

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH JULY 2002, SC. 185/1999  
**CORAM: - S. M. A. BELGORE, I. L. KUTIGI, S. U. ONU,**  
**A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC**

1. COMPTROLLER, NIGERIAN  
PRISONS SERVICES, IKOYI-LAGOS  
2. DEPUTY COMPTROLLER ..... APPELLANTS  
IKOYI PRISONS, LAGOS  
3. ATTORNEY GENERAL OF THE  
FEDERATION  
AND  
1. DR. FEMI ADEKANYE & 25 Ors ..... RESPONDENTS

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ACTIONS - Parties - Right to legal representation - Party to a suit has right to a legal practitioner of his choice - To defend his interests in any matter (H1)

APPEALS - Determination - Propriety - Since the appeal and cross-appeal are based on judgment - Which Supreme Court has set aside - There is no reason to consider the merit therein (H2)

**FACTS**

The Court of Appeal, Lagos Division had ruled sequel to an application brought before it by respondent that granting of bail to respondent is within the jurisdiction of Federal High Court Lagos. Thereafter, respondents brought application praying the Court of Appeal to vary its orders in the said judgment and also to unconditionally grant bail to respondents. The application was opposed by appellants.

After hearing arguments from both sides, the court refused to vary its earlier orders and simply admitted respondents to bail. Being aggrieved, appellants filed the main appeal at Supreme Court contending that the Court of Appeal lacked the jurisdiction to grant bail to respondents in view of its earlier judgment. On the other hand, respondents filed cross-appeal on the refusal of the Court of Appeal to vary its earlier judgment.

**HELD** (Unanimously striking out appeal and cross-appeal per **EJIWUNMI JSC**)

*Parties - Right to legal representation*

**1. Be that as it may, bearing in mind that it is a cardinal principle in the administration of justice that a party to a suit ought to have the right to have a legal practitioner of his choice to defend his interests in any cause or matter. Leave was granted to the applicant as prayed. In the result, leave was granted to Mr. Femi Falana to defend the 2<sup>nd</sup> respondent, and the brief of argument already filed on his behalf was deemed properly filed and served.** (p. 2224 B)

*APPEALS - Determination - Propriety*

**2. In the result, as the appeal and cross-appeal in the instant case is based upon a judgment which this court has set aside, there is no reason to consider the merit of the appeal and the cross-appeal.** (p. 2227 E)

## **REPRESENTATION**

Emeka Ngige for the appellant  
Dickson Osuala for the 1<sup>st</sup>, 3<sup>rd</sup> - 26<sup>th</sup> respondents  
Femi Falana for the 2<sup>nd</sup> respondent

## **CASES REFERRED TO**

Jadesinmi v. Okotie-Eboh (No. 2) (1986) 1 NWLR (pt. 16) 264  
Ejowhomu v. Edoko Enter. Industries Ltd (1986) 5 NWLR (pt. 39) 1  
Adekeye v. Akin Olugbade (1987) 3 NWLR (pt. 60) 214  
Gombe v. P.W. Nig. Ltd (1995) 6 NWLR (pt. 402) 402  
Odojin v. Agu (1992) 3 NWLR (pt. 229) 350  
Obioha v. Ibero (1994) 1 NWLR (pt. 322) 503  
Mohammed v. Hussein (1998) 4 NWLR (pt. 584) 108  
Obayagbona v. Obazee (1972) 5 SC 247

## **STATUTES REFERRED TO**

Constitution of Federal Republic of Nigeria 1979, s. 6(6)(a)  
Court of Appeal Act, s. 16

**LEAD JUDGMENT BY EJIWUNMI JSC**

This appeal is against the ruling of the court below delivered on the 6<sup>th</sup> of July 1999. The ruling was delivered sequel to an application brought before that court by the respondents who were the applicants in that court. By their several applications, they sought for the following reliefs:-

*“(1) Praying this Honourable Court to vary its order contained in the judgment of this court dated the 15<sup>th</sup> of June 1999.*

*(2) Praying the Court of Appeal to grant bail to the respondents/applicants.*

**ALTERNATIVELY**

*(3) An order of this Honourable Court directing the lower court to release the respondents on bail.”*

The application was opposed by the appellants, who were respondents in the court below. After receiving arguments from learned counsel who appeared for the parties, the court below delivered a considered ruling.

In the course of the ruling, the court below per Oguntade, J.C.A., said inter alia thus:-

*“I must say that I do not see the application before me as an attempt to alter, vary or otherwise reverse the orders made by this court in its judgment of 15/6/99. Although the application employed the words “to vary its orders”. I think the essence and pith of the application is that the applicants be admitted to bail. In the judgment of 15/6/99, we had directed that the applicants be admitted to bail. If in the present application, the applicants were asking for their unconditional release, that would amount to a variation. I think it is more appropriate to say that the applicants are seeking from this court a consequential order arising from the failure of the 3rd respondent to comply with the order of this court that the applicants be arraigned before the Federal High Court.”*

The court below after reference to some authorities, then proceeded to grant bail to the applicants. It is against this ruling that this appeal was filed to this court by the appellants. The respondents also, being dissatisfied with the ruling of the court below, filed a cross-appeal. Pursuant to their appeal, the appellants filed the following grounds of appeal. They read without their particulars, thus:-

“(1) *The learned Justices of the Court of Appeal seriously erred in law in assuming jurisdiction to reverse part of its judgment delivered on the 15<sup>th</sup> June 1999, entrusting the grant of bail to the respondents on the Federal High Court.*

B (2) *The learned Justices of the Court of Appeal seriously erred in law in granting bail to the respondents when they clearly lacked the power and jurisdiction to do so.”*

The grounds of appeal of the cross-appellants are also reproduced without their particulars, thus:-

C “(1) *The learned Justices of the Court of Appeal erred in law in not varying the consequential orders made in their judgment dated 15/ 06/99 when there was before them the prerogative Order of Prohibition dated 09/02/99 made by the High Court of Lagos forbidding 20 further proceedings in the various criminal charges pre-*  
D *ferred against the appellants before the failed Banks Tribunals.*

(2) *The Court of Appeal erred in law in not varying its consequential orders and releasing the appellants unconditionally having dismissed the respondents’ appeal in its entirety and upheld the decision of the 25 lower court.*

E (3) *The Court of Appeal erred in law when it refused to vary the order it made in its judgment of 15/6/99 when the said order was manifestly made without jurisdiction.*

(4) *The learned Justices of the Court of Appeal erred in law in holding at page 13 lines 26, 27 and 28 and line 1 of page 14 of the*  
F *Ruling of 6<sup>th</sup> day of July 1999, that the arraignment of the appellants at the Tribunals was not an infraction of municipal and international law in force in Nigeria.”*

But by a motion on Notice dated 4<sup>th</sup> day of June 2002, filed  
G by learned counsel, Femi Falana acting on behalf of the 2<sup>nd</sup> respondent, prayed this court to make following orders in his favour. They are as follows:-

“(1) *An order permitting Femi Falana Esq. of Falana and Falana’s Chambers to represent the 2<sup>nd</sup> respondent therein*

H (2) *An order granting leave to the 2<sup>nd</sup> respondent to file his Brief of Arguments out of time.*

(3) *An order deeming the Brief of Arguments filed by the 2<sup>nd</sup> respondent as having been properly filed and served.*

(4) *An order permitting the 2<sup>nd</sup> respondent to adopt the said*

*Brief and adduce oral arguments on same.”*

Attached to this motion is a 16 paragraph affidavit deposed to by the 2<sup>nd</sup> respondent, namely, Otumba Olufemi Ajayi. For present purposes, paragraphs 3-12 of the affidavit deserve to be set down.

*“Para 3. That as soon as the appeals herein were filed specifically requested Mr. Femi Falana represent me in this Honourable Court.* B

*4. That when Mr. Falana informed me that he could not take up this matter as Mr. Osuala was representing all the respondents, i wrote to Mr. Osuala to allow Mr. Falana to represent my interests in these appeals. A copy of my letter is attached and marked Exhibit A.* C

*5. That when I asked Mr. Falana sometimes in February this year whether he had filed the necessary papers on my behalf he informed me that Mr. Osuala had filed a brief on behalf of all the respondents including me.* D

*6. That when I informed Mr. Falana that I was going to take up this matter in open court he advised me to speak to Mr. Osuala in order not to embarrass him in the circumstance.*

*7. That thereafter I contacted Mr. Osuala and pleaded with him to discontinue his further appearance for me in this matter.* E

*8. That Mr. Osuala assured me that he would take urgent steps to withdraw his appearance for me before the hearing of the appeals.*

*9. That when Mr. Osuala later received the hearing notice on behalf of the respondents including me he did not forward the hearing notice to me.* F

*10. That to my utter dismay when the appeal was heard on April 15, 2002 Mr. Osuala announced his appearance for all the respondents including me.* G

*11. That I only became aware two weeks ago when Mr. Femi Falana informed me that this appeal had been heard and judgment fixed for July 12, 2002.*

*12. That although this Honourable Court has heard the appeal and adjourned the matter for judgment I have already filed and served my brief on the parties.”* H

As this court considered that this application is of immense importance to the applicant and to the administration of justice, the application was set down for hearing on the 20<sup>th</sup> June 2002. On

that day, Mr. Femi Falana, counsel for the 2<sup>nd</sup> respondent, moved his application in the presence of Mr. Emeka Ngige, learned counsel for the appellants/respondents. Mr. Dickson Osuala was absent. After due consideration of the affidavit filed by the 2<sup>nd</sup> respondent, it formed the firm view that the application has merit. Moreso, when it is manifest that the 2<sup>nd</sup> respondent had manifested his intention, by virtue of Exhibit A, that he would prefer Mr. Femi Falana to represent his interests in this appeal. It is unfortunate that his wish in this regard appears not to have been respected.

***Be that as it may, bearing in mind that it is a cardinal principle in the administration of justice that a party to a suit ought to have the right to have a legal practitioner of his choice to defend his interests in any cause or matter. Leave was granted to the applicant as prayed. In the result, leave was granted to Mr. Femi Falana to defend the 2<sup>nd</sup> respondent, and the brief of argument already filed on his behalf was deemed properly filed and served.***

Thereafter, Mr. Falana adopted and placed reliance on the said brief for the determination of the appeal. He also made further submissions on the issues raised in the appeal. Mr. Emeka Ngige also replied.

Pursuant to the Rules of this court, briefs of arguments were filed and exchanged. For the appellants, their learned counsel, Emeka Ngige identified only one issue for the determination of the appeal. It reads:-

*“Having regard to the grounds of appeal filed in this appeal it is our respectful submission that the main issue for determination is simply whether the Court of Appeal had jurisdiction to entertain the applications of respondents and proceeding therefrom to grant bail to them irrespective of the fact that it had delivered its final judgment on the 15<sup>th</sup> of June 1999 which thereby made it Functus Officio on the motions and the prayers in question.”*

Now that it has been ordered that Mr. Femi Falana is the counsel for the 2<sup>nd</sup> respondent, brief and the issues for him will be considered separately from the issues canvassed in the brief earlier filed by Mr. Dickson Osuala for the other respondents, which included the 2<sup>nd</sup> respondent.

With regard to the 1<sup>st</sup>, 3<sup>rd</sup> - 27<sup>th</sup> respondents, these are the issues identified in the brief filed on their behalf by their counsel, Mr.

Dickson Osuala. It would appear that those issues also cover the cross-appeal of the respondents. The issues are:-

“(1) *Whether the appellants have a competent appeal before the Supreme Court of Nigeria having regard to the provisions of 15(2) Habeas Corpus Law Cap. 58, Laws of Lagos State.*

(2) *Whether an application challenging the respondents/cross-appellants commitment to prison in exercise of the criminal jurisdiction of the defunct Failed Banks Tribunals is a civil or criminal matter.*

(3) *Whether the lower court in a criminal cause or matter is competent to grant bail to the respondents/cross-appellants pending the determination of the criminal appeal lodged by the appellants before the Supreme Court of Nigeria.”*

For the 2<sup>nd</sup> respondent, learned counsel in the brief filed on his behalf in this court, only one issue was raised. This issue being, whether the Court of Appeal was right in admitting the respondents to bail having regard to the facts and circumstances of this case.

In arguing the only issue raised for the appellants, it is apparent that learned counsel for the appellants anchored his argument on the following three grounds:-

“(1) *Powers and jurisdiction of the Court of Appeal under section 16 of the Court of Appeal Act, Cap. 75 L.F.N. 1990, Section 6(6)(a) of the 1979 or 1999 Constitution and its inherent powers.*

(2) *When is the court functus officio over its judgment.*

(3) *Powers of the court to make consequential orders.”*

In respect of the first base of his argument, it is his contention that section 16 of the Court of Appeal, which the court relied upon to hear and determine the applications of the respondents, did not vest such powers in the court. In support of that contention, he referred to several decisions of this court. These are Jadesinmi v. Okotie-Eboh (No. 2) [1986] 1 N.W.L.R. (pt. 16) 264, Ejowhomu v. Edoko Enter Industries Ltd. [1986] 5 N.W.L.R. (pt. 39) 1, Adekeye v. Akin Olugbade [1987] 3 N.W.L.R. (pt. 60) 214, Gombe v. P.W. (Nig.) Ltd. [1995] 6 N.W.L.R. (pt. 402) at page 402.

It is also the contention for the appellants by their learned counsel, that the inherent powers of the court vested in it by section 6(6)(a) of the Constitution of 1979 was wrongly applied by the court below to vest itself with jurisdiction to deal with the applications of the respondents. For that contention, reference was made to Odofin v.

Agu [1992] 3 N.W.L.R. (pt. 229) 350, Obioha v. Ibero [1994] 1 N.W.L.R. (pt. 322) 503.

On the second base for his argument, which is, whether, the court below was not functus officio when it heard the applications of the respondents. In the view of learned counsel for the appellants, the court below was functus officio when it heard the respondents' applications for bail. This is because, argued counsel, that as soon as the court below delivered its judgment on the 15<sup>th</sup> of June 1999, it became functus officio in respect of the motions filed by the respondents and all the prayers contained therein. See Mohammed v. Hussein [1998] 4 N.W.L.R. (pt. 584) 108. With regard to whether the order made by the court below could be said to be a "Consequential Order" in relation to the earlier Orders made on the 15<sup>th</sup> of June 1999, it is argued for the appellants, that if the court below per Oguntade, J.C.A., had followed strictly the dictum in Obayagbona & Anor. v. Obazee & Anor. [1972] 5 S.C. 247, he might have refrained from hearing the applications of the respondents. This is because, he would have recognised that the orders sought in the applications could not be regarded as a consequential order upon the orders made by the court in its judgment of 15/6/99. Learned counsel for the appellants then submitted that for all the reasons given above, the appeal against the ruling delivered on the 6<sup>th</sup> of July 1999 be allowed.

I have earlier in this judgment reproduced the three issues identified for the 1<sup>st</sup>, 3<sup>rd</sup> - 27<sup>th</sup> respondents for the determination of this appeal. After a careful perusal of the 1<sup>st</sup> and 2<sup>nd</sup> issues, I cannot for the reasons given in the judgment of this court in SC 183/99 Comptroller Nigeria Prisons Services v. Dr. Femi Adekanye & 26 Ors. to be delivered on 12<sup>th</sup> July 2002 (and as yet unreported) be re-opened in this judgment. The two issues are therefore dismissed for the reasons given in the said judgment.

On the third issue, the contention of learned counsel for the respondents/cross-appellants is that the Court of Appeal acted competently in admitting the respondents to bail under Section 16, Court of Appeal Act. The premise of this contention being that it is permissible for the court below to give any of the orders, the court of first instance can lawfully give. He therefore urged that this issue be resolved in favour of the respondents.

For the 2<sup>nd</sup> respondent, the thrust of the argument of his



learned counsel in his brief is that, the order admitting the respondents to bail by the court below was right. The premise of his argument is that the order granting bail to respondent did not detract in any material particular from the judgment delivered on 15<sup>th</sup> June 1999. It is also his contention that the court below correctly applied the decision of this court in *Obayagbona & Anor. v. Obase* [1972] 5 B S.C. 247.

I have set down all the arguments of parties to this appeal so as to be satisfied on what the appellants and respondents/cross-appellants and the 2<sup>nd</sup> respondent depend upon for the success of their respective cases. It is manifest that their various submissions are all rooted in the judgment of the Court of Appeal delivered on the 15<sup>th</sup> June 1999. Though the appeal was apparently focused on the ruling of the court below delivered on 6<sup>th</sup> July 1999, yet it is clear that the application which led to the ruling was dependent upon whether the judgment of 15<sup>th</sup> June 1999 remains valid. This is the judgment which was the subject of the appellants and against which respondents also cross-appealed in Suit SC. 184/99, *Comptroller "Nigeria Prisons Services & 2 Ors. v. Dr. Femi Adekanye & 26 Ors.,* would be given on 12<sup>th</sup> July 2002. By that judgment, the decision of this court is that the court below wrongly upheld the decision of the learned judge of the High Court of Lagos State. D

***In the result, as the appeal and cross-appeal in the instant case is based upon a judgment which this court has set aside, there is no reason to consider the merit of the appeal and the cross-appeal.*** F

The appeal and the cross-appeal will therefore be struck out, and they are struck out accordingly. The orders of the court below are also struck out as the judgment of that court has been set aside as G stated above.

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### **BELGORE JSC**

I agree with the reasons duly set out in the judgment of my learned brother, Ejiunmi, J.S.C. I also strike out the appeal and the cross-appeal. H

**KUTIGI JSC**

I read before now the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. I agree with him that it is proper to strike out both the appeal and the cross-appeal herein in view of our judgments in the sister cases earlier delivered this morning. The appeal  
B and cross-appeal are accordingly struck out.

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**ONU JSC**

C For the reasons for judgment just delivered by my learned brother, Ejiwunmi, J.S.C., a preview of which I have had, I, too, am of the view that the appeal and cross-appeal herein be and are accordingly struck out.

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**KATSINA-ALU JSC**

I have read before now in draft the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. I agree with it. I have nothing to add.  
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