents having averred in their amended statement of claim that their retirement was at the instigation of the Military Administrator, the ground on which the Court of Appeal ruled ceased to hold. That, in my view, is a misconception for two reasons: First, **when the question is whether a court can reconsider an issue it had conclusively pronounced upon and determined on a previous occasion at a later stage in the same proceedings, the primary question is not whether on the production of a better evidence it could come to a different conclusion, but whether it had the power even to re-open the issue.** Secondly, in this case, the Court of Appeal gave two alternative reasons, whereas the only one the appellants have addressed on this appeal is first of the two alternative reasons. The opinion of the Court of Appeal remains final and conclusive on both grounds. E

**In the decision which led to this appeal, the Court of Appeal held that "the learned trial judge was in error to have re-opened the question of his jurisdiction under the Act when the said issue had been conclusively settled by the Court of Appeal Judgment, which was still subsisting."** I feel no hesitation in agreeing that was a correct conclusion. F G

The remaining issues can be disposed of shortly. The first two of these relate to the ground of Appeal in the court below and *what that court should have done in regard to those grounds which it found to have contained narrative or argumentative particulars and those in which he struck out the particulars.* It is not necessary to set out those grounds since the issue concerning them can be disposed of without much ado. H

**Where the parties to an appeal and the court are not misled by the contents of a ground of appeal, complaint about its form becomes a technicality which does not occasion a miscarriage of justice and which ill-becomes a counsel to bring up at this level of appeal.**

B Although in this appeal counsel for the appellants argued that the Court of Appeal should have struck out the grounds that contained particulars that were argumentative or narrative, and those in which it had struck out the particulars, it has not been suggested that retaining those grounds had occasioned a miscarriage of justice. The appellants' counsel must have overlooked the change in our appellate system by the introduction of the brief system. Appeals are now argued on issues distilled from the grounds of appeal and not on the grounds of appeal themselves. It follows that **where the complaint is not that the issues do not flow from the grounds of appeal, any complaint about the form of the grounds of appeal is inconsequential.**

Besides, in this case after looking at the grounds of appeal in question it is not at all difficult to conclude that the body of the grounds whose particulars have been struck out contained enough to convey the complaint of the respondents. The court below was right in not striking out those grounds.

The only remaining issue is *whether by accepting three months salary paid to each of them the respondents are precluded from complaining about their retirement.* **This is an issue which can easily be disposed of on the authority of Adeniyi v. Governing Council of Yaba College of Technology (1993) 7 SCNJ (Part 11) 304; [1993] 6 NWLR (Part 300) 426.** In that case Karibi - Whyte, JSC, delivering the leading judgment of this court said:

*"The compulsory retirement of the appellant on the grounds of misconduct under section 12 (1) is void. It cannot be rendered valid because the appellant had applied for benefits thereunder."*

H The principle of that case applies with equal force to this case. There was nothing in the case to suggest that the respondents gave up their right of action by their conduct. Furthermore the case was not a case of mere breach of a contract of employment

**but one in which the retirement of the respondents was void because of non-compliance with the provisions of the statute which it was claimed, conferred power on the first appellant to retire them.**

The conclusion that inexorably follows from all I have said is that there is no merit in this appeal. In the result I dismiss the appeal with B  
N10,000 cost to the respondents.

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### KARIBI-WHYTE JSC

I have read the judgment of my learned brother Ayoola, J.S.C., C  
in this appeal. I agree with his conclusion that this appeal should be dismissed. The principal issue in this appeal is the very familiar and commonly disputed one of the validity of the exercise of powers under the Public Officers (special Provision) Act, Chapter 381 Laws of the Federation, 1990. It is the issue of the validity of the exercise of powers to retire public officers, compulsorily under the provisions of the Public Officers (Special Provisions) Decree. The facts of this case remain substantially undisputed. D  
E

### THE FACTS

Respondents, who were the plaintiffs in the Benue High Court, were legal Officers in the Ministry of Justice, Benue State. 1st Respondent was the Acting Assistant Director and Chairman of the Rent Tribunal. 2nd Respondent was a Principal Legal Officer in the same Ministry of Justice. On the 31st January, 1994, at about 6.30 a.m. plaintiffs heard announcements over Radio Benue, that they and three other colleagues had been relieved of their appointments with the Benue State Government. The announcement was repeated every hour by the same medium throughout the 31st January, 1994. The "Voice" Newspaper, owned exclusively by the Benue Government, and widely circulated throughout the country carried the news item on its front page the same day 31st January, 1994. On the 2nd February, 1994, a letter No. S/MGO/BN/S/ 38/Vol.11/735 dated 28th January, 1994 purportedly issued and signed by Engr. S. N. Torsabo, a retired Public Officer and former Secretary to the Benue State Government was left at the door post of the 1st plaintiff by F  
G  
H

unknown persons. The letter purported to have retired the 1st plaintiff from service with immediate effect on the ground that his services were no longer required. A similarly worded letter of the same date purported to have been written and signed by the same person was sent to 2nd B plaintiff.

Both aggrieved plaintiffs took out a joint writ of summons against the defendants/appellants challenging their purported retirements by the 1st defendant/appellant from the Civil Service of Benue State. They also claimed general and special damages.

C Defendants/appellants before filing a statement of defence, filed an application seeking to strike out the suit No. MHC/86/94 by the plaintiff/respondents for want of jurisdiction. Applicants relied on the provisions of the Public Officers (Special Provisions) Decree No. 17 of 1984, D now Cap 381, Laws of the Federation. 1990. Plaintiffs/respondents filed a joint counter affidavit opposing the application.

After argument before the Chief Judge of the Benue State High Court, the application was granted in part. The learned Chief Judge held E he lacked jurisdiction to question the action of the 1st appellant retiring the respondents. He struck out the relief claiming for the unlawful retirement. He held that the other reliefs in the claim subsisted and were not affected by the ruling.

F Respondents/Plaintiffs appealed against the ruling to the Court of Appeal defendants did not cross-appeal. In a considered judgment dated 22nd February 1996, the Court of Appeal allowed the appeal, the ruling of the High Court dated 27/7/94 was set aside. It was ordered that the case should proceed before another Judge upon a statement of defence to be filed by the defendants. The grounds on which the appeal G was allowed were as follows -

"(a) the premature retirements of the appellants does not come within the ambit of the Decree ....."

H (b) from the letters of retirement addressed to the appellants or from the surrounding circumstances in the case as disclosed in the affidavit evidence of the parties that the Military Administrator believed or intended to act under the Act ...."

*(c) the retirement of the appellants on the grounds relied upon by the respondents does not enjoy the immunity from civil proceedings"*

The case now came before Hon. Justice Ikongbe where plaintiffs amended their statement of claim. Defendants filed a statement of defence. In paragraph 40 of their statement of defence, they averred as follows -

*"The defendants will contend at the trial:*

*(c) .....*

*(d) the retirement of the plaintiffs was done under the provisions of Public Officers (Special Provisions) Act, Cap. 381 and all other relevant Laws enabling the Military Administrator to so retire them."*

At the trial, appellants as defendants did not lead any evidence in support of their contention that plaintiffs were retired under the provisions of the Public Officers (Special Provisions) Decree. After the conclusion of evidence and addresses of counsel, and parties asked to submit written addresses and the case had been adjourned for judgment the learned trial judge suo motu raised the issue of his jurisdiction and requested counsel to address him on the issue. Parties addressed.

Plaintiffs/respondents in their written address contended that the issue of jurisdiction could not be raised again, having been determined by the Court of Appeal in the judgment dated 22/2/96. There had been no appeal against that judgment.

The learned trial judge in a considered judgment, held that he had no jurisdiction to hear the action of plaintiffs/respondents as it concerned the retirement of the plaintiffs/respondents by the 1st appellant. He dismissed the action on the claim for wrongful and unlawful retirement and libel. He did not make any finding on the other heads of claim relating to general and special damages. Plaintiffs/respondents not satisfied, appealed again to the Court of Appeal.

In the Court of Appeal parties filed and exchanged briefs of argument. Appellants filed and raised preliminary objection to grounds 2,3,4 and 5 of the 1st respondent and grounds 1, 2, 3 and 6 of the 2nd respondents' ground of appeal. The grounds of the objection were that the particulars of these grounds of appeal were either narratives or argumenta-

tive and were in contravention of Order 3 r. 2 of the Court of Appeal Rules.

B The Court of Appeal agreed in part with the criticism. On the particulars of the grounds of appeal it was found that the particulars of the 2nd and 3rd grounds of appeal of the 1st respondent were built in the grounds of appeal and therefore good in law. The offending particulars to the grounds of appeal were struck out as unnecessary. Grounds 4 and 5 were held to be good in law. Grounds 1,2,3 and 6 of the grounds of appeal of the 2nd respondent were held to be good. The Appeal of the C appellants was allowed in its entirety. It was held that the issue of jurisdiction was determined in the decision of the Court of Appeal No. CAL/117/94 of the 22nd February, 1996.

D Defendants have appealed against this judgment on the following grounds of appeal.

#### **GROUND OF APPEAL**

"(1) *The learned justices of the Court of Appeal erred in law in failing to strike out grounds 2 and 3 of 1st respondent's grounds of appeal after having found that they are "narrative and argumentative."*

#### **PARTICULARS OF ERROR**

F (a) *Grounds 2 and 3 of the 1st respondent's grounds of Appeal were found to be "narrative and argumentative" contrary to the provisions of Order 3 Rule 2(3) Court of Appeal Rules.*

(b) *The above formed the basis of the preliminary objection by the appellants and upheld by the lower court.*

G (c) *The proper order to make in the circumstances was one striking out the said grounds 2 and 3.*

(2) *The learned justices of the Court of Appeal erred in law in failing to strike out grounds 1, 2, 3 and 6 of 2nd respondent's grounds of appeal on the basis that they have "built-in" particulars.*

#### **PARTICULARS OF ERROR**

H (a) *The lower court upheld the preliminary objection of the appellants and struck out the particulars set out under grounds 1, 2, 3 and 6 of the 2nd respondent's grounds of appeal.*

(b) *The lower court, however, refused to strike out the said grounds*



on the basis that they have "built-in" particulars.

(c) Order 3 Rule 2 (2) Court of Appeal Rules does not contemplate "built-in" particulars, but requires that the particulars be clearly stated.

(d) The proper order to make in the circumstances was one striking out the said grounds 1,2,3 and 6 of the 2nd respondent's grounds of appeal. B

(3) The learned justices of the Court of Appeal erred in law in holding that the question whether 1st appellant authorized or directed Engr. Torsabo to retire the respondents had become "Res judicata" by virtue of the decision of the Court of Appeal in Exhibit 4. C

#### **PARTICULARS OF ERROR**

(a) The Court of Appeal in Exhibit 4 allowed the appeal and ordered a retrial of the case. D

(b) At the fresh trial the respondents amended their claim and admitted the contention of the appellants that they were retired on the directive of the 1st appellant.

(c) The trial judge was, therefore, right to have examined the issue of jurisdiction and consider if he could entertain the action. E

(d) The learned justices of the Court of Appeal erred in law in holding that the acceptance of three months salary in lieu of notice did not amount to respondent's acceptance of their retirement. F

#### **PARTICULARS OF ERROR**

(a) Upon their retirement, the respondents processed and were paid their three months salary in lieu of notice.

(b) The said acceptance of three months salary amounted to acceptance of their retirement. G

(c) The respondents were precluded consequently from complaining. Appellants have filed four issues for determination as arising from the grounds of appeal as against three and two respectively on the part of the 1st and 2nd respondents respectively. I reproduce hereunder H the various issues for determination formulated by the parties.

#### **ISSUES FOR DETERMINATION**

It is respectfully submitted that the following issues call for determina-

tion in this appeal:

(a) *Whether the Learned Justices of Appeal were right in failing to strike out the grounds of appeal that were found to be narrative and argumentative?*

B (b) *Whether having struck out the particulars set out under grounds 1,2,3 and 6 of the 22nd respondent's grounds of appeal, the learned Justices of Appeal were right in failing to strike out the said grounds?*

C (c) *Whether the Learned Justices of Appeal were right in holding that the question whether 1st appellant had authorised Engr. S.N. Torsabo to retire the respondents had become res judicata?*

(d) *Whether the Learned Justices of Appeal were right in holding that the acceptance of three months salary in lieu of notice did not amount to respondents' acceptance of their retirement?"*

D **"ISSUE FOR DETERMINATION (1ST RESPONDENT)**

It is submitted that three issues fall for determination viz:-

1. *Whether the Learned Justices of Appeal ought to have strike out 1st respondent's grounds 2 and 3 of the grounds of appeal.*

E 2. *Whether the issue of the retirement of the respondents by Engr. S. N. Torsabo on the authorization of the 1st appellant had become res judicata.*

F 3. *Whether the acceptance of the three months salary paid in lieu of notice, paid piece-meal, two months after the purported retirement amounts to acceptance of the purported retirement by the respondents and precludes the respondents from complaining."*

**"ISSUES FOR DETERMINATION 2ND RESPONDENT**

G 3. *It is submitted that two issues call for determination viz:-*

(a) *Were the Learned Justices of the Court of Appeal right in their views that the doctrine of estoppel was applicable to the appeal.*

H (b) *Were the Learned Justices right in their decision that grounds 1, 2, 3 and 6 of the 2nd respondent's grounds of appeal were valid and in declaring the purported retirement of the 2nd respondent as null and void.*

*Issue 1 covers grounds 3, while issue 11 covers 2 and 4 of the appellant's grounds of appeal."*

I have considered all the issues for determination. The three issues filed by 1st respondent appear to me adequate and as covering the four issues filed by the appellant. I therefore adopt them. Issues 1 and 2 of appellant is covered by issue 1 of the 1st respondent and grounds 1 and 2 of the grounds of appeal.

Issue 1 relates to the question of the compliance of the grounds 2, 3, 4 and 5 of the grounds of appeal with the provisions of Order 3 r. 2(3) of the Court of Appeal Rules. The submission was firstly that the Court of Appeal having found that grounds 2,3, of the 1st respondent's grounds of appeal were narrative, argumentative and legal submissions, they were in contravention of the Rules; and ought to have been struck out as incompetent. Compliance with the provisions of Order 3 r. 2(3) is mandatory. The decision of the Court of Appeal in *Ndaaoko v. Zakariyau* (1996) 1 R.M.L.R. (pt. 2) 187, *Oge v. Ede* (1995) 3 R.M.L.R. (pt. 385) 564, *Sanusi v. Ayoola* (1992) 9 N.W.L.R. 275 were cited.

Again, the Court of Appeal upon hearing argument on the preliminary objection of the appellants struck out all the particulars of error under grounds 1,2,3 and 6 of the 2nd respondent's grounds of appeal on the grounds that they were narrative/legal arguments. However, the grounds of appeal on the grounds were allowed to stand for the reason that they had built-in particulars. The rule requires the particulars to be clearly stated. The Court of Appeal ought to have struck out the affected grounds of appeal.

I agree entirely with the reasoning of the Court of Appeal on this issue, and the submissions of learned counsel to the respondents. The issue rests entirely on the interpretation of the provisions of Order 3 rule 2(4)(3) of the Court of Appeal Rules, 1981, which state

*"(2) If the ground of appeal alleges misdirection or error in law the particulars, and the nature of the misdirection or error shall be clearly stated.*

*(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively."*

The two sub-rules of Order 3 rr. 2, 3 of the Court of Appeal Rules, 1981 inter alia govern and are guides to the drafting of notices of appeal and the grounds of appeal in the notice. The words of the rule are clear, simple and unambiguous and should be given their ordinary plain meaning. Sub-rule 3, provides that the grounds of appeal upon which appellant rely at the hearing should be framed devoid of narrative; and should be numbered consecutively. However, sub-rule 2 provides that the nature of all allegations of misdirection or error of law shall be clearly stated in the particulars. It seems to me that although the particulars of error of misdirection are usually appended to the grounds in the interest of clarity, the provision of rule 2(2) merely states that they shall be stated clearly. It follows however, that as long as the particulars of error or misdirection alleged had been incorporated in the text of the ground of appeal, and have been clearly stated the absence of any heading indicating particulars of error will not affect the validity of the grounds of appeal. The contention of appellant will merely be servile to form rather than substance. It is competent to incorporate particulars of error in the body of the ground of appeal. Such a practice does not contravene the provision of Order 3 r. 2 (2) and does not render the ground incompetent - See Nsirim v. Nsirim (1990) 5 S.C.N.J. 174 (1990) 3 N.W.L.R. 285; Akanbi v. Raji (1998) 12 N.W.L.R. 360.

The dictum of the Court of Appeal challenged states -  
*"On the whole therefore, the preliminary objection succeeds partially, in that I have found some of the particulars given under some grounds of appeal are truly narrative or legal arguments, and have therefore struck them out. But the main body of the grounds which have built-in particulars are allowed to stand."*

I am satisfied that the court below here is saying that although the particulars given under the caption contain narrative or legal arguments the particulars of error alleged are clearly incorporated in the grounds of appeal. This is what the court refers to as particulars being "built-in" in the grounds of appeal.

In striking out the particulars 1-3, the Court of Appeal found only grounds 2 and 3 to contain narratives or argumentative. All other

grounds and particulars filed by 1st appellant namely 1, 4, 5 were held to be good. The Court of Appeal reproduced ground 2 of the ground of appeal and held that the "in-built" particulars are the expression underlined.

*"(2) The learned trial judge erred in law in reopening the issue of jurisdiction of the court to entertain appellants suit when the matter had been put to rest by the Court of Appeal, Jos in Appeal No. CA/J/117/94 decided on the 22nd February, 1996, for which the respondent never appealed.*

The second appellant's six grounds of appeal were similarly considered. Grounds 1,2, 3 and 6 of the grounds of appeal were alleged to "contain particulars that are narratives, legal arguments/submissions, irrelevant and contradictory." The Court of Appeal found the particulars in grounds 1, 2, 3, 4 and 6 as containing narratives, and are struck out. The grounds of appeal are not affected. Ground 4 with its built-in particulars stand. Ground 5, the omnibus ground also stands.

I agree with the submission of learned counsel to the 1st respondent in his brief of argument that although the court below considered the issue, appellants did not urge any reasons in support of the contention in the preliminary objection on grounds 2 and 3 of the 1st respondent's grounds of appeal. Appellants did not specify which particulars of which ground of appeal were narrative, argumentative or legal conclusions and in contravention of Order 3 r. 2(3) Court of Appeal Rules, 1981. The preliminary objection was therefore abandoned in law and ought not have been considered. - See Jallco Ltd. v. Owoniboy (1995) 4 S.C.N.J. 256.

It seems to me that respondent should have appealed against the finding of the court below on this ground. Having not done so, respondent is not entitled to be heard on the issue. - See Odife & anor. v. Aniemeka & Ors. (1992) 7 N.W.L.R. 25.

Respondents have submitted that it is not disputed by the appellants that all the grounds of appeal which have survived the preliminary objection have "built-in" particulars. The finding in the court below is justified in regarding the grounds of appeal with "built-in" particulars as valid and the finding is supported by judgment of the Supreme Court.

I also agree with the submission of 1st respondent's counsel that the learned justices of the Court of Appeal never found that the 2nd and 3rd grounds of appeal of the 1st respondent contravened Order 3 r. 3 (3), but it was the particulars that were so held. This is because the main grounds of appeal were held to contain "built-in" particulars. Appellant is therefore wrong in his submission that the justices of the Court of Appeal were in error for failing to strike out the grounds of appeal which were found to be narrative and argumentative. As I have already observed, it was not the 2nd and 3rd of the grounds of appeal of the 1st respondent, and grounds 1, 2, 3 and 6 of the 2nd respondent but the particulars of such grounds that were held to be narrative and argumentative. The grounds of appeal themselves contain "built-in" particulars and were therefore good in law.

Striking out the particulars which consist of narratives does not affect the main grounds of appeal which consist of "built-in" particulars. Accordingly issues 1 and 2 fail and are resolved against the appellant.

Issue 2 of the 1st respondent, which is the 1st issue by the 2nd respondent is appellants' issue 3 all variously formulated come to

*"Whether the Court of Appeal was right in holding that the question whether 1st appellant had authorized Engr. S.N. Torsabo to retire the respondents had become res judicata."*

Learned counsel to the appellant referred to the grant of the application by the defendants to strike out the action of plaintiffs/respondents in limine, for want of jurisdiction, and the setting aside of the decision of the High Court by the Court of Appeal which directed the action to proceed to trial before another judge. It was submitted that since evidence had not been led to show that Engr. Torsabo had been authorized by 1st appellant to retire the respondents, the trial court was wrong to strike out the relevant claim. Estoppel was therefore not created by the decision, because the appellants were at liberty to establish the said fact at the resumed trial.

At the resumed trial, respondents in para. 41 of their amended statement of claim now averred that they were retired on the direction of the 1st appellant. It was further submitted citing section 20, 75 of the

Evidence Act that on this averment appellant was no longer required to prove the allegation. In the circumstance, the trial court was right in raising the issue of jurisdiction, and to strike out the action for want of jurisdiction. He relied on section 3 (3) of the Public Officers (Special Provisions) Act and Ebohon v. A-G, Edo State (1994) 6 N.W.L.R. 190 B and Nwosu v. Imo State Environmental Sanitation Authority (1990) 4 S.C.N.J. 97. It was submitted that Wilson v. A-G of Bendel State (1985) 1 N.W.L.R. 752 relied upon by the Court of Appeal was not applicable.

In his brief of argument learned 1st respondent's counsel submitted that appellants were in error to contend that there was no issue C estoppel, on the question whether Engr. S.N. Torsabo had the consent of 1st appellant, the appropriate authority, under Cap. 381 of Laws of the Federation, 1990 to retire the respondents. The error was based on the D averment in paragraph 41 of the amended statement of claim where it was averred

*"41. The plaintiffs aver that after reaping the benefits of their hard work and excellent job performance, the 1st defendant on the insti- E gation of the 2nd defendant decided to throw out the plaintiffs."*

This averment was denied by the defendants in paragraphs 33 and 34 of their amended statement of defence alleging that the decision to retire plaintiffs was to improve the Ministry of Justice and to wipe out apparent decay. There is no doubt that by this denial in para.33 & 34 of the amended F statement of defence of the averment in paragraph 41 of the amended statement of claim, the parties joined issues on the allegation. The averment in paragraph 41 of the statement of claim could not be in the circumstances regarded as an admission.

The burden was on the appellants who averred that Engr. S.N. G Torsabo, 2nd appellant had the authority of the 1st appellant to retire respondents as he did as averred in paragraph 40(b) of the amended statement of defence to lead evidence in support to establish the authority - See Odunsi v. Bamgbala (1995) 1 S.C.N.J. 275; Eseigbe v. Agholor H (1993) 12 S.C.N.J. 82. Appellants failed to establish the burden.

The Court of Appeal in their judgment held that the Public Officers (Special Provisions) Decree No. 17 of 1984 now Cap. 381 Laws of

Nigeria, 1990 was not complied with in the mere issuance of the purported retirement letters to the respondents. It was held therefore, that appellants were not protected by the Decree. Accordingly, appellants did not establish that Engr. S.N. Torsabo, 2nd appellant was authorized by the 1st appellant, the appropriate authority, to effect the retirement of the respondents - See *Wilson v. A.G, Bendel State* (1985) 1 N.W.L.R. 572, *Garba v. Federal Civil Service Commission* (1988) 1 N.W.L.R. 449. The issue of jurisdiction was therefore decided against appellants.

There is no dispute that the issue, the parties and the subject matter are the same in the previous action before Idoko C.J which went onto to the Court of Appeal as the action before Okongbeh J. The Court of Appeal having determined the issue of the ouster of jurisdiction, the matter was *res judicata*. Issue estoppel bars a party from re-litigating in subsequent proceeding an issue which had been raised and finally determined solemnly in an earlier proceeding - See *Balogun v. Adejobi* (1995) 1 S.C.N.J. 242, *F.C.D.A. v. Sule* (1994) 3 S.C.N.J. 71, *Ebba v. Ogodo* (2000) 6 S.C.N.J. 100

There is no doubt that the facts the issue before the learned trial judge was a proper case of issue estoppel. The issue of ouster of jurisdiction whether the learned trial judge had the requisite jurisdiction to determine whether the respondents have been retired under the provisions of the Public Officers (Special Provisions) Decree No. 17 of 1984 having been determined between the parties, is *res judicata* and not subject matter for determination in the proceedings. The Court of Appeal had held that there was jurisdiction; the decision which is binding on the High Court is binding on Ikongbeh, J.

I therefore answer the second issue in the affirmative.

I now turn to the third issue for determination, which is the fourth issue in the formulation by the appellants. This issue relates to the contention whether the Court of Appeal was right to hold that acceptance by respondents of three months salary in lieu of notice of dismissal from their appointments did not amount to acceptance of their retirement.

The submission of appellants was that the acceptance by the



learned trial judge of the evidence in proof of the averment that respondents were paid and collected three months' salary in lieu of their retirement was acceptance of the validity of their retirement. They could no longer complain. The decisions of *Union Beverages Ltd. v. Owolabi* (1988) 1 N.W.L.R. 128; *Uwagbenebi v. Nigeria Palm Produce Board* (1986) 3 B N.W.L.R. 489, *Morohunfolo v. Kwara State College of Technology* (1986) 4 N.W.L.R. 732 were cited in support.

It was submitted that the Court of Appeal relied on the authority of *N.I.T.E.L. Ltd v. Ikaro* (1994) 1 N.W.L.R. 350 to hold otherwise where such acceptance was made under protest. It was argued respondents did not protest before payments of the three months' salary in lieu of retirement was made. The court below it was submitted, raised the issue of the protest suo motu, and that there was no protest at the time of the payment and collection of the three months' salary.

Both counsel to respondents have opposed the submission both on grounds of fact and on law. I agree with the submission that respondents had shown that defendants were unable to prove that their retirements by the letter written by the 2nd appellant, Engr. S.N. Torsabo was authorized or directed by the 1st appellant who is the appropriate authority under the enabling law. The retirement of respondents was therefore not in compliance with the enabling law, that is, the Public Officers (Special Provisions) Act Cap. 381 of the Laws of Nigeria, 1990. The retirement being unlawful and void, a valid act cannot arise there-from. I agree therefore that acceptance of three months salary in lieu of notice cannot in the circumstance preclude the respondents from complaining about the unlawful retirement which was void ab initio.

In *Adeniyi v. Yaba College of Technology* (1993) 7 S.C.N.J. 304, this court held void a compulsory retirement under the enabling law based on ground of misconduct not in accordance with the provisions of the enabling law. It was also held that the appellants' application for and collection of three months' salary in lieu of retirement did not render valid the invalid and void act of unlawful and wrongful retirement.

There is on the facts no valid notice of retirement on the respondents, which could be accepted by them. The principle is now well settled

that where an act is void ab initio, it cannot be validated by subsequent acts even if valid. This is because you cannot add something on nothing - See U.A.C. Ltd v. Macfoy (1961) 3 All E.R. 1160. The retirement remains void, notwithstanding the acceptance of the payment of three months' salary in lieu of notice. I am satisfied therefore that the acceptance by the respondents of the three months' salary in lieu of notice of retirement did not amount to acceptance of the invalid and void retirement.

I therefore resolve this issue against the appellants.

Having resolved all the issues for determination in this appeal against the appellants, this appeal fails in its entirety and is accordingly dismissed. The judgment of the Court of Appeal is hereby affirmed.

Appellants shall pay costs of this appeal assessed at N10,000 to each respondent.

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**KUTIGI JSC**

I read in advance the judgment just delivered by the learned brother Ayoola, J.S.C. I agree with his reasoning and conclusion. I will also dismiss the appeal with costs as assessed.

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**MOHAMMED JSC**

I have had the preview of the judgment just delivered by my learned brother, Ayoola, J.S.C, in draft, and I agree with him that this appeal has failed. For the reasons given in the judgment, I dismiss the appeal and affirm the decision of the Court of Appeal. I also award N10,000.00 costs to the respondents.

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**KATSINA-ALU JSC**

I have had the advantage of reading in draft the judgment of my learned brother AYOOLA, JSC. I entirely agree with it. For the reasons which he has given, I would also dismiss the appeal with N=10,000.00 Cost to the respondents.