

SUPREME COURT OF NIGERIA

5TH MAY, 2006. SC. 240/2001

**CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, I. C. PATS-
ACHOLONU, S.A. AKINTAN, A. M. MUKHTAR, JJSC**

ALHAJI IBRAHIM ABDULHAMID APPLICANT/APPELLANT
AND

1. TALALAKAR

2. MAJOR G. OFOCHIE RESPONDENTS/RESPONDENTS

ACTIONS - Competence - Jurisdiction - Reliefs claimed - Sole reference to its nature - Is what determines jurisdiction - And competence of the action (H1)

ACTIONS - Torts - Procedure for filing claims - Where the principal claims are tortious - Writ of summons is proper - Not Fundamental Rights Procedure (H2)

PRACTICE & PROCEDURE - Actions - Competence - Commencement - Common law claims - Where initiated vide Fundamental Rights Procedure - It is a fundamental breach - That makes the claims incompetent (H3)

FACTS

Before the Kano High Court the applicant/appellant instituted an action against the respondents under the Fundamental Rights (Enforcement Procedure) Rules, 1979. Applicant alleged that he was indebted to the 1st respondent who employed the unlawful services of the 2nd respondent, and other military officers in seeking to recover the debt vide intimidating letters, harassment/imprisonment, seizure of applicant's cars, etc. The reliefs sought were to restrain the respondents from subjecting the applicant and members of his family to degrading treatment, release of his vehicle that was seized forcefully, N1 million compensation for several harassments and loss of business goodwill/prosperity.

At the conclusion of hearing the trial court found in favour of the applicant, granted all the reliefs save that it reduced the damages to N250,000.00. Respondents appealed while the applicant cross appealed to the Court of Appeal which allowed respondents' appeal and dismissed applicant's cross appeal. Being aggrieved applicant has further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

“1. Whether the Court of Appeal was right in its conclusion that the reliefs sought by the appellant (applicant) were not maintainable or could not be sought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.

2. Whether the competency of the appellant's (applicant) action under the Fundamental Rights (Enforcement Procedure) Rules, 1979 can be determined solely by reference to the nature of the reliefs being sought by the appellant as done by the Court of Appeal in this case without reference to the processes filed at the trial court.”

HELD (Unanimously dismissing the appeal per KUTIGI JSC)

ACTIONS - Competence - Jurisdiction

1. Issue (2) relates to the competency of the applicant's action and whether or not its competence could have been determined by reference solely to the nature of the reliefs or claims sought as was done by the Court of Appeal. The answer to me is simply 'yes' in the affirmative. The Court of Appeal was right to have considered the reliefs or claims only, and without reference to any other thing. It is settled and a fundamental principle that jurisdiction is determined by the plaintiff's claim or relief. In other words, it is the claim before the court that has to be looked at or examined to ascertain whether or not it comes within the jurisdiction conferred on the court. (p. 1563 C)

ACTIONS - Torts - Procedure for filing claims

2. Thus, there is no doubt that the learned trial Judge himself realized that the reliefs sought by the applicant are tortious in nature. In other words, these are common law reliefs. These could only have been claimed strictly

by following the common law procedure by issuing a writ of summons and filing pleadings thereof.

Now, the Court of Appeal in its judgment as earlier stated, concluded that none of the reliefs sought by the applicant touched upon the violation of fundamental rights and consequently the action under the Fundamental Rights (Enforcement Procedure) Rules is wrong and incompetent. The claims were then struck-out. So both the High Court and the Court of Appeal in effect found the reliefs to be tortious in nature. Needless to say that in the instant case, the tortious claims are the principal claims even if there existed some fundamental rights infringement as found by the trial Judge. And that being the case, the Court of Appeal would have been entitled to hold that a wrong procedure has been adopted under the Fundamental Rights (Enforcement Procedure) Rules, instead of by the issuance of a Writ of Summons. (p. 1564 G)

Common law claims - Procedure for initiating

3. I have no doubt at all that a claim under the common law can properly be joined in an application under Section 42 of the 1979 Constitution, where such a claim is secondary, ancillary or incidental to the complaint of a breach of fundamental right. In the instant case, the claims as found by both the High Court and the Court of Appeal were common law claims or reliefs which were wrongly brought under the Fundamental Rights (Enforcement Procedure) Rules instead of by Writ of Summons. This is a fundamental breach and not a mere technicality which can be waived or ignored. One of the indices of jurisdiction as laid down in *Madukolu v. Nkemdilim* (1962) All NLR (part 2) 581 at 589, is that the action is initiated by due process of law, which in this case is by Writ of Summons. That is lacking here.

The trial High Court clearly has the jurisdiction to determine all the issues in this case but a proper procedure must be followed. The Court of Appeal was therefore properly guided and came to the correct conclusion. Issue (1) also fails. (p. 1565 E)

NOTABLE POINTS OF INTEREST

AKINTAN.JSC

1. Individuals that breach fundamental rights of another

The position of the law is that where fundamental rights are invaded not
 B by government agencies but by ordinary individuals, as in the instant
 case, such victims have rights against the individual perpetrators of the
 acts as they would have done against state actions. It follows therefore
 that in the absence of clear positive prohibition which precludes an indi-
 C vidual to assert a violation or invasion of his fundamental right against
 another individual, a victim of such invasion can also maintain a similar
 action in a court of law against another individual for his act that had
 occasioned wrong or damage to him or his property in the same way as
 an action he could maintain against the state for a similar infraction: See
 D Onwo v. Oko & Ors. (1996) 6 NWLR (Pt. 456) 584, at 603; and Ogugu
 v. The State (1994) 9 NWLR (Pt. 366) 1. The position of the law there-
 fore is that the provision of Section 44(1) of the 1979 Constitution (which
 is also re-enacted in the 1999 Constitution) for the enforcement of the
 E fundamental rights enshrined in Chapter IV of the Constitution is permis-
 sible and does not constitute a monopoly for the enforcement of those
 rights. The aim of the section, according to Bello, CJN., in Ogugu v. The
 State, supra, is to provide a simple and effective judicial process for the
 F enforcement of fundamental rights in order to avoid the cumbersome
 procedure and technicalities for their enforcement under the rules of the
 common law or other statutory provisions.

I believe therefore that a victim of any of the infractions of the
 G fundamental rights preserved in Chapter IV of the Constitution has a
 discretion either to pursue his remedies under the Fundamental Rights
 (Enforcement Procedure) Rules 1979 or commence his action as pro-
 vided under the various rules of court or in accordance with any of the
 common law or statute or rules of courts. (p. 1568 E)

H

2. When a claim can be enforced vide fundamental rights procedure

The next question to be resolved is whether the appellant's claim comes
 within the type that is enforceable as an infraction of fundamental right.

The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief sought is for the enforcement or for securing the enforcement of a fundamental right and not, from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not ipso facto a claim for the enforcement of fundamental right. Thus, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right. (p. 1569 D)

REPRESENTATION

Abdulwahab Bamidele, Esq., for Applicant/Appellant.

Vivian Bosah, (Miss), for Respondents.

CASES REFERRED TO

Tukur v. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549
Sea Trucks (Nig) Ltd. v. Anigboro (2001) 1 S.C. (Pt. I) 45; (2001) 2 E
NWLR (Pt. 696) 159

Onwo v. Oko & Ors. (1996) 6 NWLR (Pt. 456) 584, at 603

Ogugu v. The State (1994) 9 NWLR (Pt. 366) 1

Minister of Internal Affairs & Ors. v. Darman (1982) 3 NCLR 15

B.R.T.C. v. Egbuonu (1991) 2 NWLR (Pt. 171) 81

Tukur v. Government of Gongola State (1989) 9 S.C. 1; (1989) 4 NWLR
(pt. 117) 517

Anigboro v. Sea Trucks Nigeria Ltd. (1998) 1 HRLRA 291; but see (2001)
1 S.C. (Pt. I) 45

Kokoro-Owo & Ors. v. Lagos State Government & Ors. (1988) 1 HRLRA
322

Western Steel Works v. Iron & Steel Workers (1987) 1 NWLR (Pt. 49)
284

Adeyemi v. Opeyori (1976) 9-10 S.C. (Reprint) 18; (1976) 9-10 S.C.
311

A-G of Bendel State v. Aideyan (1989) 9 S.C. 127; (1989) 4 NWLR (Pt.

118) 646 at 674

Aqua Limited v. Ondo State Sports Council (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91)

B LEAD JUDGMENT BY KUTIGI JSC

The proceedings which gave rise to this appeal commenced at the Kano State High Court, holden at Kano, where the applicant instituted an action under the Fundamental Rights (Enforcement Procedure) Rules, 1979 against the respondents after obtaining leave of court to do so. The reliefs sought by the applicant against the respondents read:

“RELIEFS SOUGHT BY APPLICANT

(a) *To restrain the respondents, their agents and servants from harassing, intimidating and subjecting the applicant and members of the applicant’s family and employees to degrading treatment.*

(b) *To secure the release of the applicant’s vehicle with Registration No. KN 7292 KQ forcefully seized and detained by the respondents.*

(c) *To perpetually restrain the respondents and their agents from seizing and detaining any of the applicant’s property, movable or immovable.*

(d) *To claim the sum of N1,000,000.00 (One Million Naira) from the respondents jointly and severally as a compensation for several harassments, intimidation and degrading treatment of the applicant and employees and members of the applicant’s family by soldiers and airforcemen who are agents of the respondents in consequence of which the applicant lost and is still losing his personal and business reputation and also suffering loss of business goodwill and prosperity.”*

The grounds upon which the reliefs were sought are stated to be:

“GROUNDS UPON WHICH RELIEFS ARE SOUGHT

(a) *The applicant received threats and intimidating letters on 14/12/89 and 18/12/89 from one Major G. Ofoche of Third Field Abulance Bukavu Barracks of the Nigerian Army, Kano at the instigation of the first respondent in an attempt to intimidate the applicant to settle a debt owed to the first respondent by the applicant.*

(b) *On 1/3/90, one John Tella Hussain, an Airforce Officer and*

former Kano State Chairman of Task Force on Tax Recovery went to the applicant's house at about 7.00 a.m, drove members of the applicant's family from their main house and locked them up in a room in the Boys' Quarters together with the applicant's employees. Same John Tella Hussain also took away the applicant's Peugeot 404 Pick Up van with Registration no. KN 2848 KQ fully loaded with animal skins for sale and gave some to the first respondent. Furthermore, the said John Tella Hussain later confirmed to the applicant that the first respondent requested him to take the action and deal with the applicant because of the debt the applicant owed the first respondent.

(c) Sometime in May, 1990, the same John Tella Hussain led about eight Airforcemen to the applicant's house, forcefully seized the applicant's Peugeot 505 car with Registration No. KN 9272 KQ and forcefully took same to the first respondent in order that the first respondent could value the car and offset the applicant's debt to the respondent with the value of the car. The said car was detained and for one week after certain vital documents missed inside the car.

(d) On 12/6/90 at about 7.00 a.m, one Yahaya, an Airforce officer and Secretary to the Task Force on Tax Recovery led seven Airforcemen to the applicant's house and forced the applicant to drive his 505 car registration no. KN 7292 KQ to the Airforce Base, Kano, where the applicant's freedom of movement was restricted only to an office in the Airforce base, between 7.00 a.m and 12.00 noon. The applicant was led to the second respondent who detained the applicant's 505 car and insisted that unless the applicant pays up the debt he (the applicant) owes to the first respondent, the applicant's car would not be released.

(e) The applicant's 505 car presently detained by the respondents is the only car with which the applicant moves about in the conduct and pursuit of his business and as a result of constant harassment and intimidation of the applicant by soldiers and Airforcemen who are agents of the respondents, the applicant is now seen by his personal and business associates as a person of questionable integrity and the applicant's hitherto flourishing business is being seriously affected as a result of loss of personal and business reputation."

The application was supported by affidavit, further or reply affidavits. The respondents filed counter-affidavits. At the hearing of the application, the applicant testified for himself and called five other witnesses. The respondents testified for themselves and called no other witness. Upon the conclusion of oral evidence by the witnesses, counsel on both sides then addressed the court and judgment was reserved.

The learned trial Judge in a considered judgment spanning 58 pages of closely typed foolscap-size sheets, found in favour of the applicant when he concluded his judgment on pages 211-212 of the record thus:

“Finally as I have earlier held in this judgment, the applicant is entitled to all the reliefs sought by him in the application to enforce his fundamental rights. Consequently, I hereby make the following orders:

1. The 1st, 2nd and 4th respondents and their agents are restrained from harassing, intimidating and subjecting the applicant and members of his family to any further degrading treatment.

2. The applicant’s vehicle, Peugeot 505 with registration number K.N 7292 KQ seized and detained by the respondents until it was temporarily released to the applicant pursuant to an order of this court granted by Hon. Justice Tijani Abubakar, (as he then was,) is now unconditionally and permanently released to the applicant.

3. The 1st, 2nd and 4th respondents and their agents are hereby perpetually restrained from illegally seizing and detaining any of the applicant’s properties, movable or immovable.

4. I hereby award damages of (N250,000.00) Two Hundred and Fifty Thousand Naira) being (i.e general and aggravated) compensatory and exemplary damages against the 1st, 2nd and 4th respondents jointly for several harassment, intimidation and degrading treatments of the applicant personally and members of his family by soldiers and Airforcemen who are agents of the respondents and by the respondents themselves which actions culminated in the infringement of the applicant’s fundamental rights under Sections 31(1)(a), 32(1), 34 and 40(1) of the Constitution of the Federal Republic of Nigeria, 1979, as amended and the same actions amounted to different types of torts such as assault and battery, trespass to land, trespass to chattel or goods, detinue and even

false imprisonment as disclosed by the evidence adduced at the trial."
(Underlining mine)

Dissatisfied with the judgment of the trial court, the respondents appealed to the Court of Appeal holden at Kaduna. The applicant also cross-appealed. Both sides filed and exchanged briefs of argument in that court. The principal and one of the four (4) issues submitted by the applicant for resolution in the Court of Appeal was -

"Whether the case against the appellant (plaintiff) on the evidence before the trial court was a case for Enforcement of Fundamental Rights, and if so, whether the necessary procedure and process were complied with and taken out by the trial court, and if not, whether failure to do so occasioned a miscarriage of justice."

The Court of Appeal in a unanimous judgment allowed the respondents' appeal and dismissed applicant's cross-appeal. Part of the judgment on pages 330-332 of the record read thus:

"It is observed from the record that the action was commenced in the trial court under the Fundamental Right (Enforcement Procedure) Rules, Cap. 62 of the Laws of the Federation of Nigeria, 1990. There were four reliefs sought and none of them touches upon violation of fundamental rights, second and third reliefs (b) and (c) touch upon detainee It is settled by a long line of decisions of both this court and the Supreme Court that remedy other than those touching upon fundamental rights cannot be sought under the Fundamental Rights (Enforcement Procedure) Rules (supra) The first relief in respect of which damages for N1,000,000.00 was sought and granted under relief (d) equally does not fall within the contemplation of fundamental rights There was therefore no claim before the learned trial Judge seeking for a declaration of violation of the respondents' fundamental rights. In the result, bringing the action under Fundamental Rights (Enforcement Procedure) Rules (supra), is incompetent. The whole proceedings is therefore null and void ab initio and it is set aside. The appeal succeeds and it is allowed. The decision of the trial court is set aside and the respondent's claim struck-out."

Aggrieved by the decision of the Court of Appeal, the applicant

has appealed to this court. The parties filed and exchanged briefs of arguments in accordance with the Rules of Court. The applicant in his brief has submitted two (2) issues for determination as follows:

B “1. *Whether the Court of Appeal was right in its conclusion that the reliefs sought by the appellant (applicant) were not maintainable or could not be sought under the Fundamental Rights (Enforcement Procedure) Rules, 1979.*

C 2. *Whether the competency of the appellant’s (applicant) action under the Fundamental Rights (Enforcement Procedure) Rules, 1979 can be determined solely by reference to the nature of the reliefs being sought by the appellant as done by the Court of Appeal in this case without reference to the processes filed at the trial court.”*

The respondents adopted these issues.

D The two issues are in my view clearly inter-related. They will therefore be considered and answered together. The submissions of learned counsel for the applicant on the issues can be summarized as follows -

E (i) That the Court of Appeal was wrong in its conclusion that the reliefs sought by the applicant cannot be sought or entertained or adjudicated upon man action under the Fundamental Rights (Enforcement Procedure) Rules, 1979, because the Rules do not stipulate or prescribe the form or nature a relief should take or have. He referred to Section 42 of F the 1979 Constitution and to Order 1 Rule 2 and Order 6 Rule 1 of the Rules.

G (ii) That the relief’s sought by the applicant were simply to enforce his fundamental rights under Sections 31(1)(a), 32(1) & 40(1) of the 1979 Constitution. He said relief (a) sought to enforce his rights under Sections 31(1)(a) and 32(1) of the 1979 Constitution. Reliefs (b) & (c) sought to enforce his rights under Section 40 of the Constitution while Relief (d.) seeks for monetary compensation for the violation of his H fundamental rights as complained of and as established at the trial. He cited the cases of A-G of Bendel State v. Aideyan (1989) 9 S.C. 127; (1989) 4 NWLR (Pt. 118) 646 at 674. He also referred to Section 42(2) of the 1979 Constitution and to Order 6 Rule 1(1) of the Rules.

(iii) That the Court of Appeal failed to properly interpret the relevant provisions of the Constitution as well as the Rules by not giving them their ordinary meaning and came to the wrong conclusion that the applicant's action was not competent. A number of cases were cited in support which include - *Uwaifo v. Bendel State* (1983) 4 NCLR 1; *Nafiu v. The State* (1980) 8-11 S.C. (Reprint) 85; (1980) 11-12 S.C. 130; *Aqua Limited v. Ondo State Sports Council* (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91). He said the court below was under a duty to have adopted a liberal approach in its construction or interpretation of the relevant provisions of the Constitution herein which it failed to do.

(iv) That there is nothing to suggest that under the provisions of the Constitution, an action commenced or filed under the Rules in pursuance of the Fundamental Rights provided under the Constitution, cannot be employed to seek relevant common law reliefs or remedies in appropriate cases. In other words, even if the applicant's reliefs are premised on detinue, injunction and damages etc., which are actionable under the common law, such reliefs can equally be sought under the Rules especially when the embodiment of the applicant's case is premised solely on allegations of infringement of his fundamental rights. That there is nothing in the Rules preventing the courts from entertaining reliefs bordering on Common law remedies. He cited Section 42(1) & (3) of the Constitution and Order 6 Rule 1 (1) of the Rules and the cases of *Federal Minister of Internal Affairs v. Abdur-Rahman Shugaba Darman* (1982) 3 NCLR 915, (1982) 1 FNR 200; *Abioye v. Yakubu* (1991) 5 NWLR (Pt 190) 130; *Lawal v. G.B. Olivant* (1972) 3 S.C. (Reprint) 120; (1972) 3 S.C. 124; *Aya v. Henshaw* (1972) 5 S.C. (Reprint) 56; (1972) 5 S.C. 87. Where therefore an applicant for enforcement of fundamental rights prays for a relief or reliefs that have common law features, the court would be entitled to look into such reliefs and in appropriate cases grant same in the spirit of Order 6 Rule 1(1) of the Rules.

(v) That the question of whether or not the applicant's action was competent under the Rules was raised suo motu and decided by the court without inviting the parties to address on it. In addition, the Court of Appeal concerned itself with the nature of the reliefs sought and not with

the substance of applicant's case. Consequently, the applicant as a result was not given a fair hearing when his case was dismissed. This has occasioned a miscarriage of justice. That the court below ought to have looked beyond the reliefs claimed as the totality of processes filed by the applicant sufficiently showed that complaints against the respondents were premised clearly on violations of fundamental rights of the applicant by the respondents. That the law is well settled that in dispensing justice, the court should rely or look into the substance of a case rather than its form. The following cases were cited in support - Bolaji v. Bamgbose (1986) 4 NWLR (Pt.37) 632; Bello & Ors. v. A-G of Oyo State (1986) 5 NWLR (Pt. 45) 828.

We were urged to allow the appeal, set aside the judgment of the Court of Appeal and restore that of the trial High Court

I say straight away that the issue was not raised suo motu by court. The briefs of the parties in that court prove the point. The main issue also been reproduced by me earlier in this judgment.

The respondents in their joint brief of argument replied as follows

E -

(i) That the Court of Appeal was right in its decision that the reliefs sought by the applicant before the High Court were not maintainable under the Fundamental Rights (Enforcement Procedure) Rules, because the fundamental rights covered by the 1979 Constitution include - right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to acquire and own property and right to compensation for property compulsorily acquired. But that the reliefs before the High Court and as found by trial Judge himself were for assault and battery, trespass to land, trespass to chattel or goods, detainue and false imprisonment which are torts covered by different procedure under the Rules of the High Court.

(ii) That issue (i) now before this court was one of the four issues raised by the respondents in the Court of Appeal as shown on pages 263 and 266 of the record.

(iii) That it is trite law that the competency of suits and indeed the jurisdiction of courts, are determined by the claims and or reliefs of the

plaintiff or applicant and nothing else. And that the Court of Appeal was right in determining the competency of the applicant's action by reference to the nature of the reliefs sought.

(iv) That the applicant has not shown any error of law or a miscarriage of justice to warrant interference or the setting aside of the judgment. B

The court was urged to dismiss the appeal and affirm the judgment of the Court of Appeal.

I am in agreement with the respondent's submissions above.

It is most convenient for me however to answer the applicant's issue (2) first as that will lead me directly into the heart of issue (1). C

Issue (2) relates to the competency of the applicant's action and whether or not its competence could have been determined by reference solely to the nature of the reliefs or claims sought as was done by the Court of Appeal. The answer to me is simply 'yes' in the affirmative. The Court of Appeal was right to have considered the reliefs or claims only, and without reference to any other thing. It is settled and a fundamental principle that jurisdiction is determined by the plaintiff's claim or relief. In other words, it is the claim before the court that has to be looked at or examined to ascertain whether or not it comes within the jurisdiction conferred on the court (see for example; *Western Steel Works v. Iron & Steel Workers* (1987) 1 NWLR (Pt. 49) 284; *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517; *Adeyemi v. Opeyori* (1976) 9-10 S.C. (Reprint) 18; (1976) 9-10 S.C. 311. Issue (2) therefore fails. D E F

I now go back to issue (1) which is whether or not the Court of Appeal was right in its conclusion that the reliefs or claims sought by the applicant were not maintainable under the Fundamental Rights (Enforcement Procedure) Rules. Having come to the conclusion in issue (2) above that the Court of Appeal applied the correct or proper principle by solely examining the reliefs or claims of the applicant, the task before me now is to see whether the examination of the reliefs was thoroughly and properly conducted or carried out in coming to its conclusion. G H

The starting point in resolving this issue is the judgment of the trial High Court itself. The learned trial Judge in his judgment on pages 207-208 of the record had this to say on the claims or reliefs of the applicant. He said:

B “The actions of the respondent in this case are not only infringement of the applicant’s fundamental rights but are also tortious in nature. For instance, the forceful entry of the applicant’s house by the 3rd respondent leading other armed military men is an act of trespass while the
C tort of assault and battery because the applicant said in his evidence that he was forced to enter his car to follow the military men to the Air Force Base Kano. At the Airforce Base Kano, the restriction of the applicant’s movement by detaining him in a room close to the 2nd respondent’s office
D also amount to a tort of false imprisonment or wrongful confinement. The respondent’s tampering with the applicant’s vehicles is also a tort of trespass to goods or chattel as well as detainue. From the totality of the evidence adduced by the applicant which I believe, the respondents are
E also liable in tort in addition to their liability for the infringement of the applicant’s fundamental rights. This will be duly considered in the determination of the actual amount payable to the applicant in form of compensator, general, aggravated and exemplary damages.” (Emphasis are
F mine)

Also, the last of the four (4) orders which the learned trial Judge made at the end of his judgment on page 212 of the record concluded thus -

G “4. and the same actions amount to different types of torts such as assault and battery, trespass to land, trespass to chattel or goods, detainue and even false imprisonment as disclosed by the evidence adduced at the trial.” (emphasis mine)

H **Thus, there is no doubt that the learned trial Judge himself realized that the reliefs sought by the applicant are tortious in nature. In other words, these are common law reliefs. These could only have been claimed strictly by following the common law procedure by issuing a writ of summons and filing pleadings thereof.**

Now, the Court of Appeal in its judgment as earlier stated, concluded that none of the reliefs sought by the applicant touched upon the violation of fundamental rights and consequently the action under the Fundamental Rights (Enforcement Procedure) Rules is wrong and incompetent. The claims were then struck-out. So both the High Court and the Court of Appeal in effect found the reliefs to be tortious in nature. Needless to say that in the instant case, the tortious claims are the principal claims even if there existed some fundamental rights infringement as found by the trial Judge. And that being the case, the Court of Appeal would have been entitled to hold that a wrong procedure has been adopted under the Fundamental Rights (Enforcement Procedure) Rules, instead of by the issuance of a Writ of Summons (see for example Federal Minister of Internal Affairs & Ors. v. Darman (1982) 3 NCLR 15; B.R.T.C. v. Egbuonu (1991) 2 NWLR (Pt. 171) 81; Tukur v. Government of Gongola State (1989) 9 S.C. 1; (1989) 4 NWLR (pt. 117) 517; Anigboro v. Sea Trucks Nigeria Ltd. (1998) 1 HRLRA 291; but see (2001) 1 S.C. (Pt. I) 45; Kokoro-Owo & Ors. v. Lagos State Government & Ors. (1988) 1 HRLRA 322.

I have no doubt at all that a claim under the common law can properly be joined in an application under Section 42 of the 1979 Constitution, where such a claim is secondary, ancillary or incidental to the complaint of a breach of fundamental right. In the instant case, the claims as found by both the High Court and the Court of Appeal were common law claims or reliefs which were wrongly brought under the Fundamental Rights (Enforcement Procedure) Rules instead of by Writ of Summons. This is a fundamental breach and not a mere technicality which can be waived or ignored. One of the indices of jurisdiction as laid down in *Madukolu v. Nkemdilim* (1962) All NLR (part 2) 581 at 589, is that the action is initiated by due process of law, which in this case is by Writ of Summons. That is lacking here (see *Tukur v. Gongola State* (supra); *Federal Minister of Internal Affairs v. Shugaba Darman* (supra)).

The trial High Court clearly has the jurisdiction to deter-

mine all the issues in this case but a proper procedure must be followed. The Court of Appeal was therefore properly guided and came to the correct conclusion. Issue (1) also fails.

All the two issues having been resolved against the applicant, the
B appeal fails. It is dismissed with N10,000.00 costs against the applicant/
appellant and in favour of the respondents/respondents.

KATSINA-ALU JSC

C I have had the advantage of reading in draft the judgment delivered
by my learned brother, Kutigi, JSC. I agree with it and, for the reasons he
has given I too dismiss the appeal. I also abide by the order for costs.

D

PATS-ACHOLONU JSC

I have read the judgment of my learned and noble Lord, Kutigi,
JSC., in draft and I agree with him. I must state that it is becoming
E fashionable nowadays for litigants to institute an action by way of asking
for relief for infraction of their constitutional rights in a matter where the
facts reveal that an action should conceivably lie in tort or contract. It is
difficult to say whether recourse to this inelegant procedure is borne out
F of the ignorance of counsel or a mistake. Whichever is the case, it is
important to state and emphasize that in a case of the nature before us,
counsel should have studied the facts of the case very well. Facts are the
spring board of law. It is the facts of the case that determine the appropriate
remedy. This case is lost because of the unpardonable procedure
G resorted to by the appellant's counsel. An action by way of fundamental
rights may sound romantic and possibly prosaic, but it could lead to a
loss of a case because of a parade of abysmal ignorance as to what to do.

I abide by the consequential order.

H

AKINTAN JSC

I had the privilege of reading the draft of the leading judgment just

delivered by my learned brother, Kutigi, JSC. The facts of the case and all the issues raised in the appeal are fully set out in the judgment. I therefore need not repeat them.

The main issue to be resolved in the appeal is whether the appellant was right in commencing the action under the Fundamental Rights (Enforcement Procedure) Rules, 1979. In resolving that issue, the claim of the appellant has to be examined. The appellant's cause of action, as set out in the supporting affidavit at the trial High Court, arose from the steps taken by the 1st respondent to recover a debt due from the appellant. The appellant believed that the steps the man took were directed at intimidating him.

The facts disclosed in the supporting affidavit show that the appellant and the 1st respondent were both dealers in hides and skin in Kano. The appellant admitted that he received some undisclosed sum of money from the 1st respondent for which he was to supply hides and skin. He failed to make the supplies. The appellant deposed as follows in Paragraphs 9, 10, 11, 12 and 13 of his supporting affidavit:

"9. That despite my promise and sincerity to liquidate the debt, the first respondent has threatened and vowed to use his influence and connections with Military Officers to intimidate and terrorize me to pay the debt without taking the matter to the court as the law requires.

10. That in carrying out this threat I have received several threats, intimidation and harassment (in person and through members of my family) from Military Officers who have confirmed one way or the other that their action (i.e. harassment, intimidation and degrading treatment) were at the instance of the first respondent in respect of the debt I owe him.

11. That on 14/12/89 and 18/12/89, I received threatening letters from one Major G. Ofoche of the Nigerian Army Bukavu Barracks, Kano at the instigation of the first respondent and that the same Major also harassed and intimidated members of my family when he came without meeting me.

12. (a) That in 1990, one John Tella Hussain (an Airforce Officer and former Kano State Chairman of Task Force on Tax Recovery) visited my house with 14 Airforcemen, drove members of my family from our

main house to a room in the Boy's Quarters and locked them up till the evening of that day.

(b) *That the same John Tella Hussain took away my pick up Van with Registration No. KN 2848 KQ fully loaded with skins and upon my enquiry for his reason, he confirmed to me that his action was to hurry me to pay up the debt I owe the first respondent.*

13. *That sometime in May, 1990, the same John Tella Hussain led about eight Airforcemen to my house, seized my Peugeot 505 car with Registration No. KN 7292 KQ and forcefully took the car to the first respondent in order that the first respondent should value the car and offset my debt to the first respondent with the value of the car which was taken and impounded by the first respondent for one week”.*

It is quite clear from the above averments that the allegations of harassment and intimidations were not authorized by any of the military authorities or the Kano State Tax Authority. It was founded on a dispute between two individuals, that is, the appellant and the 1st respondent. The question therefore is whether the appellant's redress could properly be initiated by way of an application for the enforcement of the appellant's fundamental rights guaranteed in Chapter IV of the 1979 Constitution.

The position of the law is that where fundamental rights are invaded not by government agencies but by ordinary individuals, as in the instant case, such victims have rights against the individual perpetrators of the acts as they would have done against state actions. It follows therefore that in the absence of clear positive prohibition which precludes an individual to assert a violation or invasion of his fundamental right against another individual, a victim of such invasion can also maintain a similar action in a court of law against another individual for his act that had occasioned wrong or damage to him or his property in the same way as an action he could maintain against the state for a similar infraction: See *Onwo v. Oko & Ors.* (1996) 6 NWLR (Pt. 456) 584, at 603; and *H Ogugu v. The State* (1994) 9 NWLR (Pt. 366) 1. The position of the law therefore is that the provision of Section 44(1) of the 1979 Constitution (which is also re-enacted in the 1999 Constitution) for the enforcement of the fundamental rights enshrined in Chapter IV of the Constitution is

permissible and does not constitute a monopoly for the enforcement of those rights. The aim of the section, according to Bello, CJN., in *Ogugu v. The State*, *supra*, is to provide a simple and effective judicial process for the enforcement of fundamental rights in order to avoid the cumbersome procedure and technicalities for their enforcement under the rules of the common law or other statutory provisions. B

I believe therefore that a victim of any of the infractions of the fundamental rights preserved in Chapter IV of the Constitution has a discretion either to pursue his remedies under the Fundamental Rights (Enforcement Procedure) Rules 1979 or commence his action as provided under the various rules of court or in accordance with any of the common law or statute or rules of courts: See *Ogugu v. The State*, *supra*; and *Onwo v. Oko*, *supra*. C

The next question to be resolved is whether the appellant's claim comes within the type that is enforceable as an infraction of fundamental right. The position of the law is that for a claim to qualify as falling under fundamental rights, it must be clear that the principal relief sought is for the enforcement or for securing the enforcement of a fundamental right and not, from the nature of the claim, to redress a grievance that is ancillary to the principal relief which itself is not *ipso facto* a claim for the enforcement of fundamental right. Thus, where the alleged breach of a fundamental right is ancillary or incidental to the substantive claim of the ordinary civil or common law nature, it will be incompetent to constitute the claim as one for the enforcement of a fundamental right: See *Federal Republic of Nigeria & Anor. v. Ifegwu* (2003) 5 S.C. 252; (2003) 15 NWLR (Pt. 842) 113, at 180; *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt. 510) 549; and *Sea Trucks (Nig) Ltd. v. Anigboro* (2001) 1 S.C. (Pt. I) 45; (2001) 2 NWLR (Pt. 696) 159. D E F G

Out of the four reliefs sought by the appellant, two are for an order restraining the respondents from harassing and intimidating the appellant and his family as well as setting any of his properties (reliefs (a) & (c)) while the others are for compensation for acts of harassment and intimidation committed against the appellant and release of the seized vehicles. The jurisdiction conferred in Section 44(1) of the 1979 Consti- H

tution is in respect of any person who alleges that any of the provisions of Chapter IV of the Constitution “has been, is being or likely to be contravened”.

B The dispute between the appellant and the 1st respondent arose over the money which the appellant owed the respondent. It was the steps the 1st respondent took at recovering the money owed by the appellant that the appellant did not like. The man did not deny owing the 1st respondent. The appellant’s claim relating to seizure of his vehicles is therefore one of detainment and not per se or ipso facto that of infringement of fundamental rights. It was therefore improper for the appellant to treat the matter as one amounting to that of infringement of his fundamental right and thereby qualify him to commence the action under the Fundamental Rights (Enforcement Procedure) Rules.

D For the reasons given above and the fuller reasons given in the leading judgment which I also adopt, I agree that there is no merit in the appeal and I accordingly dismiss the appeal and affirm the decision of the Court of Appeal striking out the appellant’s claim. I also adopt the orders made in the leading judgment, including that on costs.

MUKHTAR JSC

F After leave was obtained, the appellant applied for the enforcement of his fundamental human rights under Sections 3(1)(a), 32(1) and 40(1) of the Constitution of the Federal Republic of Nigeria 1979, against the respondents. The reliefs sought are:-

G “(a) To restrain the respondents, their agents and servants from harassing, intimidating and subjecting the applicant and members of the applicant’s family and employees to degrading treatment.

(b) To secure the release of the applicant’s vehicle with Registration No. KN 7292 KQ forcefully seized and detained by the respondents.

H (c) To perpetually restrain the respondents and their agents from seizing and detaining any of the appellant’s property, movable or immovable.

(d) To claim the sum of N1,000,000.00 (One Million Naira) from

the respondents jointly and severally as a compensation for several harassment, intimidation and degrading treatment of the applicant and employees and members of the applicant's family by soldiers and airforcemen who are agents of the respondents in consequence of which the applicant lost and is still losing his personal and business reputation and also suffering loss of business good will and prosperity. B

The grounds upon which the reliefs were sought were set out, and an affidavit in support was sworn to by one Alhaji Ibrahim Abdulhamid. Leave was given to the applicant to enforce his fundamental rights, and witnesses gave evidence. The learned trial Judge after evaluating the evidence and considering the addresses of learned counsel found in favour of the applicant thus:- C

"Finally, as I have earlier held in this judgment, the applicant is entitled to all the reliefs sought by him in this application to enforce his fundamental rights. Consequently, I hereby make the following orders:- D

1. The 1st, 2nd and 4th respondents and their agents are restrained from harassing, intimidating and subjecting the applicant and members of his family to any further degrading treatment. E

2.

3.

4."

The respondents were not happy with the judgment, so they appealed to the court below, and the applicant cross-appealed. The court allowed the appeal and dismissed the cross-appeal, after a careful treatment of the issues raised in the appeals. The Court of Appeal arrived at the following conclusion:- F

"A close examination of the provisions of Chapter IV of the Constitution of the Federal Republic of Nigeria, 1979 does not consider any of the averments in the relief set out above to be a fundamental right not to talk of its protecting them. There was therefore, no claim before the learned trial Judge asking for a declaration of violation of the respondent's fundamental right. In the end result, bringing the action under Fundamental Rights (Enforcement Procedure) Rules (supra) is incompetent. The whole proceedings are therefore null and void ab initio G H

and is set aside.”

The applicant also became dissatisfied with the judgment of the lower court, and has appealed to this court on four grounds of appeal.

In order to appreciate the above finding of the Court of Appeal, it will be imperative to peruse the relevant sections of Chapter IV of the Constitution the learned Justice referred. I will reproduce them below :-

“32(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases

.....
 40(1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for purposes prescribed by a law that, among other things.”

Looking at the facts of the case as disclosed by the witnesses, any reasonable person will perceive and be satisfied that none of the acts complained of fall within the acts in the supra provisions of the Constitution. In this regard, I am in complete agreement with the learned Justices of the court below when the court found thus:-

“It is settled by a long line of decisions of both this court and the Supreme Court, that remedy other than those touching upon fundamental rights cannot be sought under the Fundamental Rights (enforcement Procedure) Rules (supra).”

I have had a preview of the lead judgment delivered by my learned brother, Kutigi, JSC., and I am in complete agreement that the appeal lacks merit and deserves to be dismissed. I hereby dismiss it. I abide by the consequential orders made in the lead judgment.

H