

COURT OF APPEAL
IBADAN DIVISION
21ST MAY, 2004. CA/I/M.242/2002
CORAM:- S. A. IBIYEYE, V. A. O. OMAGE,
O. O. ADEKEYE, JJCA

MEDIA TECHNIQUES NIGERIA LIMITED APPELLANT
AND
ALHAJI LAM ADESINA RESPONDENT

RULES OF COURT - Non compliance - Technicalities - Oyo State HCR
O. 2 r. 1 - Where plaintiff's place of abode - Was not inserted in the Writ
of Summons - It will be overlooked - As no miscarriage of justice was
occasioned thereby (H1)

LEGAL PRACTITIONERS - Inadvertence - Writ of summons - Failure
of counsel to endorse it - Should not be visited on his client - Unto
nullification of the Writ (H2)

ACTIONS - Amendment - Courts - Relief not sought - Writ of Summons
- Where the omission therein is a mere irregularity - Trial Court's suo
motu grant of an amendment - Did not occasion miscarriage of justice
(H3)

ACTIONS - Immunity and disability - Governors - Constitution 1999, s.
308 - Whereas the respondent Governor - Has immunity from being
sued personally - He is not disabled from suing any person (H4)

LEGISLATION - Actions - Courts - Immunity - Fair hearing - Constitu-
tion 1999 s. 308(1) - That granted immunity from being sued personally
to Governors - Without disabling them from suing another - Can only be
amended by the legislature not court - And it is not an issue of fair hear-
ing (H5)

FACTS

This appeal emanated from the ruling of Sanda J. of the Ibadan High Court of Justice. The defendant/appellant raised a preliminary objection as to the validity of the plaintiff's/respondent's writ of summons. This was because the said writ, contrary to the provision of High Court of Oyo State (Civil Procedure) Rules, did not have the plaintiff's place of abode endorsed thereon. The plaintiff had inter alia, claimed the sum of N100 million naira against the defendant as damages for libel published by the defendant on page 20 in the City People Magazine issue of 10th October, 2001.

In his ruling, the trial Judge considered the omission of place of abode to be a mere irregularity and ordered counsel for the plaintiff to amend the writ of summons to bear it. In this appeal, defendant contended that the trial court wrongful granted to plaintiff a relief he never prayed for. He also sought to establish that since plaintiff, as Governor of Oyo State has constitutional immunity from being sued in his personal capacity, he should be disabled from suing any other person.

ISSUES FOR DETERMINATION

"A. Whether it is proper for the learned Judge to grant the plaintiff a relief that was not sought by the plaintiff.

B. Whether the default of a condition precedent to the issuance of a writ of summons can be treated as an irregularity that is correctable at the instance of the learned Judge.

C. Whether in the light of S.308 (1)(d) of the Constitution of the Federal Republic of Nigeria 1999 together with the available jurisprudence in that behalf, it is proper for the learned Judge to have held that the plaintiff can maintain an action against the defendant in circumstances as to making consequential compellable orders against the plaintiff."

HELD (Unanimously dismissing the appeal per **IBIYEE JCA**)

RULES OF COURT - Non compliance - Technicalities

1. What is of moment in this issue is the effect of non-compliance with the Rules of court as regards the writ of summons. Order 2 rule 1 of the Rules

is pertinent and it reads:

“1(i) Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceedings there has, by reason of anything done or left undone, been a failure to comply with the requirement of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and *if so treated, will not nullify the proceedings or any document, judgment or order therein.* “ (italics mine for emphasis).

The purport of this provision is that any irregularity such as the one complained of by the appellant will be treated as an irregularity (and it will not affect the validity of the document which in this case is the writ of summons. I agree with the several submissions of the learned counsel for the respondent that the objection in point goes to technicality for which the courts tend to shift away from and instead consider doing substantial justice. It is not in doubt that the insertion of the plaintiff’s residence or place of abode is a requirement of Order 5(2) of the Rules. Failure to insert it, in the instant case, where sufficient description of the plaintiff’s abode is averred in the statement of claim, could be overlooked as a situation which will not occasion miscarriage of justice. (p. 2673 B)

Writ of summons - Failure of counsel to endorse it

2. Such inadvertence will also not nullify the document, that is to say the writ of summons. See *Order 2 rule (1) of the Rules (supra)*. It is apparent from the endorsement on the writ of summons that the vexed insertion as regards place of abode was made by the plaintiff’s solicitors. This inadvertence is therefore more of the solicitors’ commission for which the respondent should be free from blame. It is now settled that the sins of counsel should hardly be visited on their clients. I therefore resolve issue 1 against the appellant. (p. 2673 H)

ACTIONS - Amendment - Courts - Relief not sought

3. Issue 2 is on amendment of the writ of summons which is properly raised by the appellant as a relief not sought by the respondent. I am of the strong view that since the law is settled that non-compliance with the rules

of court as regards contents of a writ of summons could be treated as an irregularity which will not nullify it, effecting an amendment suo motu by the learned Judge will not occasion any miscarriage of justice. Such an amendment, though not sought by the respondent, will no doubt augur well in the pursuit of substantial justice for which the court now lays much emphasis. Issue 2 is accordingly resolved against the appellant.
(p. 2674 B)

ACTIONS - Immunity and disability - Governors

4. The most recent authority on the interpretation on the foregoing provisions has been eloquently stated and unanimously endorsed by other Hon. Justices of the Supreme Court at pages 721 - 722 in the case of *Tinubu v. IMB Securities Ltd. (supra)* by Ayoola, JSC who stated as follows:

“Thirdly, I am unable to construe a provision of the Constitution that granted an immunity such as section 308(1) as also constituting a disability on the person granted immunity when there is no provision to that effect, either expressly or by necessary implication in the enactment. If the makers of the Constitution had wanted to prohibit a person holding the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier to provide expressly that:

‘no civil or criminal proceeding shall be instituted against any person by a person to whom this section applies during his period of office and no civil or criminal proceedings shall be instituted or continued against such person during his period in office.’

Or in like terms. The makers of the Constitution in their wisdom did not so provide.”

The foregoing unanimous opinion of the Hon. Justices of the Supreme Court, has, in my view, provided aptly an answer to issue 3. I am guided by it and I unhesitatingly agree with the submission of the learned counsel for the respondent that the respondent is shielded from being prosecuted either civilly or criminally while still occupying the office of Governor but that respondent, as Governor, could institute action

against any other person or persons in his personal capacity. The operative word in section 308(1) (a) of the 1999 Constitution is “*against*” which provides a shield or immunity for any incumbent Governor amongst other persons therein specified. (p. 2676 B)

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LEGISLATION - Actions - Courts - Immunity

5. The argument of the learned counsel for the appellant questioning the wisdom or the justification of the provision in sub- section (1)(a) is outside the province of this court or any other court to express any contrary opinion in view of the simple and unambiguous language in which the seemingly vexed provision is set out. Courts have a bounden duty to interpret, inter alia, the law or laws and not to amend or substitute provisions which they consider unwise or improper. This is an area which is within the exclusive competence of the legislature. The lower court has given ordinary literal meaning to section 308(1) (a) of the 1999 Constitution and I am not prepared to fault it.

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D

I shall cursorily remark based on the argument of the learned counsel for the appellant, that the principle or concept of fair hearing cannot find any place in the interpretation of section 308 of the 1999 Constitution. This is because “*fair hearing*” connotes that hearing has begun in the matter whereas section 308(1) of the Constitution deals with initiation or continuation of action whether civil or criminal against the person of Governor, among other persons mentioned in the provision. In these circumstances I resolve Issue 3 against the appellant. (p. 2677 A)

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REPRESENTATION

O. O. Oshinsanya Esq. for the Appellant

Akin Ige Esq. (with him, O. Idowu Esq.) for the Respondent

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CASES REFERRED TO

Chinwendu v. Mbamali & Anor (supra) at 81

Consortium M. C v. NEPA (1992) 6 NWLR (Pt. 246) 132 at 142

City Engineering Ltd. v. N.A.A. (2001) FWLR (Pt. 34) 499 at 513-514

Agencies in Service Ltd. v. Metalum Ltd. (1991) 3 NWLR (Pt. 177) 35

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2670 Media Tech. (Nig.) Ltd. v. Adesina (2005) 10 KLR Ibiyeye JCA

Rotimi v. Macgregor (1974) 11 SC 133

Onabanjo v. Concord Press of Nigeria Ltd. (1981) 2 NCLR 399

Aku v. Plateau Publishing Corporation Ltd. (1985) 6 NCLR 338; (1985) All NLR 338

B Tinubu v. I.M.B. Securities Ltd. (2001) 8 NWLR (Pt. 714) 192 at 197

I.C.S. (Nig.) Ltd. v. Balton B. V. (2003) 8 NWLR (Pt. 822) 223

Ibrahim v. Judicial Service Commission & Ors. (2002) FWLR (Pt. 120) 1743 at 1755 at 1756

C **STATUTE & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, ss. 36(1), 308(1) (a) & (b), (2) and (3)

High Court of Oyo State (Civil Procedure) Rules, 1988, O. 1, r. 2, O. 2,

D rr. 1(2) - (5)

LEAD JUDGMENT BY IBIYEYE JCA

This is an appeal from the ruling of Sanda, J. of the High Court of Justice sitting in Ibadan Judicial Division delivered on the 1st day of August, 2002.

The ruling is sequel to the preliminary objection raised by the defendant as to the validity of the writ of summons of the plaintiff on the non-inclusion of the place of abode of the plaintiff on the endorsement on the said writ of summons and the legality of the plaintiff's writ of summons in maintaining an action against the defendant while he was the Executive Governor of Oyo State. On 29th November, 2001 when the action in point was initiated. The endorsement on the writ of summons filed by the plaintiff reads:

"The plaintiff claims against the defendant as follows:

(i) *The sum of One hundred million naira as damages for libel published by the defendant on page 20 in the City People Magazine issue of 10th October, 2001 and concerning the plaintiff under the headline "Aide swindles Gov. Lam Adesina".*

(ii) *An injunction restraining the defendant whether by itself, its servants or agents or otherwise from further publishing or causing to be*

published the said or similar words defamatory of the plaintiff.”

This endorsement is in *pari materia* with the reliefs set out in paragraph 8 of the statement of claim filed on the same day as the writ of summons.

Argument of counsel on preliminary objection and the objection to B
it were canvassed on the 1st day of August, 2002 and the learned Judge delivered his ruling immediately afterwards. He held, *inter alia*

*“In the totality, the objection of the defendant/applicant is over-
ruled. The plaintiff in person of the Governor of Oyo State, Hon. Lamidi C
Adesina is competent to institute the action which is now to go to trial...”*

As regards the non-inclusion of the plaintiff’s place of abode on the
“ endorsement on the writ of summons, the learned Judge held:

*“I think this is a mere irregularity which the law permits him to
amend on payment and costs. I now order the learned counsel for the D
plaintiff amends (sic) that space provided for the place of abode of the
plaintiff with N1,000.00 cost.”*

The defendant was dissatisfied with the ruling and filed a notice of
appeal containing three grounds. E

The defendant now appellant distilled the following issues from the
grounds of appeal for the determination of this appeal:

*“A. Whether it is proper for the learned Judge to grant the plaintiff
a relief that was not sought by the plaintiff. F*

*B. Whether the default of a condition precedent to the issuance of
a writ of summons can be treated as an irregularity that is correctable at
the instance of the learned Judge.*

*C. Whether in the light of S.308(1)(d) of the Constitution of the
Federal Republic of Nigeria 1999 together with the available jurispru- G
dence in that behalf, it is proper for the learned Judge to have held that
the plaintiff can maintain an action against the defendant in circum-
stances as to making consequential compellable orders against the
plaintiff.” H*

The plaintiff now the respondent identified the following issues for
the determination of the appeal:

“(1) Whether the trial Judge was right in treating the failure on, to

insert the place of abode of the respondent in the endorsements to the writ a mere irregularity insufficient to vitiate the writ in its entirety. (2) Whether the trial Judge was right in directing that the exact place of abode of the respondent be inserted in the space provided on the writ of summons.

B (3) *Whether the respondent being the Governor of Oyo State can institute and maintain his action for defamation against the appellant.”*

The appellant also filed a reply brief of argument in reply to issues raised in the respondent’s brief of argument.

C At the hearing of this appeal the learned counsel for parties adopted and relied on their separate briefs of argument with some amplification.

It is pertinent, to note that the issues raised by the respondent have striking similarity with those of the appellant. Since the burden is on the appellant to sustain the appeal, I shall adopt the issues raised by it in its brief
D of argument for the determination of the appeal. On Issue 1, the learned counsel for the appellant contended that the learned counsel for the respondent having conceded that the want of inserting the respondent’s place of abode in the endorsement on the writ of summons is an irregularity
E failed to seek leave of court to amend it. The learned Judge instead granted the respondent leave to amend the error without being sought. He argued that that approach by the learned Judge was contrary to the rule that a court cannot grant a relief not sought or even go beyond the relief sought and
F cited in support the cases of *Egbarevba v. Mrs. Oruonghae* (2002) FWLR (Pt. 128) 1328 at 1353 and *Ndulue v. Ibezim & Anor.* (2002) 12 NWLR (Pt. 780) 139; (2002) FWLR (Pt. 110) 1951 at 1968.

In response, the learned counsel for the respondent submitted that the appellant’s contention was incorrect. He argued that the validity of
G a writ of summons is regulated by Orders 1, 2(1) and 5 of the High Court (Civil Procedure) Rules, 1988 (hereinafter referred to as the Rules). He particularly referred to Order 2 rule 1 of the Rules on non-compliance which shall be treated as irregularity which will not nullify the proceedings,
H document, judgment or order thereon. He referred to a number of authorities on the court’s present stance of shifting from technicalities to doing substantial justice to the parties. See *Chinwendu v. Mbamali & Anor.* (1980) 3 - 4 SC 31 at 81; *Egolum v. Obasanjo & 4 Ors.* (1999) 7 NWLR

(Pt. 611) 355; (1999) 5 SC (Pt. 1) and Bello v. A.-G Oyo State (1986) 6 NWLR (Pt. 45) 828. He further contended in respect of non-compliance that infraction of the rules of court could routinely be overlooked and waved in appropriate cases where no miscarriage of justice is occasioned whereas it is not so with any infraction of any statutory provisions because it affects the competence of the entire proceedings and even the jurisdiction of the court.

What is of moment in this issue is the effect of non-compliance with the Rules of court as regards the writ of summons. Order 2 rule 1 of the Rules is pertinent and it reads:

“1(i) Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceedings there has, by reason of anything done or left undone, been a failure to comply with the requirement of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and *if so treated, will not nullify the proceedings or any document, judgment or order therein.*” (italics mine for emphasis).

The purport of this provision is that any irregularity such as the one complained of by the appellant will be treated as an irregularity (and it will not affect the validity of the document which in this case is the writ of summons. I agree with the several submissions of the learned counsel for the respondent that the objection in point goes to technicality for which the courts tend to shift away from and instead consider doing substantial justice. See Chinwendu v. Mbamali & Anor (supra) at 81; Egolum v. Obasanjo (supra) and Consortium M. C v. NEPA (1992) 6 NWLR (Pt. 246) 132 at 142. It is not in doubt that the insertion of the plaintiff’s residence or place of abode is a requirement of Order 5(2) of the Rules. Failure to insert it, in the instant case, where sufficient description of the plaintiff’s abode is averred in the statement of claim, could be overlooked as a situation which will not occasion miscarriage of justice. See *City Engineering Ltd. v. N.A.A.* (2001) FWLR (Pt. 34) 499 at 513-514. Such inadvertence will also not nullify the document, that is to say the writ

of summons. See *Order 2 rule (1) of the Rules (supra)*. It is apparent from the endorsement on the writ of summons that the vexed insertion as regards place of abode was made by the plaintiff's solicitors. This inadvertence is therefore more of the solicitors' commission for which the respondent should be free from blame. It is now settled that the sins of counsel should hardly be visited on their clients. See *Agencies in Service Ltd. v. Metalum Ltd. (1991) 3 NWLR (Pt. 177) 35*. I therefore resolve issue 1 against the appellant.

Issue 2 is on amendment of the writ of summons which is properly raised by the appellant as a relief not sought by the respondent. I am of the strong view that since the law is settled that non-compliance with the rules of court as regards contents of a writ of summons could be treated as an irregularity which will not nullify it, effecting an amendment suo motu by the learned Judge will not occasion any miscarriage of justice. Such an amendment, though not sought by the respondent, will no doubt augur well in the pursuit of substantial justice for which the court now lays much emphasis. Issue 2 is accordingly resolved against the appellant.

Issue 3 deals with whether or not the respondent being the incumbent Governor of Oyo State at the time of instituting this action in the lower court can rightly do so. The learned counsel for the appellant made copious submission on this issue.

The focal area of his submissions is section 308 of the 1999 Constitution which renders the person of the Governor inviolable by court processes. He argued that there is no suggestion that the Governor who enjoys immunity can institute action against him. He relied on the case of *Tinubu v. I.M.B. Securities Plc. (2001) 8 NWLR (Pt. 714) 192; (2001) FWLR (Pt. 77) 1003 at 1028 and 1044*. Learned counsel argued that the interpretation of the 1999 Constitution that would serve its interest and best carry out its objects and purposes should be preferred. Furthermore, the relevant provisions of the Constitution should be read together and not disjointedly and that where words of any sections are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution and he

relied on the case of Ibrahim v. Judicial Service Commission & Ors. (2002) FWLR (Pt. 120) 1743 at 1755 at 1756.

Learned counsel submitted that the fundamental right of fair hearing enshrined in section 36(1) of the Constitution is incompatible with the notion that person enjoying immunity can set in motion what the defendant has no right to continue within the proper sense of the exercise of adjudicational authority. B

In reply, the learned counsel for the respondent submitted that issue 3 flies in the face of a long line of authorities which clearly establish that a serving Governor is immune from proceedings against him in his private capacity while in office whereas there are no restraints preventing him from instituting suits of his own and cited in support these cases: Rotimi v. Macgregor (1974) 11 SC 133; Onabanjo v. Concord Press of Nigeria Ltd. (1981) 2 NCLR 399; Aku v. Plateau Publishing Corporation Ltd. D (1985) 6 NCLR 338; (1985) All NLR 338 and Tinubu v. I.M.B. Securities Ltd. (2001) 8 NWLR (Pt. 714) 192 at 197. He further submitted that there is no provision either in the 1999 Constitution or any statute which takes away the right of a serving Governor to sue in respect of any wrong while retaining the immunity conferred on the incumbent by section 308(1) of the 1999 Constitution. He therefore urged the court to resolve issue 3 in favour of the respondent as there is no authority be it case law or statutorily flavoured which prohibits a serving Governor from instituting any action in a personal capacity while he is in office as Governor. E
F

Issue 3 revolves on the interpretation accorded to section 308 of the 1999 Constitution. Section 308 of the 1999 Constitution with particular reference to sub-sections (1)(a), (2) and (3) which read:

“308(1) Notwithstanding anything to the contrary in this Constitution but subject to sub-section (2) of this section. G

(a) *no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies, during his period of office*

(2) *The provisions of sub-section (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.* H

(3) This section applies to a person holding the office of President or Vice-President, Governor or Deputy Governor and the reference in this section to period of office is a reference to the period during which the person holding such office is required to perform the function of the office.” (italics mine for emphasis)

The most recent authority on the interpretation on the foregoing provisions has been eloquently stated and unanimously endorsed by other Hon. Justices of the Supreme Court at pages 721 - 722 in the case of Tinubu v. IMB Securities Ltd. (supra) by Ayoola, JSC who stated as follows:

“Thirdly, I am unable to construe a provision of the Constitution that granted an immunity such as section 308(1) as also constituting a disability on the person granted immunity when there is no provision to that effect, either expressly or by necessary implication in the enactment. If the makers of the Constitution had wanted to prohibit a person holding the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier to provide expressly that:

‘no civil or criminal proceeding shall be instituted against any person by a person to whom this section applies during his period of office and no civil or criminal proceedings shall be instituted or continued against such person during his period in office.’

or in like terms. The makers of the Constitution in their wisdom did not so provide.”

The foregoing unanimous opinion of the Hon. Justices of the Supreme Court, has, in my view, provided aptly an answer to issue 3. I am guided by it and I unhesitatingly agree with the submission of the learned counsel for the respondent that the respondent is shielded from being prosecuted either civilly or criminally while still occupying the office of Governor but that respondent, as Governor, could institute action against any other person or persons in his personal capacity. The operative word in section 308(1) (a) of the 1999 Constitution is “against” which provides a shield or immunity for any incumbent Governor amongst other persons therein speci-

fied. The argument of the learned counsel for the appellant questioning the wisdom or the justification of the provision in subsection (1)(a) is outside the province of this court or any other court to express any contrary opinion in view of the simple and unambiguous language in which the seemingly vexed provision is set out. **Courts have a bounden duty to interpret, inter alia, the law or laws and not to amend or substitute provisions which they consider unwise or improper. This is an area which is within the exclusive competence of the legislature. The lower court has given ordinary literal meaning to section 308(1) (a) of the 1999 Constitution and I am not prepared to fault it.**

I shall cursorily remark based on the argument of the learned counsel for the appellant, that the principle or concept of fair hearing cannot find any place in the interpretation of section 308 of the 1999 Constitution. This is because “fair hearing” connotes that hearing has begun in the matter whereas section 308(1) of the Constitution deals with initiation or continuation of action whether civil or criminal against the person of Governor, among other persons mentioned in the provision. In these circumstances I resolve Issue 3 against the appellant.

In the final analysis, I hold that the appeal is devoid of merit and it is dismissed. Suit No. 1/1151/2002 in the case between Alhaji Lam Adesina v. Media Techniques Nigeria Limited was properly instituted and should proceed to hearing until finally determined in Ibadan Judicial Division of the Oyo State High Court of Justice. I award costs of N5,000.00 to the respondent.

OMAGEJCA

I have read the lead judgment of my learned brother, Ibiyeye, J.C.A. I agree that the appeal in the issues formulated by the appellant is founded on undue technicality which the court below has jurisdiction to resolve. The appeal is therefore devoid of merit, and it is dismissed. I agree that the trial be proceeded within the court below. The appeal is dismissed. I abide by consequential order for costs.

ADEKEYEJCA

I had read before now the judgment just delivered by my learned brother, S. A. Ibiyeye, JCA. I hold that the most important issue in the preliminary objection raised by the defendant as to the validity of the writ of summons filed by the plaintiff - is the competence of the plaintiff's writ of summons in maintaining an action against the defendant - while he was the Executive Governor of Oyo State as at the 29th of November, 2001. The issue is whether Oyo State Governor can maintain his action for defamation against the appellant by virtue of section 308(1) (d) of the Constitution of the Federal Republic of Nigeria, 1999.

Section 308 of the 1999 Constitution prescribes an absolute prohibition on the courts from entertaining any proceedings, civil or criminal, in respect of any claim or relief against a person to whom that section of the Constitution holds office. No question of waiver of the relevant immunity by the incumbent of the office concerned or indeed by the courts may therefore arise. The relevant section defines the persons to whom it applies as the holders of the offices of the President, Vice President, the Governor or the Deputy Governor.

Tinubu v. I.M.B. Securities Plc. (2001) 8 NWLR (Pt. 714) 192; (2001) 16 WLR (Pt. 740) 670; I.C.S. (Nig.) Ltd. v Balton B. V. (2003) 8 NWLR (Pt. 822) 223.

On the other hand, the respondent as Governor could institute an action against any other person in his personal capacity. The relevant sections cover proceedings at the High Court, and at the appellate courts.

This appeal therefore lacks merit, it is dismissed. Suit No. 1/1151/2002 between Alhaji Lam Adesina v. Media Techniques Nigeria 3 Ltd., shall proceed to hearing until finally determined before the Oyo State High Court of Justice - Ibadan Judicial Division. I abide the order made as to costs.

Appeal dismissed