

SUPREME COURT OF NIGERIA
MONDAY 27TH MAY, 2002. SC.102/1997
CORAM:- S. U. ONU, A. I. IGUH, A. I. KATSINA-ALU,
S. O. UWAIFO, E. O. AYOOLA, JJSC

1. ATTORNEY GENERAL
ANAMBRA STATE

2. JOHN IKE NWOKOLO

3. DR. MICHEAL IFEORAH

4. ANTHONY ANAEKE

..... APPELLANTS

5. PATRICK OKAFOR

6. CHIEF AUGUSTINE EZENWA

(Chairman Abagana Constitutional
Review Committee)

AND

1. EPHRAIM OKEKE

2. CHIEF AJULUCHUKWU

UCHEAGBOSO

3. NWAFOR OKEKE

..... RESPONDENTS

4. ORAGWU UNCHA AKUECHIE

5. SAMUEL UDENWA

AFFIDAVITS - Depositions - Counter-affidavit - Failure to file - Effect
- Defendants are deemed to have admitted facts in affidavits - And
court is to rely on same (H1)

COURT PROCESSES - Service - Proof - Where service is in dispute
- Bailiff can swear to an affidavit of service - Although a certificate of
service is not an exclusive means of proof (H2)

COURTS - Record of proceedings - Judicial notice - Record of pro-
ceedings - Court will take judicial notice of its own proceedings and
records - As well as contents therein (H3)

COURTS - Processes - Affidavit of service - Proof - Affidavit of ser-
vice is noncontentious document - Which is not required to be proved
before court (H4)

1100 A-G Anambra State v. Okeke (2002) 5 KLR (pt. 138) 1099; (2002)

APPEALS - Notice of appeal - Service of - By O.7 r.5 Court of Appeal Rules - Notice shall be served on named parties - But parties not directly affected - Need not be served (H5)

APPEALS - Competence - Issues - Propriety of raising - The issue can be raised in Supreme Court - Because appellate court will not exercise jurisdiction - Over person who is not a party to the proceedings (H6)

APPEALS - Parties - Right of appeal - 2nd & 5th defendants are parties for purpose of invoking jurisdiction of Supreme Court - To set aside order resulting from their improper inclusion (H7)

APPEALS - Committal orders - Validity of - Since 2nd & 5th defendants have ceased to be parties at Court of Appeal - The orders were made in error and should be set aside (H8)

APPEALS - Determination of - Court of Appeal cannot in all cases - Validly determine on merit - Matter it earlier struck out for improper filing (H9)

JUDICIAL PRECEDENTS - Actions - Application for committal - Authorities - Distinction - Okotie-Eboh v. Okotie-Eboh - Present action differs from the case law - Because the application was not determined on merit (H10)

APPEALS - Court - Committal application - Jurisdiction - Court of Appeal Act s.16 - Power exercisable by the court - Does not include what trial court could not have done (H11)

FACTS

Plaintiffs/respondents, who had obtained an order of interim injunction against defendants/appellants, brought this application pursuant to Order IX Rule 13 of the Sheriffs (Enforcement) Rules made under Section 93 of the Sheriffs and Civil Process Law Cap 118 Laws of Eastern Nigeria 1963 (applicable to Anambra State). The application was brought before the High Court of Anambra State for committal of 2nd to 6th appellants to prison for their disobedience

of the interim order. The application was however withdrawn in respect of 2nd and 5th appellants who were not served with the process. Their names were thus struck out from the application.

Appellants subsequently filed notice of objection to the application on the ground of non-compliance with Order 1 rule 14 of Judgment (Enforcement) Rules. In its ruling, the court upheld the objection and struck out the application. Not satisfied, respondents appealed to the Court of Appeal, Enugu Division contending that there was substantial compliance with the said Rules. The court allowed the appeal and held that there was full compliance with the Rules. Relying on section 16 of the Court of Appeal Act of 1976, the court gave an order committing 3rd, 4th and 6th appellants to prison with options of fine. Aggrieved, appellants filed three separate appeals i.e. one from 1st appellant, another from 3rd, 4th and 6th appellants and the third appeal is from 2nd and 5th appellants whose names were earlier struck out from the committal proceedings.

HELD (Unanimously allowing the appeal in part per lead judgment of **AYOOLA JSC**)

Depositions - Counter-affidavit - Failure to file - Effect

1. In my view, there is no substance in any of these criticisms. The defendants did not file a counter-affidavit to deny the facts deposed to by the plaintiffs that they were each served personally with endorsed Form 48. The contention that the court below should not have given credence and weight to the paragraphs of the affidavit wherein those facts were deposed to is misconceived since those paragraphs were not denied. The point was clearly put in the concurring judgment of Tobi, J.C.A., (as he then was) as follows:

“The respondent did not file a Counter-affidavit contesting the veracity of the above depositions. This court is therefore entitled to presume that they have no reply and that they agree with them. This is because affidavit evidence not denied by a respondent is deemed to be admitted...” (p. 1110E)

COURT PROCESSES - Service - Proof

2. I also agree with Tobi, J.C.A., (as he then was) that where service of a court process is in dispute a bailiff can discharge the burden by swearing to an affidavit of service. I add that where a Certificate of service in terms of o. 7 r. 16 of the High Court Rules of Anambra State is produced, its production also serves the purpose of proof of service, but that does not mean that it is an exclusive means of proof of service. (p. 1111 A)

COURTS - Record of proceedings - Judicial notice

3. It is evident that it is at the discretion of the court whether or not to refuse to take judicial notice of the fact in question unless and until the production of particular book or document. I am in agreement with the position taken by the court below that the court will take judicial notice of its own proceedings and records and also their contents. Where in a proceeding the question arises whether or not a process of court has been served in the proceeding, it will be a strange thing were the court to ignore the proof of service afforded by its own record in the proceeding and hold that such process has not been served. A different circumstance would arise were the question of service to arise in a different proceeding; or, were the authenticity of what was filed on record or its adequacy be in issue. But that was not the case here. (p. 1111 D)

COURTS - Processes - Affidavit of service - Proof

4. I am in entire agreement with Tobi, JCA, (as he then was) who qualified the general proposition that the court is entitled to make use of any document or documents in its file when he said:

“There is one basic qualification of this principle of law and it is that the document or documents must have undergone the litigation process or the process of adjudication by the Court or the parties have mutually come to an agreement as to their status in the litigation.”

However, that qualification does not take an affidavit of service filed on record out of the general proposition that the court is entitled to make use of document or documents in its

file. An affidavit of service of a court process is normally a non-contentious document required to be put on record for information of the court and the parties as to the fact and date of service of a process in the proceeding. It cannot be a reasonable proposition that in that same proceeding in which it was filed the law requires that that self-same document should be proved before the court before it can be relied on. B
(p. 1111 G)

Notice of appeal - Service of

5. The 2nd and 5th defendants were named as respondents in the appeal in the court below and were also each served with a notice of appeal. Technically, they became parties to the appeal by virtue of O. 7 r. 5 and O. 7 r. 6 of the Court of Appeal Rules. However, they were wrongly named parties because (i) although by virtue of O. 7 r 5: “The Registrar of the court below shall, after the notice of appeal has been filed, cause to be served a true copy thereof upon each of the parties mentioned in the notice of appeal”, the same rule also provides that: “It shall not be necessary to serve any party not directly affected.”: In this case the 2nd and 5th defendants having ceased to be parties to the application for committal, were not parties who could have been affected by whatever decision the trial court could take on the preliminary objection and in the committal proceedings. C D E F
(p. 1112 F)

APPEALS - Competence - Issues - Propriety of raising

6. Their silence about the true state of affairs could not in my opinion have converted them to proper parties. Whether a person has been properly named as party to an appeal or not is not determined by acquiescence but is a matter of law determined by whether such person was a party to the proceedings, in which the decision appealed from was made; or, whether he was a person directly affected by the decision; or, was a person who, though not a party to the proceedings has been made a party by order of court. I hold that notwithstanding that the 2nd and 5th defendants did not raise the question of the competence of the appeal against them in the court G H

below, it is a point which can properly be raised on this appeal because an appellate court will not exercise jurisdiction over a person who is not a party to the proceedings before it without first properly bringing him into the proceedings.

(p. 1113 E)

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Parties - Right of appeal

7. The question whether the 2nd and 5th defendants' appeal to this court is incompetent bears some attention. Although they were mentioned as parties in the court below, whereas they were not so properly named, they remained parties for the purpose of invoking the jurisdiction of this court to set aside an order resulting from their improper inclusion as parties. They were in this regard, parties to the proceedings for the purpose of section 213(5) of the 1979 Constitution which provided that:

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"Any right of appeal to the Supreme Court from the decisions of the Federal Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto" (p. 1114 A)

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APPEALS - Committal orders - Validity of

8. By the time the appeal went to the court below, the 2nd and 5th defendants having ceased to be parties to the committal application, were not parties in respect of whom the court below could exercise powers pursuant to section 16 of the Court of Appeal Act. The orders of committal made against the 2nd and 5th defendants were thus made in error and should be set aside. In the result, I would allow the appeal of each of these defendants. (p. 1114 D)

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APPEALS - Determination of

9. Nothing in Okotie-Eboh's case supports a general proposition that in all cases where a matter is struck out as being improperly brought, the Court of Appeal upon setting aside the order striking it out can proceed to determine the matter on its merits. There may be cases in which, from the circumstances, it may be expedient to do so without injustice to the

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parties. This case where an issue of the liberty of the citizen is involved will, in my view, not fall within the category of such cases. Each case should be considered with reference to its own circumstances. (p. 1116 G)

Actions - Application for committal - Authorities - Distinction B

10. In this case the preliminary objection was filed before the date fixed for the hearing of the application for committal on its merits. By reason of the notice of objection the application was not heard on its merits but was struck out. Unlike the case of Okotie-Eboh there was no determination of the application on its merits. (p. 1117 A) C

Court - Committal application - Jurisdiction

11. One incontestable limit to the power of the Court of Appeal to assume full jurisdiction over the whole proceedings is that such first instance jurisdiction exercised by the Court of Appeal pursuant to section 16 does not include what the trial court could not have done. Enough, I believe, has been said to show that the court below should not have proceeded to determine the application on its merits and thereby deny the defendants of the options available to them of mounting a defence to the application on the merits. (p. 1117 E) D E

NOTABLE POINTS OF INTEREST F

IGUH JSC

1. Procedure for committal of judgment contemnors

It is plain from the above provisions that where, as in the present proceedings, an order of injunction is made by a court in the absence of the judgment debtor, that is to say, the party sought to be committed to prison, a copy of the relevant order endorsed with a notice in Form 48 shall, on the application of the judgment creditor, be issued by the Registrar and the copy so endorsed shall be served on the judgment debtor in like manner as a judgment summons. It is only if a such judgment debtor fails, to obey the order, that is to say, where he ignores and remains defiant and in contempt of such order of court and continues to be in breach thereof after service of the order G H

endorsed with a notice in Form 48 on him that the Registrar, on the application of the judgment creditor shall issue a notice in Form 49 not less than two clear days after service of the endorsed copy of the order on him. The notice in Form 49 shall again be served on the judgment debtor in like manner as a judgment summons.

B (p. 1121 D)

2. Standard of proof in contempt proceedings

It cannot be over-emphasized that the above provisions of Order IX Rule 13 of the Judgments (Enforcement) Rules shall be strictly complied with if an application for the committal of a judgment debtor to prison made thereunder must succeed. This is because a committal proceeding, the consequence of which may culminate in the deprivation of the liberty and/or freedom of an individual if he is adjudged a contemnor is to all intent and purposes a quasi-criminal matter and the standard of proof of such disobedience is not just on the balance of probabilities but on proof beyond reasonable doubt as prescribed in criminal trials. (p. 1121 G)

3. Appeals – Basis for

It is trite law that the basis for any appeal must relate to the decision of the court from which the appeal lies and any grounds of appeal and issues raised on matters outside those relating to the relevant decision are incompetent. A court is not, while dealing with preliminary or interlocutory matters, entitled to make pronouncements which would prejudice the fair hearing of the issues to be decided at the hearing of the substantive suit. (p. 1127 D)

REPRESENTATION

D. O. C. Amaechina Esq. (A.C.L.O.) Ministry of Justice, Anambra State for 1st appellant

Chief J. C. Ifebunandu (M. Sani Bawa Esq.) for 2nd to 6th appellants.

H J. H. C. Okolo Esq., SAN, with Anali Chude Esq, for the respondents

CASES REFERRED TO

Osafire v. Odili Ltd. (1990) 3 NWLR (Pt. 37) 130

Okotie Eboh v. Okotie Eboh (1986) 1 NSCC (Pt. 1) 183

Madukolu v. Nkemdilim (1962) All NLR 582

Westminster Bank Ltd. v. Edwards and Anor. (1942) AC 592

City of London Corporation v. Cox (1866) LR 2 HL 239

Atoyebi v. Governor of Oyo State & Ors (1994) 5 SCNJ 62

Uhunmwangho v. Okojie (1989) 12 SCNJ 84

Abaye v. Ofili (1986) 1 SC 231

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Olaniyi v. Aroyeham (1991) 5 NWLR (Pt. 194) 625

Metal Construction (W.A.) Ltd. v. Migliore (1979) 6-9 SC 163

The State v. Onagoruwa (1992) 2 NWLR (Pt. 221) 33

Igboho Irepo Local Govt. Council v. The Boundary Settlement Commissioner & Ors (1988) 2 SCNJ (Pt. 1) 28

C

Onagoruwa v. Adeniji (1993) 5 NWLR (Pt 293) 317

STATUTES & RULES REFERRED TO

Court of Appeal Act 1976, s. 16

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Constitution of the Federal Republic of Nigeria 1979, s. 213(5)

Evidence Act, s. 74(3)

High Court Rules of Anambra State O. 7 r. 16

Judgment (Enforcement) Rules O. 1 r. 14, O. 9 r. 13(2)

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LEAD JUDGMENT BY AYOOLA JSC

This is an appeal from the decision of the Court of Appeal - Achike, Ejiwunmi and Tobi, J.J.C.A. (as they then were) committing the 2nd, 3rd, 4th, 5th and 6th appellants (referred to in this judgment as defendants) to prison for two months or to pay a fine of N500.00 each. The background facts-

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On 16th December 1993 the respondents in this appeal (referred to in this judgment as “the plaintiffs”) who had obtained an order of interim injunction against the defendants brought an application for committal of the defendants for their disobedience of the order. On 20th December 1993 counsel for the plaintiffs withdrew the application against the 2nd December 1993 counsel for the plaintiffs withdrew the application against the 2nd and 5th defendants who had not been served. Those defendants were accordingly struck out from the application. The matter, then before Egbue, J., was adjourned to 21st of January 1994 for further hearing. By that date the matter had come before Anijah-Obi, J., who on 21st March 1994 heard arguments as to the order in which the two motions then be-

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fore him, namely: one by the defendants to strike out the plaintiffs' suit for want of locus standi and the other by the plaintiffs to commit the defendants to prison, should be heard. On 13th April, 1994 he ruled that he would hear the latter first. However, in the meantime, on 12th April, 1994 counsel for the defendants had filed a notice of
 B objection to the committal application on the ground of non-compliance with the provisions of O. 1 r. 14 of Judgment (Enforcement) Rules. Anijah-Obi, J., heard arguments on the objection on 13th April, 1994. On 10th June, 1994 he delivered a ruling upholding the
 C objection and struck out the application for committal.

The appeal to the Court of Appeal.

The plaintiffs appealed to the Court of Appeal contending, in the main, that there was substantial compliance with the Judgment (Enforcement) Rules made under the Sheriffs and Civil Process Law
 D and also that the trial judge should have committed the defendants on the materials before him. Counsel for the defendants responded to the former of those contentions but was silent on the latter in his brief of argument. The court below held that there was full compliance with O. 9 r. 13(2) of the Judgment (Enforcement) Rules and
 E that all conditions precedent to issuance of Form 49 was met. Having so held, it reminded itself of its powers under section 16 of the Court of Appeal Act 1976 which, inter alia, provided that the Court of Appeal "*generally shall have full jurisdiction over the proceedings as if*
 F *the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing*". Purporting to re-hear the appeal on the records, Achike, J.C.A., (as he then was) who delivered the leading judgment of the court below
 G said:

"In this regard, I have already examined and evaluated the affidavit evidence placed before the trial court and which is now before us and have come to the conclusion that the case of disobedience of the order made by Ezeani, J., on 11/2/93 has been estab-
 H *lished and substantiated beyond reasonable doubt, that is to say, that the acts of disobedience of the said order of the lower court have been proved to the hilt separately and against each of the 2nd, 3rd, 4th, 5th and 6th respondents. In exercise of the powers vested in this Court by virtue of section 16 of the Court of Appeal Act, 1976, I*

hold that each of 2nd, 3rd, 4th, 5th and 6th respondents has failed to obey the said order of the Court

Accordingly, I order and commit each of the aforesaid.”

With that view Ejiwunmi, J.C.A, (as he then was) and Tobi, J.C.A., agreed. In the result, the court below made an order committing the 2nd to 6th defendants to prison with options of fine. B

The three appeals before this court

Against the decision there are now before us three appeals, respectively, (i) by the Attorney-General of Anambra State who was the 1st defendant in the suit in which the order of interim injunction was made, but against whom neither was the order of interim injunction nor of committal made and who was not a party to the committal application; (ii) by the 3rd, 4th, and 6th defendants against whom the orders of interim injunction and committal were made and who were parties to the committal proceedings; and, (iii) by the 2nd and 5th defendants who, though parties against whom the interim order was made, had been struck out of the committal proceedings and had therefore ceased to be parties to those proceedings when the order of committal was made. C D

Was there non-compliance with the Judgment (Enforcement) Rules? E

The trial judge in upholding the preliminary objection raised to the committal proceedings had held that there was no proof of personal service of Form 48 on the 2nd - 6th defendants and that, even if personal service had been effected on them, what was served on these defendants were not exhibited. He further held that: (i) these defendants could not have disobeyed any order of court on the 13th day of February 1993, they having not been duly served with the Order with Form 48 before that date; and (ii) that the plaintiffs have failed to comply with O. 9 r 13(2) of the Judgment (Enforcement) Rules which required the service of a notice in Form 48 on the judgment debtor not less than two clear days after service of the endorsed copy of the Order. The court below disagreed with the trial court and held that there had not been a non-compliance with the provisions of the Judgment (Enforcement) Rules. A common contention of all the defendants in this appeal is that the court below was wrong in not holding that the plaintiffs failed to comply with the Judgment (Enforcement) Rules in bringing the committal proceedings. F G H

The 2nd and 5th joined the others in raising that contention, but as would be seen they needed not to.

The affidavit in support of the plaintiffs' application for committal of the 2nd - 6th defendants contained depositions to the facts that drawn-up order with Form 48 endorsed therein was served on each of these defendants (para.5); and, that each of the defendants was personally served (para.6). The court below referred to those paragraphs of the affidavit and the affidavit of service of Form 48 on these defendants sworn by the bailiff. There were, according to the court below, affidavits of service contained in the court file which the court would take judicial notice of. It was after it had meticulously considered the affidavits and all other points of objection canvassed by counsel for the defendants and had found those points wanting in substance that the court below set aside the decision upholding the preliminary objection.

The decision of the court below has been criticized on several scores: first, that that court should not have given "*credence and weight*" to paragraphs 5 and 6 of the affidavit in support of the plaintiffs' application when the deponent was not a bailiff, and, secondly, that although proof of service by the bailiff, in accordance with O. 7 r. 16 of the High Court Rules of Anambra State shall be by production of a Certificate of Service signed by such bailiff, no such certificate was produced by the plaintiffs.

In my view, there is no substance in any of these criticisms. The defendants did not file a counter-affidavit to deny the facts deposed to by the plaintiffs that they were each served personally with endorsed Form 48. The contention that the court below should not have given credence and weight to the paragraphs of the affidavit wherein those facts were deposed to is misconceived since those paragraphs were not denied. The point was clearly put in the concurring judgment of Tobi, J.C.A., (as he then was) as follows:

"The respondent did not file a Counter-affidavit contesting the veracity of the above depositions. This court is therefore entitled to presume that they have no reply and that they agree with them. This is because affidavit evidence not denied by a respondent is deemed to be admitted. In Onagoruwa v. Adeniji (1993) 5 NWLR (Pt 293) 317..."

I agree with him.

I also agree with Tobi, J.C.A., (as he then was) that where service of a court process is in dispute a bailiff can discharge the burden by swearing to an affidavit of service. I add that where a Certificate of service in terms of O. 7 r. 16 of the High Court Rules of Anambra State is produced, its production also serves the purpose of proof of service, but that does not mean that it is an exclusive means of proof of service. B

The Court below was further criticized for making use of the affidavit of service in the file. It was argued that taking judicial notice of such document was contrary to section 74 (3) of the Evidence Act C which provides that:

"If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so." (Italics mine) D

It is evident that it is at the discretion of the court whether or not to refuse to take judicial notice of the fact in question unless and until the production of particular book or document. I am in agreement with the position taken by the court below that the court will take judicial notice of its own proceedings and records and also their contents. See Osafire v. Odili Ltd. (1990) 3 NWLR (Part 37) 130. Where in a proceeding the question arises whether or not a process of court has been served in the proceeding, it will be a strange thing were the court to ignore the proof of service afforded by its own record in the proceeding and hold that such process has not been served. A different circumstance would arise were the question of service to arise in a different proceeding; or, were the authenticity of what was filed on record or its adequacy be in issue. But that was not the case here. I am in entire agreement with Tobi, JCA, (as he then was) who qualified the general proposition that the court is entitled to make use of any document or documents in its file when he said: E F G H

"There is one basic qualification of this principle of law and it is that the document or documents must have undergone the litigation process or the process of adjudication by the Court or the parties have mutually come to an agreement

as to their status in the litigation.”

However, that qualification does not take an affidavit of service filed on record out of the general proposition that the court is entitled to make use of document or documents in its file. An affidavit of service of a court process is normally a non-contentious document required to be put on record for information of the court and the parties as to the fact and date of service of a process in the proceeding. It cannot be a reasonable proposition that in that same proceeding in which it was filed the law requires that that self-same document should be proved before the court before it can be relied on.

I find no substance in the appeal against the decision of the Court of Appeal setting aside the decision of the trial court, striking out the application for committal. The appeals of the 3rd, 4th and 6th defendants must fail to that extent only.

The appeal of the 2nd and 5th defendants: Should an order of committal have been made against these defendants who were not parties to the committal proceedings?

The real crux of the appeal of the 2nd and 5th defendants is, whether they having been struck out of the proceedings by Egbue, J, the court below should have made an order of committal against them. A number of incidental questions arise from the arguments advanced before us which will presently be attended to.

Were the 2nd and 5th appellants properly named as parties to the appeal in the court below?

The 2nd and 5th defendants were named as respondents in the appeal in the court below and were also each served with a notice of appeal. Technically, they became parties to the appeal by virtue of O. 7 r. 5 and O. 7 r. 6 of the Court of Appeal Rules. However, they were wrongly named parties because (i) although by virtue of O. 7 r. 5: “The Registrar of the court below shall, after the notice of appeal has been filed, cause to be served a true copy thereof upon each of the parties mentioned in the notice of appeal”, the same rule also provides that: “It shall not be necessary to serve any party not directly affected.”: In this case the 2nd and 5th defendants having ceased to be parties to the application for committal, were not parties who could have been affected by whatever

decision the trial court could take on the preliminary objection and in the committal proceedings.

The plaintiffs have not contended that the 2nd and 5th defendants were properly made parties to this appeal. Counsel on their behalf argued that no issue of incompetence of the appeal was raised in the appeal in the court below. He argued that since 2nd and 5th defendants were not parties in the appeal in the court below, their appeal to this court as parties is incompetent because they could not appeal as parties and have not sought leave to appeal as persons having an interest in the matter in terms of section 213(5) of the 1979 Constitution. B
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The court below may have been misled by counsel for the 2nd and 5th defendants into believing that those defendants were properly mentioned as parties to the appeal. Instead of moving to have the notice of appeal served on them set aside, a brief of argument was filed on their behalf, albeit jointly with proper defendants, in which the opening statement was that: *“The appeal arose from an application by the plaintiff/Appellants...for the committal of the 2nd to 6th Defendants/Respondents”*... (Emphasis mine). D

Be that as it may, at no stage were the 2nd and 5th defendants re-joined as parties to the committal proceedings although they remained parties to the main suit with which the appeal was not concerned. ***Their silence about the true state of affairs could not in my opinion have converted them to proper parties. Whether a person has been properly named as party to an appeal or not is not determined by acquiescence but is a matter of law determined by whether such person was a party to the proceedings, in which the decision appealed from was made; or, whether he was a person directly effected by the decision; or, was a person who, though not a party to the proceedings has been made a party by order of court. I hold that notwithstanding that the 2nd and 5th defendants did not raise the question of the competence of the appeal against them in the court below, it is a point which can properly be raised on this appeal because an appellate court will not exercise jurisdiction over a person who is not a party to the proceedings before it without first properly bringing him into the proceedings.*** E
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The 2nd and 5th appellants not being proper parties to the

appeal in the court below, is their appeal to this court competent?

The question whether the 2nd and 5th defendants' appeal to this court is incompetent bears some attention. Although they were mentioned as parties in the court below, whereas they were not so properly named, they remained parties for the purpose of invoking the jurisdiction of this court to set aside an order resulting from their improper inclusion as parties. They were in this regard, parties to the proceedings for the purpose of section 213(5) of the 1979 Constitution which provided that:

"Any right of appeal to the Supreme Court from the decisions of the Federal Court of Appeal conferred by this section shall be exercisable in the case of civil proceedings at the instance of a party thereto..."

D The principal question: Was the order of committal rightly made against these defendants?

By the time the appeal went to the court below, the 2nd and 5th defendants having ceased to be parties to the committal application, were not parties in respect of whom the court below could exercise powers pursuant to section 16 of the Court of Appeal Act. The orders of committal made against the 2nd and 5th defendants were thus made in error and should be set aside. In the result, I would allow the appeal of each of these defendants.

F The appeal of the 3rd, 4th and 6th defendants: Should the Court of Appeal have proceeded to determine the application for committal?

G As regards the 3rd, 4th and 6th defendants, the main question is whether having set aside the decision of the trial judge, the court below should have embarked on a consideration of the application on its merits.

H Section 16 of the Court of Appeal Act gives the Court of Appeal *"full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing"*

This appeal brings once again into question the true scope of powers of *"full jurisdiction"* given to the Court of Appeal under sec-

tion 16 of the Court of Appeal Act. Counsel for the plaintiffs referred to instances in which the Court of Appeal had usefully exercised such powers. Since none of the cases he cited, except *Okotie Eboh & Ors v. Okotie Eboh & Ors* (1986) 1 NSCC (Part 1) 183 comes near the circumstances of this case, no useful purpose is served by discussing those cases. B

It is not disputed that the Court of Appeal has ample powers under section 16. However, no one will suggest that those powers are unlimited. The question is what are the limits of those powers? Such limits are to be determined case by case and not by a priori C general propositions. The court below, as did counsel for the plaintiffs before us in this appeal, relied on *Okotie-Eboh & Ors v. Okotie Eboh & Ors* (supra) for the jurisdiction it exercised to determine the committal application on its merits. The question is whether that case is authority for the exercise of such jurisdiction in this case. D

The facts of *Okotie Eboh* case (supra) only appear similar to those of this case but they are not. In that case the appellant applied for a stay of proceedings in a matter in the High Court of Lagos State in which the appellant and some of the respondents were parties. E The respondents raised an objection that since the appellant was relying on a writ of summons which has been filed in another action between the parties in support of his application for a stay of proceedings, the photocopy of the writ of summons attached to the affidavit was inadmissible as evidence of the filing of the writ of sum- F mons and, as such, there was no evidence of the writ of summons before the court. The trial judge allowed the preliminary objection and dismissed the application without hearing further argument. The appellant appealed to the Court of Appeal which allowed the appeal on the ground that the trial judge ought to have heard the applica- G tion. The Court of Appeal then, itself, heard the application on its merits and dismissed it. The appellant appealed further to this court, contending that the Court of Appeal acted without jurisdiction in re-hearing the application, when there had been no hearing or decision in the High Court in the first place. This court held, dismissing the H appeal, that the general purport of powers of the Court of Appeal under section 16 was to enable that court to exercise all the powers of a court of first instance and that the Court of Appeal exercising power under section 16 was quite competent to determine the appli-

cation even without a prior hearing in the court below.

Although the broad circumstances of the Okotie-Eboh case look similar to the circumstance of this case, a closer look at both shows a very material difference. The ground of the decision in Okotie-Eboh's case which makes the difference is manifest in the leading judgment delivered by Karibi-Whyte, JSC, as p 190 of the Reports where he said:

"The respondents have contended that the issue before the Court of Appeal was whether the application of appellant, though dismissed without hearing, was dismissed on its merits. A hearing may be said to be on the merits where the issues of fact or law or both, between the parties are fought out to a final conclusion binding upon the parties. The preliminary objection which resulted in the dismissal of the application without a hearing was that the application for a stay of proceedings have (sic) not been supported by any admissible evidence of the filing of another writ of summons on which appellant relied for his application... the learned judge dismissed the application because there was no evidence in support. I think this is a hearing of the application on its merits. There is no way the preliminary objection would have been argued without a consideration of the application on which it is based.

It is conceded that not all aspects of the application for stay of proceedings might have been considered in the objection, nevertheless since consideration of the point of law finally decided the rights of the parties, it was a decision on the merits. It follows therefore that there was before the Court of Appeal, an appeal against a decision on its merits" (Emphasis mine)

While in Okotie Eboh's case the trial court had decided the matter on its merits, that is not the position in the present case. There is, evidently, much danger to the orderly development of our laws in citing and relying on authorities without adequate attention to the exact nature of the proposition such could support. ***Nothing in Okotie-Eboh's case supports a general proposition that in all cases where a matter is struck out as being improperly brought, the Court of Appeal upon setting aside the order striking it out can proceed to determine the matter on its merits. There may be cases in which, from the circumstances, it may be expedient to do so without injustice to the parties. This case***

where an issue of the liberty of the citizen is involved will, in my view, not fall within the category of such cases. Each case should be considered with reference to its own circumstances.

In this case the preliminary objection was filed before the date fixed for the hearing of the application for committal on its merits. By reason of the notice of objection the applica-^Btion was not heard on its merits but was struck out. Unlike the case of Okotie-Eboh there was no determination of the application on its merits. It is not impossible that had the trial judge overruled the objection the defendants might have sought to file counter-affidavits to contest the merit of the application, in view of the fact that their preliminary objection related only to procedural conditions precedent to the bringing of the application which they contended were not performed. There is no doubt that had the High Court overruled their preliminary objection, they would have been^C entitled to be heard fully on the application and bring before the trial court whatever evidence they considered helpful for their defence. They certainly would not have expected the trial judge to proceed to determine the application on the merits in the same ruling in which he over-ruled their objection. The trial judge could not have done so^D without occasioning a miscarriage of justice.^E

One incontestable limit to the power of the Court of Appeal to assume full jurisdiction over the whole proceedings is that such first instance jurisdiction exercised by the Court of Appeal pursuant to section 16 does not include what^F the trial court could not have done. Enough, I believe, has been said to show that the court below should not have proceeded to determine the application on its merits and thereby deny the defendants of the options available to them of mounting a^G defence to the application on the merits.

For these reasons I would allow the appeal of the 3rd, 4th and 6th defendants to the extent only that the order of committal made against them should be set aside.

The appeal of the 1st defendant, the Attorney-General of H Anambra State.

The Attorney-General Anambra State who was the 1st defendant has also appealed. He submitted as the only issue for determination the following question?

“Whether the Court of Appeal (taken as the trial court pursuant to section 16 of the Court of Appeal Act, 1976) lacked the jurisdiction ab initio to convict and sentence any party for contempt without first disposing of the issue of jurisdiction raised in the substantive suit.”

B It is difficult to see how, in the first place, the 1st defendant could properly be an appellant in this matter since although he was a nominal 1st defendant in the substantive suit he was not a party to the committal proceedings and no order was made against him by the court below.

C Besides, the issue of jurisdiction was not raised in the court below there being no appeal against the decision of the trial judge that he would take the committal application before determining the motion relating to the standing of the plaintiffs to file the suit. That D the 1st defendant dressed the issue in this court as a jurisdictional issue makes no difference.

The 1st defendant had striven to establish his right to appeal and to justify the issue he raised for determination. However, it is not necessary to prolong the matter by discussing these issues and determining them in view of the fact that the appeals of the other defendants, particularly the 3rd, 4th and 6th defendants will be allowed and the order committing them to prison will be set aside and in view of the consequential orders that will follow.

F In the result, I allow the appeals of the 2nd to 6th defendants to the extent stated. I set aside the order of committal made by the Court of Appeal against them in its entirety, including the order as to costs. I order that the application for committal be remitted to the High Court of Anambra State to be heard on its merits, but in regard G to the 3rd, 4th and 6th defendants only, the 2nd and 5th defendants having been struck out from the application. At such hearing the 3rd, 4th and 6th defendants shall be at liberty, if so advised, to take any steps they deem appropriate for their defence on the merits of the application. It will also be open to them at such hearing to contend H that they could only be liable for disobedience of the court order only if such had occurred after the date the court below had found that form 49 was served on each of them. I strike out the appeal of the Attorney-General.

The 2nd and 5th defendants/appellants and the 3rd, 4th and

6th defendants/appellants are entitled to costs of this appeal which I assess at N10,000 to each of the two sets of appellants. There is no order as to costs in regard to the 1st defendant/appellants appeal.

ONU JSC

Having been privileged to read before now the judgment just delivered by my learned brother Ayoola, JSC I agree with his reasoning and conclusion that:

1. In relation to the three appeals, the appeal of the 1st Appellant (the Attorney-General of Anambra State) be and is hereby struck out since he has no right of appeal therein.

2. In respect of 2nd and 5th Appellants, since they were not parties at all to this case (and not being in jeopardy), their appeal is struck out.

3. For the 3rd, 4th and 6th Appellants, their appeal be and is hereby allowed. In choosing to commit them to prison the Court of Appeal exercised their powers under Section 16 of the Court of Appeal Act rather than calling upon them to show cause in a purely criminal matter.

I subscribe to the consequential orders made inclusive of those for trial de novo before the trial court.

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ayoola, J.S.C. and I am in agreement that there is merit in the appeals of the 2nd - 6th defendants and that the same ought to be allowed.

The appeals have arisen from an application for the committal of the 2nd - 6th defendants to prison pursuant to the provisions of Order IX Rule 13 of the Sheriffs (Enforcement) Rules made under Section 93 of the Sheriffs and Civil Process Law, Cap. 118 Laws of Eastern Nigeria, 1963 applicable to Anambra State of Nigeria.

The application was initiated by the plaintiffs/respondents in Form 49 on the ground of alleged disobedience by the 2nd - 6th defendants/appellants of an ex parte order of injunction made by Ezeani, J. on Friday the 11th February, 1993 in a substantive action

between the parties. I think for a better appreciation of the matters in issue in these appeals that it is desirable to set out the interim order of injunction made by Ezeani, J. on the 11th February, 1993 which is the subject matter of this contempt proceeding. This reads as follows:

B *"It is ordered that the 2nd to 6th defendants are hereby re-*
strained from holding any meeting of Abagana Welfare Union on
13th February, 1993 or any other day at St. Peter's School Hall within
Abagana or at any other place in connection with the selection of a
 C *traditional ruler of Abagana and or carrying out any process of the*
selection of the traditional ruler of Abagana, pending the determina-
tion of the motion on notice. It is further ordered that the defendants
be restrained from operating in any way the "Constitution of Abagana
Town" or any amendment thereof pending the said determination of
 D *the motion on notice which is fixed for 18th February, 1993."*

Essentially the order restrained the defendants from holding any meeting of Abagana Welfare Union on the 13th February, 1993 or at any other day in connection with the selection of a traditional ruler of Abagana and from operating the Constitution of Abagana
 E town pending the determination of the motion on notice fixed for 18th February, 1993. The said Form 49 was supported by an affidavit sworn to by the 1st plaintiff. The order of injunction in issue having been made ex parte and in the absence of the defendants, the
 F filing of the said Form 49 as prescribed by the provisions of Order IX Rule 13 of the Sheriffs (Enforcement) Rules aforementioned was preceded by the issuance of Form 48 with the relevant drawn up order of injunction endorsed thereon. The date of service of the said Form 48 with the drawn up order was hotly contested by the parties
 G in these proceedings.

Order 9 Rule 13 of the Judgments (Enforcement) Rules, Cap. 118, Laws of Eastern Nigeria, 1963 applicable to Anambra State of Nigeria provides as follows:

H *"13(1) When an order enforcement by committal under section 71 of the Law has been made, the Registrar shall, if the order was made in the absence of the judgment debtor and is for the delivery of goods without the option of paying their value or is in the nature of an injunction, at the time when the order is drawn up, and in any other case, on the application of the judgment creditor, issue a*

copy of the order endorsed with a notice in Form 48, and the copy so endorsed with a notice in Form 48, and the copy so endorsed shall be served on the judgment debtor in like manner as a judgment summons.

(2) If the judgment debtor fails to obey the order, the Registrar on the application of the judgment creditor shall issue a notice in Form 49 not less than two clear days after service of the endorsed copy of the order, and the notice shall be served on the judgment debtor in like manner as a judgment summons.

(3) On the day named in the notice, the court, on being satisfied that the judgment debtor has failed to obey the order and, if the judgment debtor does not appear-

(a) that the notice has been served on him, and

(b) If the order was made in his absence, that the endorsed copy thereof has also been served on him, may order that he be committed to prison and that a warrant of commitment may issue."

It is plain from the above provisions that where, as in the present proceedings, an order of injunction is made by a court in the absence of the judgment debtor, that is to say, the party sought to be committed to prison, a copy of the relevant order endorsed with a notice in Form 48 shall, on the application of the judgment creditor, be issued by the Registrar and the copy so endorsed shall be served on the judgment debtor in like manner as a judgment summons. It is only if a such judgment debtor fails, to obey the order, that is to say, where he ignores and remains defiant and in contempt of such order of court and continues to be in breach thereof after service of the order endorsed with a notice in Form 48 on him that the Registrar, on the application of the judgment creditor shall issue a notice in Form 49 not less than two clear days after service of the endorsed copy of the order on him. The notice in Form 49 shall again be served on the judgment debtor in like manner as a judgment summons.

It cannot be over-emphasized that the above provisions of Order IX Rule 13 of the Judgments (Enforcement) Rules shall be strictly complied with if an application for the committal of a judgment debtor to prison made thereunder must succeed. This is because a committal proceeding, the consequence of which may culminate in the deprivation of the liberty and/or freedom of an individual if he is ad-

judged a contemnor is to all intent and purposes a quasi-criminal matter and the standard of proof of such disobedience is not just on the balance of probabilities but on proof beyond reasonable doubt as prescribed in criminal trials.

B Now, when the present committal proceeding came up for hearing before the trial court, learned counsel for the 2nd - 6th defendant, raised a preliminary objection on the ground that the provisions of Order IX Rule 13 of the Sheriffs (Enforcement) Rules were not complied with in that:-

C *“(a) The defendants were served with a certified copy of the Order instead of the original copy signed by the Judge and sealed with the Court seal.*

D *(b) That no date of serve of Form 48 was mentioned in the affidavit of the 1st Plaintiff/Respondent and that Form 48 ought to have been exhibited.*

(c) That Form 48 was addressed to 2nd - 6th defendants through their Solicitor at 162 Zik Avenue Enugu and this could not constitute personal service.

E *(d) That if the Order with Form 48 endorsed was served on the Defendants after selection of the Chief, they would not be in contempt.*

(e) That any document not annexed to the Motion cannot be made reference to.”

F One of the main issues in controversy between the parties in the preliminary objection centered around the effectiveness and propriety or otherwise of the service of Form 48 with the drawn-up order endorsed thereon by the plaintiffs on the 2nd - 6th defendants. The actual date of service of the said Form 48 on the defendants is of G vital importance in the proceeding in the determination of whether or not the alleged act of the defendants complained of constituted contempt of the order of court. This is because if the alleged act of the defendants was committed before the service of Form 48 on them, then, of course, no contempt would have been established H against them. It would be otherwise if the alleged act was committed after the service of the said Form 48 on the defendants.

In this regard, the learned trial Judge after some consideration of the issue observed as follows:-

“It is not in controversy that the address of service on Form 48

for each of the 2nd - 6th defendants is 162 Zik Avenue, Uwani Enugu, the office of their Solicitor. This, Chief Ifebunandu said, was not good service. On the other hand, Dr. Mogbana stated that when he realized the mistake, he insisted on personal service. However, he failed to exhibit the affidavits of service to prove personal service. The affidavits of service are necessary to settle the two issues; firstly the date of service as this date was not mentioned in the applicant's affidavit and secondly, the nature of service since this is now in dispute. B

I do not agree with Dr. Mogbana when he said that the Defendants/Respondents did not deny that they were served personally because in a quasi - criminal proceedings such as this the onus is on the applicant to show that he has taken every step necessary to comply with the law. The applicants themselves know the importance of the affidavit of service and the need to exhibit them because in paragraph 6 of the affidavit of the 1st Plaintiff/Respondent, it is deposed D as follows:-

"That each of the defendants was personally served; that I specifically refer to the affidavits of service sworn to and filed by the Bailiff of the court and make same an exhibit to this affidavit."

Behold the documents were not in fact exhibited and I hold E that failure to do so, particularly when no date of service was given in the affidavit, is detrimental to the applicants' case."

The Court of Appeal, for its own part, after a similar exercise as the trial court relating to the service in issue found thus:-

"Affidavits of service of Form 48 with the drawn-up order endorsed thereon were served on Anthony Anaekie, 4th respondent, Chief Augustine Ezenwa, 6th respondent, Patrick Obiakor, 5th respondent, John Ike Nwokolo, 2nd respondent and Michael Ifeorah, the 3rd respondent on 9th November, 1993, 12th November, 1993, 23rd November, 1993 and 1st December, 1993 respectively - see F pages 151 to 155 of the record. It is crystal clear that from the above dates when Forms 48 with the drawn-up order endorsed thereon were respectively served on 2nd - 6th respondents up to 16th December, 1993 when Forms 49 were dated and thereafter respectively G served on the respondents, there was a minimum interval of 14 clear days. Affidavits of service at pages 169 to 173 clearly confirm that copies of Form 49 were respectively served personally on 4th, 6th and 3rd respondents on 17th December, 1993, and the H

same were also served personally and respectively on 5th and 2nd respondents on 19th January, 1994. Clearly, these dates as set out in the respective proofs of service of Form 48 and Form 49 affirm that the prescribed interval of at least two clear days between the service of Form 48 and Form 49 affirm that the prescribed interval of
 B at least two clear days between the service of Form 48 and Form 49 were absolutely complied with.” (Underlining supplied for emphasis)

It was therefore “*crystal clear*” to the court below that service on the 2nd - 6th defendants of a copy of the relevant order of Friday,
 C the 11th February, 1993 endorsed with a notice in Form 48 pursuant to the provisions of Order IX Rule 13 of the Sheriffs (Enforcement) Rules was effected on the various dates in November and December 1993 expressly stated as aforementioned.

A close study of the affidavit in support of the plaintiffs’ application for committal of the 2nd - 6th defendants to prison would appear to reveal that the alleged contemptuous act of the 2nd - 6th defendants in respect of which precise date was given was committed on Monday the 13th February, 1993. The defendants on that date were said to have held the meeting in issue and purported to select
 E the 6th defendant as the traditional ruler of Abagana. This is disclosed in paragraphs 7 and 8 of the affidavit in support of the application which deposed as follows:-

“7. That in utter defiance of the Court’s order, the 2nd to 6th
 F defendants did hold the meeting of Abagana Welfare Union on 13/2/93.

8. That in utter contempt of the said order they purported to select the 6th defendant as the traditional ruler of Abagana.”

If, in fact, the relevant order of injunction endorsed with a
 G notice in Form 48 was served on the 2nd - 6th defendants after the alleged contemptuous act of the defendants, the crucial question must necessarily arise whether or not this would constitute contempt pursuant to the express provisions of Order IX Rule 13 of the Sheriffs (Enforcement) Rules. In view, however, of the ultimate decision I
 H intend to reach in the appeals of the 3rd, 4th and 6th defendants and the final order I propose to make, I will refrain from making any further comment in respect of this crucial question. It suffices to state that the trial court at the end of hearing in respect of the preliminary objection upheld the same and struck out the application for com-

mittal on ground of incompetence. The appeal to the court below against this decision of the trial court was allowed and the same was according set aside. The Court of Appeal, purporting to exercise its powers pursuant to section 16 of the Court of Appeal Act committed the 2nd - 6th defendants to prison for two months for contempt but with an option of payment of N500,00 fine each without hearing them or allowing the plaintiffs to move their application for committal. This is notwithstanding the fact that the 2nd and 5th defendants were on the application of the plaintiffs on the 30th December, 1993 struck out from the committal proceedings.

Aggrieved by the above decision of the Court of Appeal, the defendants separately filed their notices of appeal to this court. The 1st defendant's appeal questions the validity of the lower court's exercise of its jurisdiction under section 16 of the Court of Appeal Act, 1976 in the present case. The complaint of the 2nd and 5th defendants in their respective appeals is whether an order of committal should have been made against them when they were not parties to the committal proceedings. The appeals of the 3rd, 4th and 6th defendants on the other hand, pose the question whether the Court of Appeal rightly determined the committal proceedings against them without hearing them, or calling for their defence. I will now briefly dispose of the appeal of the 1st defendant.

There can be no doubt that the appeal of the 1st defendant is patently baseless and misconceived. He was neither adjudged a contemnor by the court below nor was he, whether directly or indirectly, convicted or pronounced guilty for the alleged contempt nor was he sentenced or committed to prison as was the case with the 2nd - 6th defendants. There was nothing in the entire judgment of the court below which in any way interfered with his legal rights and no aspect of the judgment of that court exposed or put him into any jeopardy whatsoever. It seems to me that the 1st defendant had no reason whatever to appeal against the said judgment of the court below. The 1st defendant's appeal is in my view baseless and incompetent and the same is hereby struck out.

In respect of the appeal of the 2nd and 5th defendants, it is clear from the record of proceedings that on the 20th December, 1993, learned counsel for the defendants applied for and was granted leave to withdraw the 2nd and 5th defendants from the committal

proceeding. The record of proceeding of the trial court on the said date reads thus:-

"Plaintiffs are absent except 1st, 3rd and 4th

Defendants are absent except 3rd

G. N. A. Okafor with A. J. C. Mogbana for the applicants.

B *Okafor: I withdraw this application against the 2nd and 3rd defendants who have not been served.*

Court: 2nd and 5th defendants/respondents are struck out from this application."

C Both defendants since the said 20th December, 1993 therefore ceased to be parties to the committal proceeding.

After ruling on the defendants' preliminary objection on the competence of the committal proceeding was delivered, the plaintiffs filed an appeal against the same. Strange enough, the plaintiffs from D nowhere in the Court of Appeal again brought in the 2nd and 6th defendants as respondents in the appeal without any order of the court or any amendment of the proceeding. I think that this procedure is manifestly irregular and unjustifiable. The 2nd and 5th defendants having been discharged from the proceeding by a valid and E subsisting order of the trial court, the court below lacked jurisdiction to entertain the purported appeal against them. In my view the Court of Appeal was not competent and had no jurisdiction to entertain the purported appeal against the 2nd and 5th defendants since they were F at all material times no longer parties to the committal proceeding. See *Madukolu v. Nkemdilim* (1962) All N.L.R. 582.

It must also be borne in mind that even the acquiescence of the parties would not confer any jurisdiction on the court below to entertain the purported appeal against the 2nd and 5th defendants. G So, in *Westminster Bank Ltd. v. Edwards and Another* (1942) A.C. 592 at 536, Lord Wright in addressing that proposition of law put the matter thus:-

H *"Now it is clear that a court is not only entitled but bound to put an end to proceedings if at any stage and by any means it becomes manifest that they are incompetent. It can do so of its own initiative, even though the parties have consented to the irregularity, because, as Wills, J. said in City of London Corporation v. Cox (1866) L.R. 2 H.L. 239 at 283 in the course of giving the answers of the Judges to this House, "mere acquiescence does not give jurisdiction."*

I think the court below was in definite error to have assumed jurisdiction to entertain the purported appeal against the 2nd and 5th defendants who were not parties to the committal proceeding. Accordingly, the appeals of the 2nd and 5th defendants are allowed and the order of committal and sentence passed on them by the Court of Appeal are hereby set aside and quashed. B

Turning now to the appeals filed on behalf of the 3rd, 4th and 6th defendants, it is plain that the only issue before the Court of Appeal was whether the decision of the trial court on the preliminary objection raised by the defendants was right or otherwise impeachable. It is equally clear that the only issues pronounced upon by the learned trial Judge for which an appeal could lie to the court below were strictly confined to the decision of the court on the preliminary objection canvassed before it since the trial court had not been given the opportunity to hear the main application for committal on the merits. C D

It is trite law that the basis for any appeal must relate to the decision of the court from which the appeal lies and any grounds of appeal and issues raised on matters outside those relating to the relevant decision are incompetent. See *Atoyebi v. Governor of Oyo State and others* (1994) 5 S.C.N.J. 62; *Uhunmwangho v. Okojie* (1989) 12 S.C.N.J. 84; *Abaye v. Ofili* (1986) 1 S.C. 231. A court is not, while dealing with preliminary or interlocutory matters, entitled to make pronouncements which would prejudice the fair hearing of the issues to be decided at the hearing of the substantive suit. See *Olaniyi v. Aroyeham* (1991) 5 N.W.L.R. (Part 194) 625. In the present case, the substantive application for the committal of the defendants had neither been moved nor had a decision on the merits in respect of the same been made by the trial court. In my view, the Court of Appeal should have confined itself to the issue of whether or not the decision of the trial court on the preliminary objection is sustainable. Regrettably, however, it did not. It took refuge under the provisions of Section 16 of the Court of Appeal Act, 1976 to justify the procedure it adopted in committing the 3rd, 4th and 6th defendants to prison for contempt. E F G H

With the greatest respect to the Court of Appeal, section 16 of the Court of Appeal Act operates to enable that court to exercise all such regular and lawful inherent powers that are open to it with a

view to arriving at a just and expeditious determination of a matter properly before it on appeal. See *Metal Construction (W.A.) Ltd. v. Migliore* (1979) 6 - 9 S.C. 163. There is no doubt that the trial court did not hear or pronounce on the committal proceeding against the defendants on its merit. All it dealt with was the preliminary objection raised by the defendants. I think the court below was in error not to have appreciated, even it was prepared to invoke its powers under section 16 of the Court of Appeal Act, that it firstly ought to have heard the application for committal on the merits after overruling the preliminary objection sustained by the trial court before it could properly arrive at the justices of the application. In my view, it cannot be a proper exercise of the powers conferred under section 16 of the Court of Appeal Act for the court below to overrule a preliminary objection and to deny either the plaintiffs/applicants for committal the opportunity of moving their application or the defendants/respondents, the opportunity of presenting their defence on the merits before proceeding to make committal orders and pass prison sentences against the defendants. See *The State v. Onagoruwa* (1992) 2 N.W.L.R. (Part 221) 33 at 46, 56 and 58.

It seems to me that the real question is whether a trial court can at the stage of the hearing of a preliminary objection in limine with regard to the competence of a committal proceeding overrule the same and proceed summarily therefore to grant the application and to sentence the defendants/respondents to terms of imprisonment without giving them any hearing. My straight answer is that it cannot. So in *Igboho Irepo Local Government Council v. The Boundary Settlement Commissioner and others* (1988) 2 S.C.N.J. (Part 1) 28 at 37, this court in a situation not too dissimilar to that in the present case per Nnamani J.S.C. observed as follows:-

“At the end of his submission to the Court of Appeal, Mr. Alawode had, as stated earlier, invited the court to entertain the substantive application for certiorari. To entertain it does not of course mean that he should not be heard. It is a fundamental principle of justice and fair hearing that no man ought to be condemned without being heard.”

I entertain no doubt that since the court below did not give the defendants any opportunity to be heard in their defence to the substantive committal proceeding which is a quasi-criminal matter, it ought

not to have condemned them peremptorily by committing them to a term of imprisonment as it did in utter violation of the rules of natural justice. The appeals of the 3rd, 4th and 6th defendants are clearly meritorious and the same must be and are hereby allowed.

It is for the above reasons that I agree that the appeal of the 1st defendant is incompetent and without substance and the same is hereby struck out. B

The appeals of the 2nd - 6th defendants are hereby allowed and the order of committal and prison sentence of two months passed on them by the Court of Appeal, including the order as to costs are hereby set aside and quashed. The fines imposed on the defendants and the costs awarded against them, if already paid, are to be refunded forthwith. C

It is further ordered that the committal proceeding against the 3rd, 4th and 6th defendants only be remitted to the High Court of Anambra State for hearing de novo. It is directed that the said 3rd, 4th and 6th defendants be at liberty in the interest of justice and in fair determination of the application to take whatever steps they may deem appropriate for the presentation of their defence on the merits. D E

The 2nd and 5th defendants, of the one part, and the 3rd, 4th and 6th defendants of the other part, are entitled to the costs of these appeals which I assess and fix at N10,000.00 to each of the two sets of defendants against the plaintiffs. These will be no order as to costs in respect of the appeal of the 1st defendant. F

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Ayoola JSC. I entirely agree with his reasoning and conclusion. There is nothing that I can usefully add.

UWAIFO JSC

I read in advance the judgment of my learned brother Ayoola J.S.C. I am satisfied that all the issues involved in the three appeals have been fully discussed and appropriately resolved.

It was certainly an error committed by the court below to have

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proceeded to determine the application for the committal of the 3rd, 4th and 6th defendants when the appeal before it in respect thereof was whether the trial court was right in ruling that there had been non-compliance with the procedure for commencing the committal proceedings. Since the court below decided that there had been compliance, it merely meant that the trial court would now be in a position to proceed with hearing the application for committal. Until this was done, the court below would have no jurisdiction to exercise the power conferred on it by section 16 of the Court of Appeal Act. To do so, as the court below had done, was to sit over the application as though a court of first instance.

I agree entirely with the conclusions reached by my learned brother Ayoola JSC based on the reasons he has given. I reach the same conclusions and abide by all the orders made in the leading judgment.

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