

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2003. SC. 112/2000
CORAM:- M. L. UWAI'S CJN, M. E. OGUNDARE,
S. U. ONU, A. I. KATSINA-ALU, N. TOBI, JJSC

1. ARJAY LIMITED
2. STREAMLINE AVIATION
(S.W.) U.K. LTD. APPELLANTS
3. WILLOW JET LIMITED AIR
TABERNACLE LTD.
AND
AIRLINE MANAGEMENT RESPONDENT
SUPPORT LTD.

APPEALS - Grounds - Nature of - Ground 1 does not deal with sufficiency of evidence - And so does not require evaluation of facts - It is therefore a ground of law (H1)

JURISDICTION - Objection to - Raised before pleading - Propriety - Such objection is different from a demurrer - And can be raised at any time - Even if the only process file is the writ of summons (H2)

EVIDENCE - Contracts - Admissibility - Exceptions - Admissible evidence of a contract is the contract itself - Unless facts are pleaded to bring the case under exceptions - Provided in Evidence Act s.132(b)(c) (H3)

JURISDICTION - Basis - It is wrong for court to assume jurisdiction on the basis of an agreement - Which is extraneous to the relief sought before it (H4)

EVIDENCE - Affidavits - Contradictions - Resolution - Momah v. Vab Petroleum Inc - Where a party's case is plagued by contradictions - Onus is on him to explain the contradictions to the satisfaction of court (H5)

FACTS

Plaintiff/respondent sued defendants/appellants at the High Court, claiming special and general damages for alleged breach of aircraft lease agreement made by the parties in 1997. Respondent applied for an ex parte order restraining appellants from removing the aircraft out of the Mallam Aminu Kano International Airport, Kano. Subsequently, respondent sought and obtained leave to issue and serve the writ and other process on appellants outside the jurisdiction by substituted means. Upon being served, appellants objected to the action on grounds of want of jurisdiction since the contract (subject matter of the suit) was entered into in the U.K and performed in Equitorial Guinea and all appellants were resident outside the jurisdiction of the court. The objection was heard and dismissed by the trial court. It was however ordered that the aircraft be released upon payment by appellants of the sum of US\$100,000.00.

Subsequent to the ruling, respondent brought a motion ex parte for an order converting the \$100,000.00 to its naira equivalent and to be held on trust for the eventual winner. The motion was moved and granted. Subsequently appellants applied to have the order converting the money set aside but the court dismissed the application. Dissatisfied, appellants brought three separate appeals before Court of Appeal. However, appellant later abandoned appeal on the order restraining the removal of the aircraft. Court of Appeal then considered only the appeals on jurisdiction and on conversion of the security into naira. The court set aside the conversion order but dismissed the appeals on jurisdiction. Still dissatisfied, appellants have brought this further appeal to Supreme Court.

ISSUE FOR DETERMINATION

“WHETHER THERE WAS MATERIAL UPON WHICH THE COURT OF APPEAL COULD DETERMINE THE ISSUE OF JURISDICTION.”

HELD (Unanimously allowing the appeal per ONU JSC)
APPEALS - Grounds - Nature of

1. I have myself carefully examined the two grounds of appeal along with their particulars earlier set out above. Ground 1 complains about the Court of Appeal’s finding that the trial court had no evidence on which to determine whether or not it has jurisdiction. The real

complaint of the ground, the Appellant contends and as can be seen from the particulars, is that the Lower Court misunderstood the law as to what evidence a court needs to consider in determining the issue of jurisdiction. In other words, it is further contended, this ground of appeal requires this court to decide what materials should be available to the trial court when determining whether or not it has jurisdiction. In other words, in this ground of appeal this court has to decide what materials should be available to the trial court when determining whether or not it has jurisdiction. I am in full agreement with the Appellants that it certainly does not require any evaluation of facts as it does not deal with sufficiency or otherwise of evidence given. It is for this reason that I associate myself with the Appellants' submission that Ground 1 is a ground of law.

Ground 2 complains about the Court of Appeal's finding that there was a conflict of evidence. The Appellants' grouse is that the facts deposed to in the Respondent's affidavit evidence before the Court were not contradicted by the Appellants as there was no counter affidavit. The facts, it was therefore contended, were therefore considered admitted. What that amounted to, it is therefore argued, an error for the Court of Appeal to hold that there is conflict of evidence. This is the moreso that on a careful examination of the particulars attached to this ground, it would be seen that the complaint really borders on a misapplication of the law to the facts already proved or admitted. The Court of Appeal ignored this principle of law and thus treated a submission by learned counsel during hearing as evidence to find that there is a conflict of evidence. To so find is clearly, in my view, an error of law. (p. 811 E)

JURISDICTION - Objection to - Raised before pleading - Propriety
2. I agree with the Appellants to the effect that the preliminary objection in question challenged the jurisdiction of the trial court to entertain the action. This is not a demurrer application in which case there should be a statement of claim in place, the facts of which the appellants would be required to admit before bringing their objection. I agree with the Appellants' submission that there is a difference between an objection to the jurisdiction and a demurrer. I also agree with them that an objection to the jurisdiction of the court can be raised at any time, even when there are no pleadings filed and that

a party raising such an objection need not bring the application under any rule of court and that it can be brought under the inherent jurisdiction of the court. Thus, for this reason, once the objection to the jurisdiction of the court is raised, the court has inherent power to consider the application even if the only process of court that has been filed is the writ of summons and affidavits in support of an interlocutory application, as in the case in hand. (p. 813 B)

Contracts - Admissibility - Exceptions

3. The deposition in paragraph 4(L) is inadmissible in law. Section 132 of the Evidence Act, Cap. 112, LFN 1990 states that the only admissible evidence of a contract is the contract itself. The Section however recognises exceptions, which the Respondent sought to come under and upon which the learned trial Judge and the Court below based their decisions. The exceptions are as follows:

Section 132(b) (ibid) provides that the existence of any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. Section 132(c) of the Evidence Act states as follows:

“The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.”

It is quite clear that in order to fall within the exceptions the Respondent would have to aver one of these exceptions, that is:

(i) Separate oral agreement constituting a condition precedent to the validity of Exhibit PO2.

(ii) Subsequent oral agreement to modify Exhibit PO2.

The Respondent’s averment in paragraph 4(L) never alleged that the agreement was oral, conditional, separate, or subsequent. This is essential to establishing a case within the exceptions. (p. 818 A)

JURISDICTION - Basis

4. As the Court of Appeal held in the case of Dr. Kunle Balogun v. Wema Bank Plc (2000) 4 NWLR (Pt.654) 652 at 659:

“When a Court is asked upon an interlocutory application to make an order, the Court must satisfy itself that it has the power to make, at the conclusion of hearing, the same order it is asked to make upon an interlocutory application.”

Similarly, it will be wrong for a court to assume jurisdiction on the basis of an agreement, which is extraneous to the relief sought before a court. B

I agree with the Appellants’ submission that the Court below erred in law in holding that there was conflict in the averments made by both parties. The only material before the court was the affidavit C
deposed to by the Respondent. There was no counter-affidavit filed by the Appellants. There could therefore have been no conflict, apparent or latent between the parties. (p. 819 G)

Affidavits - Contradictions - Resolution D

5. The conflict, if any, was between the Respondent’s affidavit in support of its ex-parte application dated 21st March, 1997 (see page 4 of the Record) and the affidavit in support of its Motion on Notice dated 25th of March, 1997 (see page 35 of the Record). E

In the case of Mr. Mike Momah v. Vab Petroleum Inc. (2000) 2 S.C. 142; (2000) 4 NWLR (Pt.654) 534 this Court stated the applicable principles of law regarding conflicting affidavit evidence as follows: F

“Where a party’s case is plagued by inconsistencies or contradictions, there is no obligation on the court seized of the matter to arrange for oral evidence to be called for the purposes of resolving the contradictions. In such circumstances, the onus is on the party confronted with its self-created contradictions to fully and properly explain away the contradictions to the satisfaction of the court. Failure to do so is bound to leave an indelible dent on the Appellant’s case. It is not open to the court to enter into the arena of judicial conflict between the parties in order to resolve the contradictions within a party’s own affidavit evidence.” (p. 820 B) G H

NOTABLE POINT OF INTEREST

OGUNDARE JSC

1. Proper court was where defendant resided or carried on business

B Going by the rules of the Federal High Court at the time the action leading to this appeal was filed, all that was required to show was that the defendant resided or carried on business in the judicial division in which the action was instituted.

C However, it is not in dispute that the Defendants were resident in the United Kingdom and not in Nigeria. This is borne out by the fact that Plaintiff needed to apply to the trial court for leave to serve the Defendants in the United Kingdom and an order to that effect was made. Going by Order VII rule 4, therefore, the Federal High Court would have no jurisdiction to entertain Plaintiff's suit in this case.

D If this action had been instituted under the 1999 Rules of Federal High Court, it would have been necessary to show that the contract between the parties was to be performed in Nigeria. (p.838 A)

REPRESENTATION

E Adedolapo Akinrele, Esq., for the Appellants
O. A. Dada, Esq., for the Respondent

CASES REFERRED TO

- F Nkanu v. Onun (1977) 5 S.C. 13
Amuda v. Adelodun (1994) 9 SCNJ 59
Saeby v. Olaogun (1999) 10-12 S.C. 46
Izenkwe v. Nadozie (1953) 14 WACA 361
Egbo v. Laguma (1988) 3 NWLR (Pt.80) 109
Jonah Kalio & Ors. Chief M.D. Kalio (1975) S.C. 15
G Coker v. UBA PLC (1997) 2 NWLR (Pt. 490) 641
National Bank (Nigeria) Ltd. v. Shoyeye (1977) 5 S.C 181
I.K. Martins Nig. Ltd. v. UPL (1992) 1 NWLR (Pt.217) 322
Carlen Nig. Limited v. University of Jos (1994) 1 SCNJ 72
Chief Bola Ige v. Dr. Omololu Olunloyo (1984) 1 SCNLR 158
H Ogbechie v. Onochie (1986) 2 NWLR (Pt. 26) 484
Balogun v. Wema Bank Plc (2000) 4 NWLR (Pt. 654) 652
Egonu v. Egonu (1978) 11-12 S.C. 111

A-G of Kwara State v. Olawale (1993) 1 NWLR (Pt. 272) 645

STATUTES & REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, s. 233

Federal High Court, Civil Procedure Rules Cap 134 LFN 1990, s.27

Evidence Act Cap 112 LFN 1990, s. 134

B

LEAD JUDGMENT BY ONU JSC

By an application for a writ of summons dated the 21st day of March, 1997, the Respondent as Plaintiff, claimed against the Appellants who were defendants before Abdullahi Mustapha, J., of the Federal High Court sitting in Kano, as follows:-

C

- “1. The sum of US \$575,000.00 (Five Hundred and Seventy-Five Thousand United States Dollars) being special damages suffered by the Plaintiff as a result of the defendant’s alleged breach of aircraft lease agreement made by the parties on the 3rd of February, 1997.
2. The sum of US \$500,000.00 (Five Hundred Thousand United States Dollars) being general damages suffered by the Plaintiff as a result of the defendant’s alleged breach of aircraft lease agreement made by the parties on the 3rd of February, 1997.
3. Cost of filing and prosecuting this action.
4. Further or other reliefs.”

E

The background facts leading to the filing of this appeal may be briefly stated as follows:

F

By a motion ex-parte dated 21st March, 1997, the Respondents asked for and were granted an order for interim injunction restraining the Appellants from removing the aircraft out of the Mallam Aminu Kano International Airport, Kano. On the 25th of March, 1997, the Respondent got leave to issue and serve the Writ of Summons and other processes on the Appellants outside the jurisdiction of the Court by substituted means. Four days after the order of interim injunction was obtained, the Respondent also on the same 25th March, 1997, brought a motion on notice for an order of interlocutory injunction. Upon the service of these processes on the Appellants, they appeared by counsel and objected to the action on grounds of want of jurisdiction on the premise that the contract, subject matter of the suit, was entered into in the United Kingdom and to be performed in Equatorial Guinea and all the Appellants were resident outside

H

the jurisdiction of the Court. The Appellants also prayed the Court below to strike out the names of the 2nd and 3rd Appellants from the suit as they were not privy to the contract which forms the subject matter of the Suit and in the alternative to the 1st two prayers, an order setting aside or discharging the order of interim injunction.

B Arguments were proffered on the application aforesaid and a ruling thereon was delivered on 14th of April, 1997 wherein the learned trial Judge dismissed the objection to jurisdiction and all the other prayers of the Appellants save the last prayer to which was added by amendment of the Appellants' motion and preliminary objection
C dated the 4th of April, 1997 praying that the aircraft be released upon provision of adequate security by the Appellants.

The learned trial Judge thereupon ordered the release of the aforesaid aircraft upon payment by the Appellants of US \$100,000.00 to the Registrar of the Federal High Court, Kano who would use the same to
D open an interest yielding account with the Union Bank, Kano in trust for the parties and an inspection of the aircraft by officials of the Civil Aviation Authority of the United Kingdom, failing which officials of the Civil Aviation Authority of Nigeria were to conduct the inspection. Subsequent to the ruling, the Respondent brought a motion ex-parte
E dated the 30th of April, 1997 to vary the order of the learned trial Judge for the deposit of US \$100,000.00 paid into Court to be converted to its Naira equivalent to be used by the Registrar of the Court to open an interest yielding account with the Union Bank of
F Nigeria PLC in trust for the eventual winner.

The said motion ex-parte having been moved and granted as prayed in the Respondent's favour, the Appellant moved their own motion on notice dated 2nd June, 1997 praying the court to set aside the Order of 30th April, 1997 converting the security into its Naira equivalent. This motion was moved but the same was dismissed via a ruling of
G the Court dated 17th June, 1997.

Being dissatisfied with the ruling of the 14th April, 1997 and that of 17th June, 1997, the Appellants brought three (3) appeals before the Court of Appeal sitting in Kaduna (hereinafter in the rest of this judgment referred to as "the Court below.") Appeal number one is
H against the decision made by the trial Court on a motion ex parte dated 14th April, 1997. Appeal number two on the other hand, is against the Ruling of the same trial court on 21st March, 1997.

At the hearing of the appeal before the Court below at which briefs were filed and exchanged, the Appellants abandoned the second appeal while what was left for it to consider was the judgment on jurisdiction and conversion of the security into Naira.

In its Judgment dated the 18th of January, 2000, the Court below (per Omage, JCA., and concurred in by Ayo Salami and Mahmud Mohammed, JJCA.), held in respect of Appeal number one thus: ^B

“The order being an interlocutory one made by the court is not the proper occasion when evidence can be tendered in order to determine jurisdiction. The answer to appeal one of the appellant is no evidence before the court upon which the court may determine its jurisdiction or lack of it. In the result the appeal fails. It is dismissed.” ^C
In respect of Appeal No. 3 the court below concluded its judgment by holding as follows:

“For the said sum of \$100,000 dollars remain the property of the Appellants until final judgment in the suit is delivered. The order of the Federal High Court, Kano made on 30th April, 1997 is unjust. It is hereby set aside. It is hereby directed that the case be continued before a Judge of the Federal High Court other than the Honourable Justice Abdullahi Mustapha. The appeal No. 3 succeeds. There will be no order as to cost.” ^E

The Appellants being dissatisfied with the first part of the judgment of the court below has appealed to this Court premised on the two grounds contained in a Notice of Appeal dated 30th September, 1998. ^F
On behalf of the Appellants the lone issue formulated for our determination in this appeal is:

“WHETHER THERE WAS MATERIAL UPON WHICH THE COURT OF APPEAL COULD DETERMINE THE ISSUE OF JURISDICTION.”

The only issue submitted at the Respondent’s instance as arising for determination from the two grounds of appeal on the other hand and as contained in the Notice of Appeal filed, is: ^G

“WHETHER HAVING REGARD TO THE DOCUMENTS FILED AND CONFLICT IN THE AVERMENTS OF PARTIES AS FOUND, THE COURT OF APPEAL WAS RIGHT IN HOLDING THAT THERE IS NO EVIDENCE BEFORE THE COURT OF WHICH THE COURT CAN DETERMINE ISSUE OF JURISDICTION.” ^H

In reply to the Respondent’s brief of argument dated 25th September, 2000 the Appellants, responded as follows:

PRELIMINARY OBSERVATION

The Respondent at this point has submitted that there are some inherent factors in the appeal which cast serious doubts on the competency of the appeal itself, adding, that the two grounds of appeal raised by the Appellants although labelled grounds of law, are in fact grounds of mixed law and fact. Accordingly, the Appellant ought to have obtained leave of the court below or leave of the Supreme Court vide Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to shortly as “the Constitution”) before filing the said grounds. The Respondent for its part, has submitted that it has long been well settled that the classification of grounds of appeal by learned counsel for the Appellants as grounds of law or as grounds based on mixed law and fact or on fact, is not conclusive. Such that, he argued, the court, concerned with the determination of the question must, in giving due consideration to the matter, ensure that the grounds of appeal in question are really grounds of law, grounds of mixed law and fact or of fact as the case may be. He cited in support the Supreme Court cases of *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 23) 484 at 491 and *Amuda v. Adelodun* (1994) 9 SCNJ 59 at 64. It is the Respondent’s next submission that having regards to the position of the law as summarised above and in order for this Court to determine whether the Appellants’ said two grounds of appeal are of law alone or mixed law and fact or of facts alone, it is desirable to x-ray for graphic visualization the two grounds of appeal with their particulars, to wit:

GROUND 1

The Court of Appeal erred in law in holding that there was no evidence upon which the Court could determine the issue of jurisdiction.

PARTICULARS OF ERROR

- “1. The writ of summons which was before the trial court clearly showed that the claim was based on the agreement dated 3rd February, 1997.
2. The said agreement was exhibited to the affidavit of the Respondent which was relied on by the trial court.
3. The said agreement expressed that jurisdiction would be the United Kingdom or Equitorial Guinea.

GROUND 2

That the Court of Appeal erred in law in holding that there was a

conflict in the evidence, which made it impossible for the Court to determine jurisdiction.

“PARTICULARS OF ERROR

1. The evidence before the Court was the affidavit evidence of the Respondent.
2. The Appellants did not supply contrary evidence. B
3. The Appellants are deemed to have accepted the averments in the affidavit.
4. The only admissible evidence the Appellants are deemed to have admitted in the aforesaid affidavit was the agreement of 3rd February, 1997 which ousted the jurisdiction of Nigerian courts.” C

From the foregoing, the Respondent respectfully submitted that it is apparent from the above grounds of appeal that it cannot by any stretch of imagination be argued that they involve issues of law alone in that at best, they qualify as grounds involving issues of mixed law and fact as decided in *Amuda v. Adelodun* (supra) wherein Adio, JSC’s obiter dicta therein were adopted and relied upon. The Respondent there upon commended that case to this court to enable it arrive at the view that as ground 1 of the Notice of Appeal questions the truthfulness or otherwise of the Court of Appeal’s holding that there was no evidence upon which the court could determine issue of jurisdiction, which we are urged to hold, is a matter or issue based on fact. Ground 2 of the Notice of Appeal on the other hand, faulted the Court of Appeal’s holding that there were conflicts in the averments of parties which made it impossible for the court to determine jurisdiction which is also a question of fact or at best a question of mixed law and fact. D

The Respondent submitted finally on the above preliminary observation that it will urge this court at the hearing of the appeal to strike out the two grounds of appeal for being incompetent, thereby robbing this Court of jurisdiction to entertain same. The Respondent however ex abundanti cautela contends that it would canvass argument on the merit or otherwise of the appeal. E

APPELLANTS’ RESPONSE TO RESPONDENT’ S PRELIMINARY OBSERVATION: F

In Appellants’ response to the Respondent’s contention in its Brief of Argument that their 2 grounds above are in fact grounds of mixed law and fact; in which case leave of this court or that of the court below G

is required before filing the appeal, the Appellants' submitted that both grounds of appeal are indeed grounds of law. Our attention was directed to the criteria laid down for ascertaining when a ground of appeal is that of law, mixed law and fact or of fact. In support thereof, the case of *Ogbechie v. Onochie* (1986) 2 NWLR (Pt. 26) Page 484

B at Page 491 (per Eso, JSC), was cited to wit:

"There is no doubt that it is always difficult to distinguish a ground of law from a ground of fact but what is required is to examine thoroughly to grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, or one that would require questioning the evaluation of facts by the lower tribunal before the application of the law in which case it would amount to question of mixed law and fact. The issue of pure fact is easier to determine."

D The case of *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) page 718 at page 774 - 775 (Per Nnaemeka Agu, JSC), where this court laid down a general proposition as a general guide when a ground of appeal is an error of law was called in aid as follows:-

E "When then is a ground of appeal that of law? I shall deal with five particular classes, although by its very nature the categories of errors of law are not closed.

1. It is an error of law if the adjudicating tribunal took into Account some wrong criteria in reaching its conclusion or applied some wrong criteria in reaching its conclusion or applied some wrong standard or proof or, if although applying the correct criteria, it gave wrong weight to one or more of the relevant factors.

2. Several issues that can be raised on legal interpretation of deeds, documents, terms of art, words or phrases and inference drawn therefrom are grounds of law.

G 3. Where a ground deals merely with a matter of inference even if it be an inference of fact, a ground framed on it is a ground of law; provided it is limited to admitted or proved facts.... For many years, it has been recognised that inferences to be drawn from a set of proved or undisputed facts, as distinct from primary facts, are matters upon which an appellate Court is as competent as the court of trial.

H 4. Where a tribunal states the law on a point wrongly, it commits an error in law.

5. Lastly, I should mention one class of grounds of law which have the deceptive appearance of grounds of fact id est. Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based. This is regarded as a ground of law, on the premises that in a jury trial there would have been no evidence to go to the jury.....” B

I have myself carefully examined the two grounds of appeal along with their particulars earlier set out above. Ground 1 complains about the Court of Appeal’s finding that the trial court had no evidence on which to determine whether or not it has jurisdiction. The real complaint of the ground, the Appellant contends and as can be seen from the particulars, is that the Lower Court misunderstood the law as to what evidence a court needs to consider in determining the issue of jurisdiction. In other words, it is further contended, this ground of appeal requires this court to decide what materials should be available to the trial court when determining whether or not it has jurisdiction. In other words, in this ground of appeal this court has to decide what materials should be available to the trial court when determining whether or not it has jurisdiction. I am in full agreement with the Appellants that it certainly does not require any evaluation of facts as it does not deal with sufficiency or otherwise of evidence given. It is for this reason that I associate myself with the Appellants’ submission that Ground 1 is a ground of law. See Coker v. UBA PLC (1997) 2 NWLR (Pt. 490) 641, 660 at 664. C D E F

Ground 2 complains about the Court of Appeal’s finding that there was a conflict of evidence. The Appellants’ grouse is that the facts deposed to in the Respondent’s affidavit evidence before the Court were not contradicted by the Appellants as there was no counter affidavit. The facts, it was therefore contended, were therefore considered admitted. What that amounted to, it is therefore argued, an error for the Court of Appeal to hold that there is conflict of evidence. This is the moreso that on a careful examination of the particulars attached to this ground, it would be seen that the complaint really borders on a misapplication of the law to the facts already proved or admitted. See: Alagbe v. Abimbola & Ors. (1978) 2 S.C. 39. The Court of Appeal ignored this principle of law and thus treated a submission by learned counsel during hearing as evidence to find that there is a conflict of evidence. To so find is clearly, in my view, an error of law. I am there- G H

fore in agreement with the Appellants' submission that both grounds are of law because none of them requires any evaluation of facts. This is especially so as pleadings were yet to be filed in the trial Court at the time. Moreover, the preliminary objection of the Appellants (at pages 84-85) of records which was argued by the parties at the trial Court, and which gave rise to the appeal herein, had no affidavit in support of it. It was based purely on issues of law. Accordingly, I agree with the Appellants that any appeal arising from such argument can only be a ground of law since there was no joinder of issues. It is for the foregoing reasons that I hold that the Respondent's arguments on this point be and are accordingly discountenanced.

APPELLANTS' PRELIMINARY OBJECTION NOT IN COMPLIANCE WITH ORDER XXVII OF THE FEDERAL HIGH COURT RULES, 1990.

The Respondent had argued that the preliminary objection raised by the Appellants in the trial court (see pages 11-13 of its Brief) did not comply with the provisions of Order XXVII of the Federal High Court Rules, Cap. 134 Laws of the Federation of Nigeria, 1990, in that there was no Statement of Claim in place. It contended that the filing of the Statement of Claim was a condition precedent to be fulfilled under the said Order XXVII before the Appellants could bring their preliminary objection challenging the jurisdiction of the Court. In answer to this objection, I agree with the Appellants to the effect that the preliminary objection in question challenged the jurisdiction of the trial court to entertain the action. This is not a demurrer application in which case there should be a statement of claim in place, the facts of which the appellants would be required to admit before bringing their objection. I agree with the Appellants' submission that there is a difference between an objection to the jurisdiction and a demurrer. I also agree with them that an objection to the jurisdiction of the court can be raised at any time, even when there are no pleadings filed and that a party raising such an objection need not bring the application under any rule of court and that it can be brought under the inherent jurisdiction of the court. Thus, for this reason, once the objection to the jurisdiction of the court is raised, the court has inherent power to consider the application even if the only process of court that has been filed is the writ of summons and affidavits in support of an interlocutory application, as in the case in

hand. Reliance is placed on this court's decision in Attorney General of Kwara State v. Olawale (1993) 1 NWLR (Pt. 272) 645 at 674 which I unhesitatingly adopt, wherein the first two of three issues raised for this Court's determination were:

"1. Whether the Court of Appeal was right to have held that the jurisdiction of the High Court was not ousted in this matter which undoubtedly raised a chieftaincy question. B

2. Whether the Court of Appeal gave its due consideration to the merit of the plaintiff's case and reached a correct decision on the point..." Were answered (Per Karibi-Whyte, JSC), to the following effect: C

"There is no doubt the issue whether a Plaintiff's action is properly within jurisdiction or indeed justiciable can be determined even on the endorsement of the writ of summons, as to the capacity in which action was being brought, or against who action is brought. It may also be determined on the subject matter endorsed on the writ of D summons, if this is not actionable.'

The above proposition of the law was recently given approval by this Court in Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria & Anor (2002) 3 S.C. 1; (2002) 7 NWLR (Pt. 766) 272 where Uwaifo, JSC., held as follow: E

"To say, therefore as did the court below and as canvassed by the Plaintiff/Respondent before us in its Brief of Argument that objection to jurisdiction can only be taken after a statement of claim has been filed is a misconception. It depends on what materials are available. F It could be taken on the basis of Statement of Claim.....It could be taken on the basis of evidence received, or by a motion supported by affidavit giving the facts upon which reliance is placed But certainly it could be taken on the face of the Writ of Summons where appropriate. G

The tendency to equate demurrer with objection to jurisdiction could be misleading. It is a standing principle that in demurrer, the Plaintiff must plead and it is upon that pleading that the Defendant will contend that accepting all the facts pleaded to be true, the Plaintiff has no cause of action, or where appropriate, no locus standi... But as H already shown, the issue of jurisdiction is not a matter of demurrer proceedings. It is much more fundamental than that and does not depend as such on what a Plaintiff may plead as facts to prove the reliefs he seeks. What it involves is what will enable the Plaintiff to seek

a hearing in Court over his grievance, and get it resolved because he is able to show that the Court is empowered to entertain the subject matter. It does not always follow that he must plead first in order to raise the issue of jurisdiction.” (Underlining is for emphasis)

In the instant case, the Respondent filed a Writ of Summons and a Motion asking for injunction supported by affidavit stating the facts upon which the injunction was sought. Upon these materials, the learned trial Judge granted an ex-parte injunction. Invariably, these facts would form the basis of the Statement of Claim and indeed they formed the basis of a Statement of Claim as depicted on pages 143-156 of the records.

This being the case, I agree with the Appellants that their preliminary objection to the jurisdiction of the court was properly brought at the stage at which it was brought and that indeed, the trial Court could have decided the issue without a Statement of Claim being filed.

Having said this much, I will at this juncture proceed to consider the appeal proper based on the lone issue proffered by the Appellants. However, before I embark upon such consideration of the lone issue I have ruled to be pertinent in my consideration of this appeal, I wish first to advert to matters that have arisen by way of preliminaries and/or substantive law thus:

ARGUMENT: THE LONE ISSUE FOR DETERMINATION

The relevant portion of the judgment of the court below assailed is inter alia contained on pages 262-264 of the Record. It reads:

“To further grasp the issue which is now being considered, I here repeat the issue. The Appellant in appeal No. 1 asked whether- ‘Having regard to claim and evidence before the court, the lower court had jurisdiction”

There is a claim before the court by the writ of summons filed by the Respondent. It is here relevant to ask what evidence is before the court on which the court can determine the issue of jurisdiction...

In its preliminary objection the appellant had without stating so, applied under the provisions of Order 27 Rule 1 of the Federal High Court Civil Procedure Rules; which enables the Federal High Court to dismiss a Suit, if the allegation (sic) made by the Plaintiff are admitted. In the preliminary objection made by the Appellant, the Respondent has clearly not admitted some crucial averments made by the Appellant nor has the Respondent admitted the Appellant’s

version of the agreement in its affidavit in support of the motion by which an unspecified nature of the order of court was obtained. An example of conflict in the averments made by both parties is the one on which the Appellant denied that an oral agreement exists between the parties which the Respondent said varied the written terms of the contract. The question must be asked, is such an issue to be resolved by affidavit evidence... It is settled practice that a trial court has no jurisdiction to resolve suo motu conflicting affidavit evidence or prefer one version of deposition to the other without oral evidence...”

The Court below, on this point then went ahead to conclude at page 264 of the Record as follows:

“The answer to appeal one of the appellant is (sic) no evidence is before the Court upon which the Court may determine its jurisdiction or lack of it.”

It is quite clear that this decision of the Court below was based on two premises, to wit:

1. That there was no evidence upon which the Court could determine the issue of jurisdiction.
2. Assuming there was evidence before the court, then there was a conflict on the evidence to render it impossible to determine the issue of jurisdiction.

Territorial jurisdiction of a Court can be determined by the following:

- (a) Where the contract in question is made
- (b) Where the contract is to be performed
- (c) Where the defendant resides.

See *Egbo v. Laguma* (1988) 3 NWLR (Pt.80) 109 at 126-127; *I.K. Martins Nig. Ltd. v. UPL* (1992) 1 NWLR (Pt.217) 322 at 331 and *Lanleyin v. Rufai* (1959) 4 FSC 184.

It is common ground between the parties that the Appellants were resident outside the jurisdiction of this Court. For, as the learned trial Federal High Court Judge (per Abdullahi Mustapha) in his judgment dated 14th day of April, 1997 put it:

“..... for a Defendant to succeed in a Civil matter that the forum of the court is not convenient for the determination of the issue raised on the Writ of Summons it must be shown:

- “(a) That the Defendant does not reside in or carry out business within the geographical area of the Court;
- (b) That the cause of action did not arise within the geographical

area of the Court and;

(c) That the contract is not to be performed within the geographical area of the Court.

The onus is on the Defendants to establish all these.”

It is also common ground that the contract was entered into in the

B United Kingdom (locus contractus).

The only issue between the parties was whether performance of the contract took place in Nigeria. It was the Appellants’ contention in both courts that the place of performance of Exhibit PO2 (the aircraft

C lease agreement) was Malabo, Equitorial Guinea, (See page 47 of the record), that being the place where the aircraft was to be delivered for services to be rendered for the fulfilment of the respondent’s alleged contract with Air Span Aircharter Malabo. The learned trial Judge in his ruling at page 126 of the Record found jurisdiction in Nigeria on the basis that there was a variation to Exhibit PO2 by an

D oral agreement to pass through Nigeria en route Equitorial Guinea.

He therefore reasoned that since this deposition was not challenged, part of the performance of the contract took place in Nigeria. The paragraph containing the deposition is paragraph 4(L) of the Respondent’s affidavit at page 38 of the Record, which states as follows:

E “That it was agreed that the Aircraft shall be delivered to the Applicant in Kano, Nigeria on the 12th of February, 1997, from where the applicants, officials and the crew shall depart for Malabo.”

The Court below adopted that the deposition in paragraph 4(L) F (ibid) of the affidavit of the Respondent hereinbefore stated, raises a conflict with the written agreement thus rendering it impossible to determine the issue of jurisdiction (See pages 262-264 of the Record) hereinbefore quoted in extenso.

The Appellants thereupon submitted, and I am inclined to their view, that the court below was in error in finding that there was a conflict

G in the evidence. I am in entire agreement with the Appellants that the deposition in paragraph 4(L) of the affidavit upon which both courts placed heavy reliance is irrelevant for the following reasons: Firstly, the locus solutionis (place of performance) of the contract - Exhibit PO2, which forms the basis of the action, is Malabo Equitorial

H Guinea. The averment in paragraph 4(L) of the Respondent’s affidavit at page 38 of the Record amounts to a stopover on the way to the place of performance of the contract. The place of performance of

the contract is the place of resolution. The evidence on record points clearly and unmistakably to that place as Equatorial Guinea. (See Exhibit PO3 at page 48 of the Record and paragraph 5(00) at page 41 of the Record). Indeed, the aircraft arrived in Kano, Nigeria on the 12th February, 1997 and departed on the same day to Equatorial Guinea (see Exhibit PO3 at page 49 of the Record). Thus, the alleged agreement for the aircraft to pass through Nigeria is, in my opinion, irrelevant as regards performance. As the issue was not placed before the court below and none of the parties was resident in Nigeria, that court went on a frolic of its own to argue and determine the point *suo motu*. B C

Secondly, the deposition in paragraph 4(L) is inadmissible in law. Section 132 of the Evidence Act, Cap. 112, LFN 1990 states that the only admissible evidence of a contract is the contract itself. The Section however recognises exceptions, which the Respondent sought to come under and upon which the learned trial Judge and the Court below based their decisions. The exceptions are as follows: D

Section 132(b) (*ibid*) provides that the existence of any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them. Section 132(c) of the Evidence Act states as follows: E

“The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property.” F

It is quite clear that in order to fall within the exceptions the Respondent would have to aver one of these exceptions, that is:

(i) Separate oral agreement constituting a condition precedent to the validity of Exhibit PO2. G

(ii) Subsequent oral agreement to modify Exhibit PO2.

The Respondent’s averment in paragraph 4(L) never alleged that the agreement was oral, conditional, separate, or subsequent. This is essential to establishing a case within the exceptions. H

The court below in the case of *Mbonu v. Nwoti* (1991) 7 NWLR (Pt.206) 737 at page 748 per Uwaifo, JCA., as he then was, observed as follows:

“The Appellant, in effect, attempted to contradict, alter or vary by

oral evidence a transaction or grant in writing. In this regard, attention must be drawn to Section 131 of the Evidence Act.”

“I think it is plain from the rules of pleadings and of evidence in support that any such separate or subsequent agreement must be distinctly pleaded and specifically proved.” (Underlining is by me)

- B It is the Appellants’ submission that the averment in paragraph 4(L) of the Respondent’s affidavit does not raise the facts necessary to sustain the exception. The said averment is, in my view, inadmissible in law having regard to the provisions of Section 132 of the Evidence Act
- C (ibid). In consequence, there is no evidence before the Court below regarding a variation. A fortiori, no conflict could have arisen. This, in my opinion, stems from the proposition of law that evidence cannot be given of a matter not contained in the party’s pleading. See Kalu Njoku & Ors. v. Ukwu Eme & Ors. (1973) 5 S.C. 293. Further more, it is desirable that the issues joined in a civil matter be properly
- D ascertainable. See Pan Asian African Co. Ltd. v. National Insurance Corporation of Nigeria (NICON) (1982) 9 S.C. 1 at 48- 49. Indeed, as it is now well settled that parties are bound by their pleadings and a plaintiff will be held to a case he has put forward in his writ of summons and pleadings vide:
- E (a) Jonah Kalio & Ors. Chief M.D. Kalio (1975) S.C. 15 at 21;
 (b) Etowa Enang v. Fidelis Ikor Adu (1981) 11-12 S.C. 25
 (c) Edward Egonu & Ors. v. Madam E. Egonu & Ors. (1978) 11-12 S.C. 111 at 133;
- F (d) Chief Ige v. Dr. Omololu Olunloyo (1984) 1 SCNLR 158
 (e) Nkanu v. Onun (1977) 5 S.C. 13 at 22 and
 (f) Ransome Kuti v. Attorney-General, Federation (1985) 2 NWLR (Pt.6) 211. I agree with the Appellants that the Respondent cannot be awarded a relief beyond that which it claimed in its writ of summons. See Doma v. Ogiri (1997) 1 NWLR (Pt.481) at page 322. A
- G fortiori, the agreement upon which the claim is founded i.e. that of 3rd February, 1997- Exhibit PO.2. See also the Writ of Summons at page 31 of the Record.

Furthermore, as the Court of Appeal held in the case of Dr. Kunle Balogun v. Wema Bank Plc (2000) 4 NWLR (Pt.654) 652 at 659:

- H ***“When a Court is asked upon an interlocutory application to make an order, the Court must satisfy itself that it has the power to make, at the conclusion of hearing, the same***

order it is asked to make upon an interlocutory application.

Similarly, it will be wrong for a court to assume jurisdiction on the basis of an agreement, which is extraneous to the relief sought before a court.

Finally, I agree with the Appellants' submission that the Court below erred in law in holding that there was conflict in the averments made by both parties. The only material before the court was the affidavit deposed to by the Respondent. There was no counter-affidavit filed by the Appellants. There could therefore have been no conflict, apparent or latent between the parties.

The conflict, if any, was between the Respondent's affidavit in support of its ex-parte application dated 21st March, 1997 (see page 4 of the Record) and the affidavit in support of its Motion on Notice dated 25th of March, 1997 (see page 35 of the Record). In the affidavit in support of the ex-parte application, the respondent simply deposed to Exhibit "PO.2," the Aircraft Lease Agreement entered into on the 3rd of February, 1997, and made no mention of the variation oral or written (see paragraph 4(f) at page 6 of the Record). In the affidavit in support of the Motion on Notice, the alleged variation was suddenly raised (see paragraph 4(L) at page 38 of the Record).

In the case of *Mr. Mike Momah v. Vab Petroleum Inc.* (2000) 2 S.C. 142; (2000) 4 NWLR (Pt.654) 534 this Court stated the applicable principles of law regarding conflicting affidavit evidence as follows: "Where a matter is being tried on affidavit evidence and the Court is confronted with conflicting or contradictory evidence relied on by the parties on a material issue before the court, the court cannot resolve such conflict by evaluating the conflicting evidence in order to achieve the resolution of the conflict-Falobi v. Falobi (1976) 9-10 SC 1.

In the case in hand, the contradictions or conflict in affidavit evidence did not relate to the affidavit evidence filed by the Appellant on the one hand, and that filed by the Respondent on the other; rather, the contradiction arose only in the Appellant's averments in his numerous affidavits. Therefore the age-long principle of fielding witnesses to furnish oral evidence for the resolution of the contradictions between the two separate sets of evidence did not arise. Rather, it was self-evident from the judgment of the lower court that the contradictions alluded to were those that arose from the inconsistencies in the depositions in the Appellant's own affidavits." (See pages 556-557 of the Record).

This Court further stated at page 557 more succinctly that:

“Where a party’s case is plagued by inconsistencies or contradictions, there is no obligation on the court seized of the matter to arrange for oral evidence to be called for the purposes of resolving the contradictions. In such circumstances, the onus is on the party confronted with its self-created contradictions to fully and properly explain away the contradictions to the satisfaction of the court. Failure to do so is bound to leave an indelible dent on the Appellant’s case. It is not open to the court to enter into the arena of judicial conflict between the parties in order to resolve the contradictions within a party’s own affidavit evidence.”

In conclusion, I hold the view that the jurisdiction can only be founded in England or Equitorial Guinea, moreso that none of the parties to this case is resident in Nigeria. Hence, the decision of the court below to the effect that there was no evidence to determine the issue of jurisdiction or that there was conflict on the evidence, was based on an irrelevant consideration and thus has no basis and cannot be sustained. I am also equally of the view that on the materials before the trial Federal High Court, that it certainly ought to have declined jurisdiction. On its own part, the court below was clearly in error, in my opinion, when it held that there was no evidence upon which the issue of the court’s jurisdiction could be determined. Indeed, there was abundant evidence emanating from the affidavit evidence it (the Respondent) supplied, to determine the issue.

For all I have been saying, I find merit in this appeal and I accordingly allow it. The Plaintiff/Respondent’s claim be and is hereby struck out for want of jurisdiction in the trial Court. The Respondent shall pay costs of N10,000.00 to the Appellants.

UWAIS CJN

I have had the advantage of reading in draft the judgment read by learned brother, Onu, JSC. I entirely agree that the trial Federal High Court has no jurisdiction to hear the Plaintiffs’/Respondent’s case since it is clear from the available facts that the Defendants/Appellants places of business are not in Nigeria but the United King-

dom. Also the contract between the parties was not to be performed in Nigeria either but the Equitorial Guinea.

I too hereby allow the appeal with N10,000.00 costs to the Appellants against the Respondent.

B

OGUNDARE JSC

The main issue that calls for determination in this appeal is in respect of the jurisdiction of the Federal High Court, to entertain the claims of the Plaintiff in this case. C

The Plaintiff had sued the Defendants jointly and severally claiming:

“1. The sum of US\$575,000.00 (Five Hundred & Seventy - Five United States Dollars) being special damages suffered by the Plaintiff as a result of the defendants breach of Aircraft Lease Agreement made by the parties on the 3rd day of February, 1997. D

2. The sum of US\$500,000.00 (Five Hundred Thousand United States Dollars) being general damages suffered by the Plaintiff as a result of the defendant’s breach of AIRCRAFT LEASE AGREEMENT made by the parties on 3rd February, 1997. E

3. Cost of filing and Prosecuting this action.”

On the day the writ was filed, that is, 21st March, 1997, the Plaintiff filed an ex parte motion praying the court for -

“1. AN ORDER OF INTERIM INJUNCTION RESTRAINING THE DEFENDANTS either by themselves, Agents, Privies, assigns, Pilots, Engineers and or Crew members from flying or in any other way remove their AIRCRAFT EMBIIO/PI GEGN: G-OHIG from Mallam Aminu Kano International Airport to any other place pending the hearing and determination of the Motion on Notice. F G

2. AN ORDER DIRECTING THE FEDERAL AIRPORT AUTHORITY OF NIGERIA (FAAN) KANO to detain the defendant’s AIRCRAFT EMBIIO/PI REGN: OHIG at the Mallam Aminu Kano International Airport, Kano pending the hearing and determination of the Motion on Notice.” H

To this motion was an affidavit in support the penultimate paragraphs which read:

“3. That I know as a fact that the applicant is a limited liability company in Nigeria with a licence to carry on aviation business generally

within and outside Nigeria.

4. That I am informed by Captain Dayo Olu Badewo the Managing Director and Chief Executive of the applicant of the following facts through telephone conversation from Equatorial Guinea on the 20th day of March, 1997 at about 3.30p.m. in the course of his instructions to O. A. Dada Esq, in respect of the above subject matter which I verily believe to be true and correct:-

(a) That the defendants are foreign companies with licence to carry on aviation business generally within and outside the United Kingdom.

(b) That the defendants are the owners of aircraft EMB110/P1 REGN: G-OHIG the subject matter of the applicants' suit.

(c) That in the later part of the year 1996, he contacted the defendants with a view to leasing the above referred Aircraft for the purposes of the applicant's operation between Nigeria and Equitorial Guinea and other parts of the world.

(d) That prior to the contract referred to in paragraph 'c' above, the applicant had secured contract with many reputable companies in Equitorial Guinea and in Nigeria for purposes of rendering Aviation services such as Mobil Oil, Nigerian government, etc.

(e) That on 30th January, 1997, the second defendant for and on behalf of the first and third defendants addressed a fax message to the applicant for the purpose of concluding the contract deal. A copy of the said letter shown to me is attached and marked EXHIBIT 'PO1'

(f) That the applicant on the receipt of Exhibit PO1 made a payment of Eighty Thousand United States Dollars (\$80,000) to the defendants and an Aircraft lease agreement was entered into between the parties on 3rd February 1977. A copy of the said agreement shown to me is attached and marked Exhibit 'PO2'

(g) That as agreed by the parties in clause 11 of Exhibit PO2 the above referred Aircraft was flown to Equitorial Guinea from England on the 12th of February, 1997.

(h) That to the greatest surprise of Captain Dayo Olu Badewo the Air conditioner of the Aircraft was not working and the above discovery was instantly reported to Mr. Andy Green the defendants' Commercial Manager who accompany (sic) the Aircraft and he promised to rectify same.

(i) That shortly after the arrival of the said Aircraft in Equitorial Guinea there was a test Flying of the Aircraft to ascertain its conditions for

the purposes for which it was let.

(j) That to a further surprise of the said Captain Dayo Olu Badewo the following defects were discovered in the Aircraft in the presence of Mr. Andy Grreen the Pilot and other crew members:-

(i) The aircraft had temperature problems which reduced the power of its right engine; B

(ii) There is no adequate ventilation in the aircraft;

(iii) The Hydraulic pump is defective etc.

(x) That the defendants also instructed the Pilot not to fly the said aircraft to an part of Nigeria in order to avoid detention of same. C

(y) That the said Pilot however had sympathy for the applicant to fly the Aircraft to England through Kano so that the applicant can take steps to impound same in order to be refunded its money.

(z) That by the arrangement of the pilot of the aircraft and the applicant the aircraft shall land at Aminu Kano International Airport, D Kano on 21st March, 1997 and shall depart for London on 22nd March, 1997.

(aa) That if the aircraft is allowed to leave the air space of Nigeria for England the applicant would have lost about \$500,000 because the defendants had planned to abscond with the aircraft. E

(bb) That if the aircraft is detained in Kano, the defendants shall take steps towards refunding the applicant all the expenses it incurred in respect of the contract.” (underlinings are mine for emphasis)

To this affidavit was annexed a number of documents including F the Aircraft lease agreement made between the Plaintiff and the 1st Defendant on 3rd February, 1997 which, because of its relevance to this judgment, I quote here below:

“Heads of Agreement/Letter of intent

Dated: 3rd February 1997

Between: Arjay Ltd., 12 New Street, Guernsey, UK. (LESSOR) AND G
Airline Management Support Ltd., P.O. Box 4995K, Ikeja, Lagos
Nigeria. (LESSEE)

Aircraft Lease of EMB110/P1 Regn: G-OHIG

It is hereby agreed that: H

1) Arjay will supply the above aircraft on a dry lease basis at a rate of \$16,000 per calendar month.

2) Engine/Prop/U/C/ reserves will be charged at a rate of \$120.00 per block hour.

- 3) Maintenance reserves will be charged at a rate of \$160.00 per block hour.
- 4) 1 Captain, 1 first officer, and 1 engineer will be supplied by the lessor at the following rates: Captain: \$6,000.00 pcm. F/O: \$4,500.00 pcm. Engr: \$4,000.00 pcm.
- B The above rates are exclusive of accommodation, transport and out of pocket expenses incurred in relation to the aircraft operation.
- 5) The lessor will be responsible for all maintenance and defect rectification for the duration of the lease.
- C 6) The aircraft will be operated in accordance with the Streamline Aviation operations manual, subject to UK CAA restrictions as laid out in the U.K. AIP and Air Navigation Order.
- 7) The minimum duration of the lease contract is 6 months.
- 8) The minimum hours per month billed for maintenance and reserves would be 45 hours.
- D 9) Aircraft lease fee's, crew and engineer costs, 54 hours reserves and maintenance costs are to be settled in advance of the commencement of the calendar month. Any additional hours or disbursements to be settled within 14 days of month end.
- E 10) All payments will only be considered settled when funds are cleared with the Lessor.
- 11) A returnable deposit of \$30,000.00 will be required prior to the commencement of the lease. Once this is in place, we can offer the aircraft for delivery to Equitorial Guinea for 12th Feb. 1997.
- F 12) The above lease will start and finish at Southend Airport, Essex, UK. Positioning costs are to be the responsibility of the Lessee. This cost is quoted by the lessor as being an additional \$4,000.00 to position Southend-Malabo.
- 13) The above lease is exclusive of all fuel costs, navigation charges, all airport costs, and any local government charges or taxes levied.
- G 14) Arjay Ltd./Streamline Aviation (SW) Ltd., it's associates (sic) and employees undertake not to solicit or contract for any aviation business in Equitorial Guinea or surrounding area's serviced by the aircraft for the duration of the lease.
- 15) The Lessor will provide an option for the Lessee to purchase EMB110/P2 registration G-OCS1 or substitute aircraft during the period of the lease. On completion of such a purchase, the lease can be terminated without penalty.
- H

16) All payments to be made to in accordance with the attached instructions:” (Underlining are mine for emphasis)

The motion was granted and it was ordered that -

“1. The Defendants either by themselves, Agents, Privies, Assigns, Pilots, Engineers and or Crew members are restrained in the interim from flying or in any other way removing their AIRCRAFT EMB 110/ P1 REGN: C-OHIG from Mallam Aminu Kano International Airport to any other place pending the hearing and determination of the Motion on Notice. B

2. THE FEDERAL AIRPORT AUTHORITY OF NIGERIA (FAAN) C KANO is ordered to detain the Defendants’ AIRCRAFT EMB 110/1P REGN: OHIG at the Mallam Aminu International Airport, Kano pending hearing and determination of the Motion on Notice.

3. This Order as well as all necessary papers filed in respect of this case should be served on all the Defendants and any other person D affected by this Order.

4. The Plaintiff/Applicant shall give a written undertaking to pay to the Defendants for any loss they may lawfully sustain as a result of this Interim Order if eventually it turns out that the Order ought not to have been granted. E

5. The Motion on Notice shall come up for hearing on Tuesday, 25th March, 1997.”

A written undertaking as to damages was given by the Plaintiff.

Pursuant to another motion filed by the Plaintiff for service on the Defendants out of jurisdiction, and granted by the trial court, the following orders were made: F

“1. Leave is granted to the Plaintiff/Appellant to issue and serve the Writ of Summons and all other processes of this court in this suit on the Defendants in United Kingdom which is outside the jurisdiction G of this Court.

2. It is further ordered that the Writ of Summons and all other Court processes in this suit be served on the Defendants by substituted means to wit:

To effect service of the initial processes of the Court on the defendants by substituted means by serving the Pilot of the Aircraft CAPTAIN TALA EL- SHELHI and subsequent processes of the Court to be served on the Defendants by substituted means by despatching same to the 1st Defendant’s address in the United Kingdom which is No.2 H

NEW STREET ST. PETER PORT GUESNSEY G.Y. 141E CHANNEL ISLAND UNITED KINGDOM and the 2nd and 3rd Defendants' address to wit:

LONDON SOUTH END AIRPORT SOUTH END ON SEA ESSEX S.S.2 6YP UNITED KINGDOM.

- B 3. It is also ordered that the Defendants should make an appearance in this Court on 7th April, 1997.
4. Case is adjourned to 7th April, 1997 for argument of the Motion on Notice."
- C The affidavit in support of the motion for an order of interlocutory injunction etc., contained virtually the same facts as deposed to in the affidavit in support of the ex parte motion for similar prayers except that in paragraph 4(l)-(p) facts not contained in the previous affidavit were deposed to and these are:
- D "(i) That it was agreed that the Aircraft shall be delivered to the applicant in Kano, Nigeria on 12th February, 1997 from where the applicant's officials and the crew shall depart for Malabo.
- (m) that it was agreed by the parties that three days before the delivery of the aircraft in Kano Nigeria the said Aircraft shall be grounded and taken for proper services and maintenance in preparation for the contract. The respondents however failed to do so and as a matter of fact the Aircraft was sued on 11th February, 1997.
- E (n) That the said Captain Dayo Olubadewo left London on 9th February, 1967 for Kano to receive the Aircraft.
- F (o) That as agreed by the parties the said Aircraft arrived in Kano, Nigeria on 12th February, 1997 and same was received by the said Captain Dayo Olubadewo.
- (p) That after the receipt of the aircraft Captain Dayo and some of the officials of the applicant together with the crew and Mr. Andy Green left Kano for Malabo. A copy of the aircraft Technical Log form
- G No.011 evidencing the flight shown to me is attached and marked as Exhibit PO3' (Underlining are mine for emphasis)
- It is these facts that the court below referred to as conflicts in the affidavit evidence. I shall say more on this later in this judgment.
- I have taken pains to set out in this judgment the various orders issued, particularly relating to service out of jurisdiction, to show
- H that the Defendants, to the knowledge of the Plaintiff, were not, at all times relevant to the action leading to this appeal, resident in

Nigeria. Paragraph 4 of the affidavit filed by the Plaintiff also shows the complaints of the Plaintiff.

Upon being served with the writ of summons, the Defendants, through their counsel, filed a Notice of Preliminary Objection and a motion which read:

“NOTICE OF PRELIMINARY OBJECTION AND OF MOTION
PURSUANT TO ORDER 27, ORDER 4 RULES 5(2), ORDER 33
RULE 11, ORDER 20 RULE 4 OF THE FEDERAL HIGH COURT
CIVIL PROCEDURE RULES LAWS OF THE FEDERATION 1990
TAKE NOTICE that the defendants/applicants herein at the resumed
hearing intend to raise a Preliminary objection to the action herein
upon grounds set out in the 1st schedule to this application and would
in consequence pray this honourable court to strike out this action.
FURTHER TAKE NOTICE that in the alternative to the objection
raised above counsel may be heard on behalf of the 2nd and 3rd
defendants/applicants for an order striking out their names from this
suit upon grounds set out in the second schedule hereto.

AND FURTHER TAKE NOTICE that in the alternative to the objection
raised in the 1st paragraph hereof counsel may be heard on behalf
of the defendants/applicants for an order discharging or setting aside
the order of interim injunction upon grounds set out in the third
schedule hereto.

AND FOR SUCH FURTHER AND OTHER ORDER as this honour-
able court may deem fit to make in the circumstances.

1ST SCHEDULE

1. The subject matter of the action is outside the territorial jurisdiction of this honourable court.
2. Leave of this honourable court was not obtained to issue the writ of summons outside the jurisdiction of the court.
3. The Defendants were not given up to 30 days between the service of the writ on them and the return date. Contrary to the Sheriffs and Civil Process Act Laws of the Federation of Nigeria, 1990.

2ND SCHEDULE

The second and third defendants are not parties to the agreement which forms the basis of this action.

3RD SCHEDULE

1. No real urgency was disclosed.
2. No facts disclosed to reveal an intention by the defendants to

remove their property outside jurisdiction.

3. No valid undertaking as to damages was offered.

4. No triable issues are disclosed on the affidavit.”

B At the hearing on 7th April, 1997 learned counsel for the Defendants appeared under protest to argue the Notice of Preliminary Objection and motion. Arguments of counsel for both sides lasted two days at the conclusion of which, the learned trial Judge, in a reserved ruling, adjudged:

C 1. “...I hold that the mere fact that the Aircraft which is the subject of the Lease Agreement was to be delivered in Kano, Nigeria to the Plaintiff and was indeed so delivered as agreed, is enough to confer this Court with jurisdiction to entertain this suit as being part of the cause of action which arose within the jurisdiction of this Court.”

D 2. “I agree that this prayer (that is, the prayer to strike out the names of the 2nd and 3rd Defendants) is premature and that the said Defendants should await the filing of the Statement of Claim when it will become clear whether or not they are strangers to the Lease Agreement and whether or not the agreement itself comes within any of the recognised exceptions to the doctrine of privity of contract.” (Words in brackets are mine)

E 3. “Having held that the Plaintiff has established a case of extreme urgency based on the affidavit in support of the Motion Ex parte, I do not think it is now open to this Court based on the same affidavit to make a ‘U TURN’ and say no real urgency was disclosed. The same F conclusion applies to Ground 2. It has been shown in the affidavit in support of the Motion Ex parte that unless the court intervened, the Aircraft would be removed out of the Airspace of Africa. The Defendants have therefore failed to show that the Order of Interim Injunction should be discharged or set aside.”

G 4. “The Order of Interim Injunction made by this Court on 21st March, 1997 is hereby varied.

It is therefore ordered as follows:

H That the AIRCRAFT EMB110/PI REGN: G-OHIG now detained at Mallam Aminu Kano International Airport, Kano, Nigeria on the order of this Court made on 21st March, 1997 shall within 14 days be released to the Defendants on the following conditions:

1. That the Defendants shall arrange for the inspection of the Aircraft by officials of Civil Aviation Authority of UK (the place of registra-

tion of the Aircraft) within seven (7) days from today with a view to making a report as to (sic) the airworthiness of the Aircraft and failing that the Inspection shall be carried out by officials of Civil Aviation Authority of Nigeria. The expenses for such inspection shall be borne by the Plaintiff.

2. That the Defendants shall deposit with the Registrar of this Court the sum of \$100,000 (One Hundred Thousand U.S Dollars) in cash or Bank draft as security for the release of the Aircraft. The Registrar shall immediately in turn open an interest yielding account with the Union Bank (Nig) Plc, Kano Main Branch in trust for the parties to this suit for the benefit of either of them at the end of trial.”

Consequent upon the order of the trial court, the Defendants deposited in court the sum of US\$100,000 (One Hundred Thousand US Dollars). By a subsequent order made on the application of the Plaintiff, the trial court varied this order and ordered:

“That the sum of USD 100,000 deposited in Court by the Defendants be converted to its Naira equivalent and same shall be used by the Registrar of this Honourable Court to open an interest yielding account with Union Bank of Nigeria Plc., Bank Road, Kano in trust for the eventual winner of this case.”

Meanwhile, the trial court having ordered pleadings to be filed, the Plaintiff filed its statement of claim. As this statement of claim is not relevant to the determination of this appeal, I say no more on it.

The Defendants were displeased with the three rulings of the trial court given on 21st March, 1997 (in respect of the ex parte motion); 14th April, 1997 (in Defendants’ notice of preliminary objection and motion) and 17th June, 1997. They appealed against each decision to the Court of Appeal. The three appeals were consolidated for hearing and in its judgment delivered on 14th January, 2000, the Court of Appeal (Kaduna Division), in a unanimous decision, dismissed the 1st and 2nd appeals but allowed the appeal against the order converting the sum of \$100,000 into Naira. The ground upon which the 1st and 2nd appeals were dismissed is summed up in the words of Omage, JCA, who read the lead judgment of the Court.

The learned Justice of Appeal said:

“The answer to appeal one of the appellant is no evidence is before the court upon which the court may determine its jurisdiction or lack of it.”

Still further dissatisfied, the Defendants have now appealed to this court challenging the correctness of the ground upon which the Court of Appeal dismissed their appeals on jurisdiction. The two grounds of appeal, without their particulars, contained in their Notice of Appeal read:

- B 1. "The Court of Appeal erred in law in holding that there was no evidence upon which the court could determine the issue of jurisdiction.
2. That Court of Appeal erred in law in holding that there was a conflict in the evidence, which made it impossible for the court to determine jurisdiction."

C Pursuant to the rules of this Court, the parties filed and exchanged their respective briefs of argument and at the oral hearing of the appeal, learned counsel for the parties made submissions in further elucidation of the arguments in their respective written briefs.

D In the Respondent's brief, without specifically raising an objection to the competence of the appeal, the learned counsel raised, what he called, "Preliminary Observation" in which he submitted that the two grounds of appeal contained in the Defendants' notice of appeal were not grounds of law simpliciter but were grounds of mixed law and fact requiring the leave of either the Court below or this court to appeal by virtue of Section 233 (3) of the Constitution of the Federal Republic of Nigerian, 1999. That leave not having been sought nor obtained, argued learned counsel, the appeal was incompetent and urged the court to strike it out.

F The Defendants filed a Reply brief in response, inter alia to the submissions of the Respondent's counsel in his "Preliminary Observation." In that Reply Brief, learned counsel for the Defendants after citing *Ogbechie v. Onochie* (1986) 2 NWLR 484, 491 and *Nwadike v. Ibekwe* (1987) 4 NWLR 718, 774-775 as to when a ground of appeal is a ground of law simpliciter, submitted that the two grounds of appeal raised by the Defendants were grounds of law simpliciter. He submitted that the Defendants had right of appeal as of right and the appeal was, therefore, competent.

G I have set out earlier in this judgment the two grounds upon which the Defendants are challenging, in this court, that part of the judgment of the Court of Appeal that is against them. If there is evidence upon which an issue can be determined and a court says there is no evidence, that obviously is an error of law. As no finding of fact

is being challenged, the complaint cannot amount to one of mixed law and fact. Again, if there is no conflict in evidence and a court says there is conflict in evidence, that clearly is an error of law. The learned counsel for the Defendants is right in his submission that the two grounds of appeal in the matter on hand are grounds of law simpliciter. The “Preliminary Observation” of learned counsel for the Plaintiff is misconceived. I must observe that I find it a strange way to raise a preliminary objection by way of preliminary observation. What counsel has done is not what the rules of this court lay down. Having disposed of this distraction, I now come to the main issue in this appeal. The question raised for determination is: Whether there was material upon which the Court of Appeal could determine the issue of jurisdiction. The Court below, per Ojage, JCA., had observed: “To further grasp the issue which is now being considered, I here repeat the issue. The appellant in appeal No. 1 asked whether- “having regard to the claim and evidence before the court, the lower court had jurisdiction.”

There is a claim before the court, by a writ of summons filed by the Respondent. It is here relevant to ask what evidence is before the court? There is no evidence whatsoever before the court on which the court can determine the issue of jurisdiction. It has been resolved that where an objection is made to the jurisdiction of the court the court is still entitled to assume jurisdiction to hear evidence, to enable it decide whether or not it is in fact not possessed of jurisdiction. See: *Anisminic Ltd. v. Foreign Compensation Commission & Ors.* (1969) (All ER 208, H.L. (II), *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria* (1976) 1 All NLR (Pt. 409) (III); *A-G Lagos State v. Justice L.J. Dosunmu* (1989) 6 S.C. (Pt. II) 1; (1989) 3 NWLR, (Pt. 111).” Mr. Akinrele, learned counsel for the Defendants has criticized this passage. He submitted that the territorial jurisdiction of a court in a contract case can be determined by:

- (a) Where the contract in question was made
- (b) Where the contract is to be performed
- (c) Where the defendant resides.

and cited in support *Egbo v. Lagama* (1988) 3 NWLR 109, 126-127; *I.K. Martins Nig. Ltd. v. UPL* (1992) 1 NWLR 322, 331; and *Lanleyin v. Rufai* (1959) 4 FSC 184. Learned counsel then observed that it was common ground between the parties (a) that the Defendants

were resident outside the jurisdiction of the trial court as found by the learned trial Judge and (b) that the contract was entered into in the United Kingdom as also recognised by the learned trial Judge. Learned counsel observed that the only remaining issue is as to where the contract was to be performed. He referred to the lease
B agreement between the parties and the contract between the Plaintiff and Airspan Aircharter Malabo as disclosed in paragraph 5 (o) of the Plaintiff's affidavit in support of its motion on notice for interlocutory injunction. Learned counsel submitted that on the materials before
C the trial court which materials were provided by the Plaintiff, there was sufficient evidence which went to show that the contract between the parties was to be performed in Equitorial Guinea, outside Nigeria. Learned counsel further submitted that the seeming contradiction in the affidavit evidence as found by the court below was irrelevant as the Defendants offered no affidavit evidence offered by the Plaintiff.
D Learned counsel argued the deposition in the affidavit evidence that there was oral agreement altering the written lease agreement would be inadmissible under Section 132 of the Evidence Act. He urged the court to allow the appeal and hold, on the materials on record, that the trial court had no jurisdiction to entertain the Plaintiffs action.
E Mr. Dada, for the Plaintiff, submitted that the court below was right in its judgment that there was no evidence before the court upon which the issue of jurisdiction or lack of it could be determined. He reasoned that at the stage the Defendants filed their notice of preliminary ob-
F jection and motion, pleadings had not been filed. The only materials then before the court were the writ of summons, motion ex parte for interim injunction, affidavit in support and exhibits attached thereto, motion on notice for interlocutory injunction, affidavit in support and exhibits attached thereto. Learned counsel agreed with the observation of the court below that Defendants' preliminary objection was
G filed pursuant to Order XXVII Rules I & II of the Federal High Court Rules, Cap. 134 laws of the Federation applicable at all times relevant to this case. Learned counsel argued that under the rules, the Plaintiff must have filed its statement of claim before the Defendants could raise their objection. He submitted that in the absence of Plaintiffs statement of claim, the court below was right in holding as it did in
H its judgment. He urged the court to dismiss the appeal.
In their Reply Brief, Mr. Akinrele for the Defendants submitted that the

Defendants' preliminary objection was a challenge to the jurisdiction of the trial court and not a demurrer. An objection to jurisdiction could be raised at any stage of proceedings even if the only process of court that had been filed was the writ of summons and affidavit in support of an interlocutory injunction, so argued learned counsel; he cited in support *Attorney-General of Kwara State v. Olawale* (1993) 1 NWLR (Pt. 272) 645, 674H per Karibi- Whyte, JSC.; *Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria & Anor.* (2002) 3 S.C. 1; (2002) 7 NWLR 272. He finally submitted that the preliminary objection to the jurisdiction of the court was properly brought at the stage it was brought and that the trial court could have decided the issue without a statement of claim being filed. B C

I have carefully considered the submissions of learned counsel both in their respective briefs and in oral arguments. With profound respect to their Lordships of the Court below, I think they are in error when that Court, per Omu, JCA, observed: D

"In its preliminary objection, the appellant had without stating so, applied under the provisions of Order 27 Rule 1 of the Federal High Court Civil Procedure Rules; Rule (1) which enables the Federal High Court to dismiss a suit, if the allegation made by the Plaintiff are admitted." E

Order XVII of the then Rules of the Federal High Court dealt with demurrer where a defendant conceives that he has a good legal or equitable defence to the suit, so that even if the allegations by the plaintiff were admitted or established yet the plaintiff would not be entitled to any decree against the defendants. A challenge to jurisdiction, as in this case, is not a demurrer. It is the general rule of practice that issue of jurisdiction can be raised at any stage of the proceedings even on appeal - *Barclays Bank v. Central Bank* (1976) 6 S.C. 175, 184. A demurrer is only raised after a plaintiff has filed his statement of claim but before the defence is filed. I think this issue has been put to rest by this Court in *A-G of Kwara State v. Olawale* (supra) where Karibi-Whyte, JSC observed at pages 674 - 675 of the Report: "There is no doubt the issue of whether a plaintiff's action is properly within jurisdiction or indeed justiciable can be determined even on the endorsement of the writ of summons, as to the capacity in which action was being brought, or against who action is brought. It may also be determined on the subject matter endorsed on the writ of H

summons, if this is not actionable.”

And in *Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria & Anor.* (supra), this Court, per Uwaifo, JSC., again observed at pages 296-297 of the Report:

- “To say, therefore, as did the court below and as canvassed by the
 B plaintiff/respondent before us in its brief of argument that objection to
 jurisdiction should only be taken after the statement of claim has been
 filed is a misconception. It depends on what materials are available.
 It could be taken on the basis of the statement of claim: see *Izenkwe*
 C *v. Nadozie* (1953) 14 WACA 361 at 363; *Adeyemi v. Opeyori* (1976)
 9 -10 S.C. 31; *Kasikwu farms Ltd. v. Attorney - General of Bendel*
State (1986) 1 NWLR (Pt. 19) 695. It could be taken on the basis of
 the evidence received: see *Barclays Bank of Nigeria Ltd. v. Central*
Bank of Nigeria (1976) 1 All NLR 409; or by a motion supported
 by affidavit giving the facts upon which reliance is placed: see *National*
 D *Bank (Nigeria) Ltd. v. Shoyeye* (1977) 5 S.C 181 at 194 per
Obaseki, JSC. But certainly it could be taken on the face of the writ
 of summons where appropriate: see *Attorney-General Kwara State*
v. Olawale (1993) 1 NWLR (Pt. 272) 645 at 674-675 where *Kari-*
bi-Whyte, JSC., observed:
 E ‘There is no doubt the issue of whether a plaintiff’s action is properly
 within jurisdiction indeed justiciable can be determined even on the
 endorsement of the writ of summons, as to the capacity in which
 action was being brought, or against who action is brought. It may
 F also be determined on the subject-matter endorsed on the writ of
 summons, if this is not actionable.’
 The tendency to equate demurrer with objection to jurisdiction could
 be misleading. It is a standing principle that in demurrer, the plain-
 tiff must plead and it is upon that pleading that the defendant will
 contend that accepting all the facts pleaded to be true, the plaintiff
 G has no cause of action, or where appropriate, no locus standi: see
Federal Capital Development Authority v. Naibi (1990) 3 NWLR (Pt.
 138) 270; *Williams v. Williams* (1995) 2 NWLR (Pt. 375) 1; *Akpan v.*
Utin (1996) 7 NWLR (Pt. 463) 634; *Brawal Shipping (Nig.) Ltd. v.*
F.I. Onwadike Co. Ltd. (2000) 6 S.C. (Pt. II) 133; (2000) 11 NWLR
 (Pt. 678) 387. But as already shown, the issue of jurisdiction is not a
 H matter for demurrer proceedings. It is much more fundamental than
 that and does not, entirely depend as such on what a plaintiff may

plead as facts to prove the reliefs he seeks. What it involves is what will enable the plaintiff to seek a hearing in court over his grievance, and get it resolved because he is able to show that the court is empowered to entertain the subject-matter. It does not always follow that he must plead first in order to raise the issue of jurisdiction.”

If the minds of their Lordships had adverted to *A-G of Kwara State v. Olawale* (supra) which had been decided and reported before their judgment in this case, they would not have observed as they did. I must, with respect, say that their Lordships are again in error when, per *Omage, JCA.*, they observed:

“An example of conflict in the averments made by both parties is the one on which the appellant denied that an oral agreement exists between the parties, which Respondent said varied the written terms of the contract. The question must be asked, is such an issue to be resolved by affidavit evidence? To resolve such an issue on an affidavit evidence will in my view derogate from the essence of due processes which should give justice and may work hardship on the parties if so resolved. It is settled practice, that a trial court has not jurisdiction to resolve suo motu conflicting averments in affidavits or on conflicting affidavit or prefer one version of deposition to the other, without oral evidence. See *Asonye v. Registered Trustees of Christ Apostolic Church* (1995) 2 NWLR (Pt.378) at 634, Para.D.” There can be no conflict of affidavit evidence in this case as the Defendants filed no affidavit. Only the Plaintiff filed the two affidavits before the trial court. The second affidavit appears to contain some facts not deposed to in the first affidavit. This, in my respectful view, cannot be described as conflict in affidavit evidence. In any event, for *Asonye v. Registered Trustees of Christ Apostolic Church* (supra) to apply, the two parties must have filed affidavits contradictory of each other requiring oral evidence to be called to resolve the conflict; such conflict is not resolved by the court preferring one version to the other without oral evidence - *Falobi v. Falobi* (1976) 10 NSCC 576. That is not the situation in this case. Where a party files affidavits and there are contradictions in those affidavits, that only goes to destroy or, at least, weaken the case being canvassed by the party through his affidavit evidence. It is not a case of oral evidence being required to resolve the contradictions.

What do we mean by jurisdiction of court? By jurisdiction is meant

the authority, which a court has to decide matters that are litigated before it or to take cognisance of matters prosecuted in a formal way for its decision. The limits of this authority which may be territorial or as to subject-matter, are imposed by statute under which the court is constituted, and may be extended or restricted by the like means.

B The jurisdiction of the Federal High Court was prescribed by Section 230 of the 1979 Constitution (as amended) (now Section 251 of the 1999 Constitution). By Section 6(3) of the Constitution it is a superior court of record.

C Order VII of the Federal High Court (Civil Procedure) Rules Cap.134 Laws of the Federation of Nigeria, 1990 provides for the place of instituting and of trial of suits: Rule 4 thereof provided:

“4. All other suits may be commenced and determined in the judicial division in which the defendant resides or carries on business. If there are more defendants than one resident in different judicial divisions, the suit may be commenced in any one of such judicial divisions; subject, however, to any order which the Court may, upon the application of any of the parties, or on its motion, think fit to make with a view to the most convenient arrangement for the trial of such suit.” (Underlining are mine)

E While now Order 10 rule 1(4) of the Federal High Court (Civil Procedure) Rules, 1999 which provides thus:

“All suits for specific performance, or upon the breach of any contract, shall be commenced and determined in the Judicial Division of the Court in which the contract is supposed to have been performed or in which the defendant resides or carries on substantial part of his business.”

Going by the rules of the Federal High Court at the time the action leading to this appeal was filed, all that was required to show was that the defendant resided or carried on business in the judicial division in which the action was instituted. With respect to learned counsel for the Defendants, I find *Egbo v. Lagama* (supra) and *Lanleyin v. Rufai* (supra) irrelevant to this case. And as *I. K. Martins (Nig.) Ltd. v. UPL* (supra) was decided on the rules of the High Court of Anambra State, it is equally inapplicable to the case on hand.

H However, it is not in dispute that the Defendants were resident in the United Kingdom and not in Nigeria. This is borne out by the fact that Plaintiff needed to apply to the trial court for leave to serve the

Defendants in the United Kingdom and an order to that effect was made. Going by Order VII rule 4, therefore, the Federal High Court would have no jurisdiction to entertain Plaintiff's suit in this case. If this action had been instituted under the 1999 Rules of Federal High Court, it would have been necessary to show that the contract between the parties was to be performed in Nigeria. As to where the contract was to be performed, the learned trial Judge found:

"It has been shown in the affidavit in support of the Motion on Notice that the Defendants belong to a group of foreign Companies engaged in Aviation business generally within and outside the United Kingdom and that they are owners of Banderait Aircraft Registration No. G-OHIG the subject matter of this suit. In January 1997, Captain Dayo Olubadewo the Managing Director of the Plaintiff signed a contract with ARISPAN AIR CHARTER MALABO in Equatorial Guinea for the purposes of supplying the said Company an Aircraft on Lease basis for carrying 18 passengers and or 1.5 tons of cargo. Thereafter Captain Olubadewo entered into a deal for leasing the Defendant's Aircraft Banderait Ello LP for six months at an agreed amount of money."

The Plaintiff has not challenged this finding. I would think that that finding is sufficient to conclude that the contract was to be performed in Equatorial Guinea. See also paragraph 11 of the aircraft lease agreement, which states:

"11. A returnable deposit of \$30,000.00 will be required prior to the commencement of the lease. Once this is in place, we can offer the aircraft for delivery to Equatorial Guinea for 12th Feb, 1997."

But the learned trial Judge did not stop at that finding. He went on to say:

"The Plaintiff is not contesting the fact that the Defendants do not reside or carry on business here. It is also not contesting the fact that the contract is not to be performed here. It is however, insisting that part of the cause of action arose here." (Underlining are mine)

If the Plaintiff is not contesting the fact that the contract "is not to be performed" in Nigeria, how then did part of the cause of action arise in Nigeria? The learned trial Judge found -

"It was agreed that the Aircraft shall be delivered to the Plaintiff in Kano, Nigeria on 12th February 1997 and the aircraft arrived in Kano, Nigeria on 12th February, 1997 and same was received by Captain

Olubadewo. After its receipt both Captain Olubadewo and some of the officials of the Plaintiff with the crew and Mr. Andy Green the Group Commercial Manager of the Defendant left Kano for Malabo.” This finding must have been based on paragraph 4(l)-(p) of the Plaintiff’s second affidavit quoted in the earlier part of this judgment.

B Had the learned trial Judge examined the Log documents annexed to the affidavit, he would have found that the aircraft flew from U.K. and made a stop-over in Kano, Nigeria to refuel and proceeded a few hours later on its journey to Malabo, Equatorial Guinea where it was to be used. The stop-over in Kano, Nigeria would not be sufficient, C in my respectful view, to give to the Nigerian court jurisdiction to entertain any action relating to the aircraft lease agreement between the parties. The lease contract was to be performed not in Kano, Nigeria but in Malabo, Equatorial Guinea. That is what is contained in the lease agreement upon which the Plaintiff sued. He did not D sue on a written agreement that was subsequently amended by an oral agreement.

It follows that none of the two factors to ground jurisdiction can be resolved in favour of the trial court. Nor can I find anything in Section 230 (as amended) or any other Section of the 1979 Constitution E that prescribed jurisdiction in the Federal High Court in the circumstances of this case. That court on the materials before it ought to have declined jurisdiction. And the court below was clearly in error when it held that there was no evidence upon which the issue of F the court’s jurisdiction could be determined. On the contrary, there was so much evidence supplied by the Plaintiff at the trial court to determine the issue. It was on the affidavit evidence given by the Plaintiff that the learned trial Judge made all his findings that I have highlighted above. What further evidence did the Court of Appeal require? I cannot fathom an answer to this question. Suffice it to say G that there was abundant evidence on the record upon which the issue of jurisdiction could be determined.

It is for the reasons I have given in this judgment that I agree with my learned brother, Onu, JSC., a preview of whose judgment I had ere now, that this appeal be allowed and it is allowed by me. I set aside the decision both of the court below (as regards the issue of jurisdiction) H and of the trial court. I hold that the trial court lacked jurisdiction to entertain Plaintiff’s suit before it. That suit is accordingly struck out

by me with costs as assessed by my learned brother, Onu, JSC.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Onu, JSC., with which I am in entire agreement. The contract in question was entered into in the United Kingdom to be performed in Equatorial Guinea. Surely the Nigerian courts have no jurisdiction over the dispute arising therefrom. For the reasons given by my learned brother, Onu, JSC., I too, would allow the appeal with N10,000.00 costs to the appellants.

TOBI JSC

The crux of this appeal is whether Nigerian courts have jurisdiction to hear a dispute over a contract which was entered into in the United Kingdom to be performed in Equatorial Guinea merely because the aircraft, the subject of the contract, was in transit through Nigeria to Equatorial Guinea.

The facts of the case are not complicated. On 3rd February, 1997, the Arjay Limited of 12 New Street, Guernsey, United Kingdom (the lessor), entered into an aircraft lease agreement (Exhibit PO2) with Airline Management Support Limited, P.O. Box 499 SK, Ikeja, Lagos, Nigeria (the lessee) as per the 17 conditions agreed to by the parties in the lease agreement.

After entering into Exhibit PO2, things fell apart and Airline Management Support Limited sued. The company asked for two reliefs based on breach of Exhibit PO2. The third relief was for cost of filing and prosecuting this action.

The aircraft arrived at Mallam Aminu Kano International Airport on 12th February 1997. On 14th February, 1997, a familiarization flight took place. After the flight, the Director of Litigation in the firm of Messrs. J. B. Majiyagbe and Co., Mr. Pius Okoko, in his affidavit in support deposed that the defects in paragraph 5 therein were discovered. As a result, the respondent brought a motion ex parte on 21st March, 1997 for an order of interim

injunction restraining the appellant from removing the aircraft out of the Mallam Aminu Kano International Airport. The motion was granted by Mustapha, J., sitting at the Federal High Court, Kano. It was after this that the respondent filed a writ asking for the three reliefs. The respondent also filed a motion for an order of interlocutory injunction.

The appellants entered appearance by counsel and objected to the jurisdiction of the court on the ground that the contract, the subject matter of the suit, was entered in the United Kingdom for performance in Equatorial Guinea and that Nigerian courts have no jurisdiction to hear the matter.

The learned trial Judge rejected the objection to jurisdiction. In his ruling of 14th April, 1997, he dismissed the objection and all other prayers of the appellant. He did not dismiss “the last prayer to which was added by amendment of the appellants motion and preliminary objection dated 4th of April, 1997 viz: that the aircraft be released upon provision of adequate security by the appellants.” The learned trial Judge said at page 175 of the Record:

“It must not be forgotten that the Defendants/Applicants were those who moved the Motion for the provisions of reasonable security as a condition for the release of the Aircraft. All the parties are agreed that whatever amount the court ordered to be deposited should be kept in an interest yielding account with a reputable Commercial bank in the joint names of the parties to this suit. The conversion of the \$100,000 into naira equivalent was the only way the deposit could be kept in an interest yielding account. The only alternative to that is to keep it with the Central Bank of Nigeria and that will not attract interest. Having failed to show that they were prejudiced by the Order, I am unable to grant prayer No. 1 on the Motion Paper.... In the final analysis I hold that prayer No. 1 on the Motion Paper must be refused and it is hereby refused.”

Dissatisfied with the Ruling, the appellants filed three appeals. They abandoned one. That was the second appeal. In its judgment delivered on 8th January, 2000, the Court of Appeal found and ordered that the US\$100,000 security converted to naira be reconverted to dollars. The court held that it could not decide on the issue of jurisdiction as there was no evidence before

it to decide on the issue. Delivering the leading judgment of the court, Omage, JCA., said at page 264 of the Record:

“The answer to appeal one of the appellant is no evidence is before the court upon which the court may determine its jurisdiction or lack of it. In the result, the appeal fails. It is dismissed.”

Dissatisfied with the decision of the Court of Appeal on jurisdiction, they filed an appeal. Briefs were filed and exchanged.

Appellants filed the following issue for determination:

“WHETHER THERE WAS MATERIAL UPON WHICH THE COURT OF APPEAL COULD DETERMINE THE ISSUE OF JURISDICTION.”

The respondent filed the following issue for determination:

“WHETHER HAVING REGARDS TO THE DOCUMENTS FILED AND CONFLICT IN THE AVERMENTS OF PARTIES AS FOUND, THE COURT OF APPEAL WAS RIGHT IN HOLDING THAT THERE IS NO EVIDENCE BEFORE THE COURT ON WHICH THE COURT CAN DETERMINE ISSUE OF JURISDICTION.”

The fulcrum of the submission of learned counsel for the appellants is that upon the evidence on the Record, jurisdiction can only be found in England or Equatorial Guinea and not in

Nigeria and that there was enough evidence for the Court of Appeal to hold that the Federal High Court has no jurisdiction to hear the matter. He dealt with the law of pleading, particularly in the context of Exhibit PO2; Section 131 of the Evidence Act and conflicting affidavit evidence. Counsel referred us to *Egbo v. Lagama* (1988) 3 NWLR (Pt.80) 109 at 126-127; *I.K. Martins Nig. Limited v. UPL* (1992) 1 NWLR (Pt.217) 322 at 331; *Lanleyin v. Rufai* (1959) 4 FSC 184; *Mbonu v. Nwoti* (1991) 7 NWLR (Pt.206) 748; *Doma v. Ogiri* (1997)1 NWLR (Pt.481) 322; *Balogun v. Wema Bank Plc* (2000) 4 NWLR (Pt.654) 652 at 659; *Momah v. Vab Petroleum Inc.* (2000) 2 S.C. 142; (2000) 4 NWLR (Pt. 654) 534 and *Falobi v. Falobi* (1976) 9-10 S.C. 1.

On the other hand, the thrust of the submission of learned counsel for the respondent is that the Court of Appeal was perfectly right in holding that there was no evidence before the court on which the issue of jurisdiction or lack of it could be determined. He cited Order XXVII of the Federal High Court Rules, Cap. 134,

Laws of the Federation of Nigeria, 1990 and the following cases: Madukolu v. Nkemdilim (1962) 1 All NLR 587; Mbonu v. Nwoti (supra); Saeby v. Olaogun (1999) 10-12 S.C. 46 at 55; Carlen Nig. Limited v. University of Jos (1994) 1 SCNJ 72 at 82-83 and Unipetrol Nigeria Ltd. v. Prima Tankers Limited (1986) 5 NWLR (Pt.42) 532. Counsel submitted that the case of Balogun v. Wema Bank Plc. (supra) cited by the was cited out of context as the case has no relevance whatsoever to the case on appeal.

It is elementary law that where parties have entered into a contract or an agreement, they are bound by the provisions of the contract or agreement. This is because a party cannot ordinarily resile from a contract or agreement just because he later found that the conditions of the contract or agreement are not favourable to him. This is the whole essence of the doctrine of sanctity of contract or agreement. The court is bound to construe the terms of the contract or agreement and the terms only in the event of an action arising therefrom. See Northern Assurance Co. Ltd. v. Wuraola (1969) NSCC 22; Aouad v. Kessrawani (1956) NSCC 33; Oduye v. Nigeria Airways Limited (1987) 2 NWLR (Pt.55) 126; Niger Dams Authority v. Chief Lajide (1973) 5 S.C. 207; Bookshop House v. Stanley Consultants (1986) 3 NWLR (Pt.26) 87.

Exhibit PO2 is the aircraft lease agreement which was signed by Arjay Limited and Airline Management Service Limited, the lessor and the lessee, respectively. Paragraph 12 of Exhibit

PO2 reads in part:

“The above lease will start and finish at Southend Airport, Essex UK.”

My understanding of paragraph 12 is that Exhibit PO2 will commence and end at Essex in the United Kingdom. This means that Exhibit PO2 which resulted in the aircraft, commencing its journey to Malabo, Equatorial Guinea via Kano, Nigeria, must end in Essex. I ask: where is the Nigerian element in Exhibit PO2 to justify jurisdiction of a Nigerian court? I do not see any and there is none.

In a breach of contract or agreement, and in the absence of any specific provisions contained therein, the court’s focus should be either the *lex loci contractus* (the place the contract was entered into) or the *lex loci solutionis* (the place of performance).

Fortunately, Exhibit PO2 provides for both. While the *lex loci contractus* in Exhibit PO2 is United Kingdom, the *lex loci solutionis* is, by paragraph 11 of the exhibit, Equatorial Guinea. I say this because paragraph 11 provides that “A returnable deposit of \$30,000.00 will be required prior to the commencement of the lease. Once this is in place, we can offer the aircraft for delivery to Equatorial Guinea for 12th February, 1997.” I ask again: where is the Nigerian content in Exhibit PO2? Why should the trial Judge assume jurisdiction in the matter? B

Courts of law should not be hungry or thirsty for jurisdiction. The Constitution and the statute setting up to the courts have vested enough jurisdiction on them and they need not go outside the enabling laws in search for jurisdiction. Jurisdiction is a hard matter of law which is donated by the Constitution and the statute establishing the court. Where a trial Judge goes on an unguarded journey in search for jurisdiction, appellate courts will call him to order. This is one such occasion or situation. C D

Was the Court of Appeal right when it held that there was not enough evidence before the trial court to enable it deal with the issue of jurisdiction? I think I have answered that question indirectly. I should, perhaps, answer the question directly and it is that there was enough evidence before the trial court to enable the Court of Appeal take decision one way or the other on the jurisdiction of that court. E F

This court will not send the matter to the Court of Appeal to take a decision on the issue of jurisdiction of the Federal High Court, Kano. I think I can invoke Section 22 of the Supreme Court Act. I have indicated above the evidence available in the High Court. It is for the above reasons and the fuller reasons given by my learned brother, Onu, JSC., in his judgment that I allow the appeal. I award N10,000.00 as costs in favour of the appellants. G H

B

C

D

E

F

G

H