

SUPREME COURT OF NIGERIA
23RD JUNE, 2006. SC. 386/2001
CORAM:- S. U. ONU, D. MUSDAPHER, M. MOHAMMED,
W. S. N. ONNOGHEN I. F. OGBUAGU, JJSC

1. MR. POPOOLA ELABANJO

2. MR. BAYO ELABANJO

..... APPELLANTS

(For themselves and on behalf of
late David Elabanjo Family)

AND

CHIEF (MRS.) GANIAT DAWODU

..... RESPONDENT

PRACTICE & PROCEDURE - Application - In lieu of demurrer - A defendant relying on point of law - To raise preliminary issue - Is to set out that point of law - In a statement of defence - For the issue to be properly raised (H1)

COURTS - Jurisdiction - Objection to - Not being an ordinary point of law - Objection to jurisdiction - Need not be raised in a statement of defence - As O. 23 does not apply to it (H2)

JURISDICTION - Objection to - Time to raise - Being a threshold issue - Objection to jurisdiction should be raised - At earliest opportunity at any stage - Sufficient facts are available (H3)

STATUTES - Land matters - Limitation Law - Scope of - It not only denies the right of action - But extinguishes title - At the expiration of twenty years for state - And twelve years for others (H4)

ACTIONS - Cause of action - Meaning of - It is a set of facts and circumstances - Giving rise to the right to file a claim - In court for remedy (H5)

ACTIONS - Limitation - Period of - Determination - It is determined by comparing - The date cause of action arose - With the date on which the

Writ was filed - To know if period in between - Exceeded that allowed (H6)

FACTS

The Plaintiffs/Appellants sued the defendant/Respondent in December 1996, at the Lagos State High Court claiming possession of a parcel of land at Ifako, Bariga, which land the Supreme Court had already in 1985 adjudged to belong to Late David Elebanjo, Appellants' progenitor. Appellants also claimed for injunction and damages. Upon being served with the Statement of Claim, Respondent, without filing a Statement of Defence, filed a notice of preliminary objection challenging the jurisdiction of the court on the ground that the action was Statute barred, having been brought more than 12 years after the cause of action accrued contrary to the provisions of the Lagos State Limitation Law. After hearing both counsel on the preliminary objection, the learned trial judge struck out the objection for incompetence on the ground that the procedure by which it was raised amounted to demurrer, which has been abolished by Order 23, rule 1 of the High Court Rules of Lagos State. His Lordship held that Respondent ought to have first filed a statement of Defence in which the point of law would be highlighted before raising the preliminary objection by way of motion, in accordance with Order 23, Rules 2 and 3.

Respondent appealed to the Court of Appeal against that ruling of the High Court. That Court allowed the appeal, upheld the preliminary objection and consequently dismissed the Appellants' action. Appellants therefore brought this appeal to the Supreme Court against that judgment of the Court of Appeal. It is contended for the Appellants that for failing to comply with the Court Rules, the notice of preliminary objection was not properly before the court and was liable to be struck out as done by the trial court. And that the Court of Appeal was wrong to have countenanced that objection as it were. For the Respondent, it is argued, inter alia, that a preliminary objection challenging jurisdiction was not an ordinary point of law as to be governed by Order 23. And further that the objection was brought under the Limitation Law of Lagos State and not

under the High Court Rules.

ISSUES FOR DETERMINATION

“1. Issue One

Whether the judgment of the lower court was not entered in total disregard of the provisions of Order 23 Rules 1, 2 & 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994.

2. Issue Two

Whether the lower court was right in holding that the action of the appellants was statute barred.”

HELD (Dismissing the appeal per **MOHAMMED JSC**, Onnoghen JSC, Dissenting)

Application - In lieu of demurrer

1. The complaint of the appellants in their first issue in this appeal is that the court below in its judgment entered in favour of the respondent in allowing her appeal, was in complete or in total disregard of the provisions of Order 33 Rules 1, 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994.

By these rules quoted above, there is no doubt whatsoever that proceedings by way of demurrer have been abolished by Rule 1 and in its place Rules 2 and 3 are to be used by parties in raising any point of law in their pleadings, namely, Statement of Claim, Statement of Defence, counter-claim or reply to a counter claim for determination and disposal by the learned trial Judge in the cause of the hearing of the matter or in the judgment at the end of the trial. The rules plainly deal with the procedure to be followed by parties wishing to rely on points of law to raise issues for determination in the course of the trial of the action or after the trial in the final judgment of the trial court. Indeed, the application of Order 33 Rule 1 of the Lagos State High Court (Civil Procedure) Rules, 1994 was explained by this court in *Mobil Oil (Nig) Plc, v. I. A. L. 36 Inc.* (2000) 4 S.C. (Pt. I) 85; (2000) 6 NWLR (pt. 659) 146 at 175-176 relied upon by the appellants where Iguh, JSC., said:-

“I think I should point out that an application by way of demurrer under the Federal High Court (Civil Procedure) Rules, 1976 must not

be confused with or mistaken for an application in lieu of demurrer applicable presently in Lagos State and Western State. In the latter class of applications, the points of law desired to be raised by the defendant in a preliminary issue are required to be set out in the Statement of Defence before such application in lieu of demurrer is raised. “

By this dictum, all what is being explained is that a defendant wishing to rely on points of law to raise a preliminary issue, is required to set out such points of law in the Statement of Defence before the preliminary issue is regarded as properly raised. (p. 2322 C / F)

COURTS - Jurisdiction - Objection to

2. It is important to examine the application of the respondent at the trial High Court reproduced at page 5 of the record of this appeal.

On the face of this application one cannot but agree entirely with the learned counsel to the respondent that the point of law raised by the respondent in the application before the trial High Court is not an ordinary point of law that could have been raised under Order 23 of the Lagos State High Court (Civil Procedure) Rules 1994. The application was plainly brought under the provisions of the Limitation Law, Cap. 118 of the Laws of Lagos State, 1994 to challenge the jurisdiction of the trial court that it has no jurisdiction to entertain the appellants’ action for their failure to bring the action within the period of 12 years prescribed by the law. As the respondent being defendant had perceived that the action as constituted before the trial court against her was not worth defending, was perfectly justified in refusing to avail herself of the provisions of Order 23 of the High Court Rules, by filing her Statement of Defence before raising her objection against the jurisdiction of the trial court. This is because the law is trite that an objection that a court has no jurisdiction to entertain a matter or action is certainly not an ordinary point of law contemplated under Order 23 Rules 2 and 3 of the Lagos State High Court Civil Procedure Rules. Issue of jurisdiction is very fundamental. It can be raised at any stage of the proceedings in the High Court, the Court of Appeal and in this court by the parties or suo motu by the court itself. Therefore, it was perfectly in order for the trial court which heard the

Preliminary Objection to have ruled on it one way or the other, rather than striking it out on the ground that no Statement of Defence was filed before it was brought. The trial court was wrong in taking this stand as found by the court below whose judgment was not given in total disregard of the provisions of Order 23 of the Lagos High Court Rules as assumed by the appellants because being an issue of jurisdiction, these rules cannot dictate when and how it can be raised. (pp. 2323E/2324B)

JURISDICTION - Objection to - Time to raise

3. It is now beyond argument that because issue of jurisdiction is regarded as a threshold issue and a lifeline for continuing any proceedings, objection to it ought to be taken at the earliest opportunity as was done in the present case if there are sufficient materials before the court to consider it and a decision reached on it before any other step in the proceedings is taken because if there is no jurisdiction, the entire proceedings are a nullity no matter how well conducted. See *Ndaeyo v. Ogunnaya* (1977) 1 S.C. (Reprint) 7. It is quite clear from these decisions of this court that at any stage sufficient facts or materials are available to raise the issue of jurisdiction, or that it has become apparent to any party to the action that it can be canvassed, there is no reason why there should be any delay in raising it. In *Petrojessica Enterprises Ltd, v. Leventis Technical Co. Ltd.* (1992) 5 NWLR (Pt. 244) 675 at 693, Belgore, JSC, put it plainly thus:-

“Jurisdiction is the very basis on which any tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity xxxx. This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this court; afortiori the court can suo motu raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction; but once it is apparent to any party that the court may not have jurisdiction, it can be raised even viva voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.” (p. 2325 B)

Limitation Law - Scope of

4. The second issue under consideration now is whether the court below was right in holding that the action of the appellants was statute barred. What has to be determined in this issue is whether the action of the
B appellants was filed within the time prescribed by the Limitation Law Cap. 118 of the Laws of Lagos State 1994.

On a careful reading of the provisions of the Lagos State limitation Law reproduced above, it becomes quite clear that the provisions do not merely deny the right of action in Section 16 thereof but completely
C extinguish an existing right or title to land at the expiration of the period of limitation of twenty years for the State and twelve years for other parties from the date of the accrual of the right of action. See Akibu v. Azeez (2003) 1 S.C. (Pt. II) 71; (2003) 5 NWLR (Pt. 814) 643 at 667-
D 669, where these provisions of the Lagos State Limitation Law 1994, came under consideration by this court. The provision of the law are quite clear and unambiguous. (p. 2329 F /2331 B)

E Cause of action - Meaning of

5. This issue can not be resolved effectively without stating what a cause of action is all about. A cause of action has been defined in the Dictionary of English Law, Second Impression, page 325 as “the fact or combination of facts which give rise to a right to sue.” This definition had
F been closely adopted in many decisions of this court. In a recent decision of this court in P.N. Udoh Trading Company Limited v. Abere (2001) 5 S.C. (Pt.II) 64; (2001) 11 NWLR (Pt. 723) 113 at 129, the term was defined thus:-

G “Cause of action had been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for remedy. It includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle
H the plaintiff to succeed.” (p. 2331 F)

ACTIONS - Limitation - Period of - Determination

6. Guided by the decision of this court in Egbe v. Adefarasin (No. 2)

(supra), the period of limitation in any limitation statute is determined by looking at the Writ of Summons and the Statement of Claim alleging when the wrong was committed which gave rise to the cause of action and by comparing that date with the date on which the Writ of Summons was filed. If the time on the Writ of Summons is beyond the period B allowed by the Limitation Law, the action is statute barred. Looking at the Writ of Summons in the case at hand, the appellants' suit claiming possession of the 2 1/2 plots of land in dispute, damages for trespass and perpetual injunction was filed on 5-12-1996. The Statement of Claim of C the appellants who sued in a representative capacity for the Elabanjo family who acquired interest in the larger portion of land containing the land in dispute since 1969, shows that the respondent trespassed on to the land in August 1984 when she brought a caterpillar to level the land in D preparation for putting up structures thereon. On these facts, to say that the cause of action giving the appellants the right to sue and seek remedy against the respondent who was in possession arose in August 1984, can hardly be disputed. Thus, by waiting until 5-12-1996 when their action was filed against the respondent, a period of 12 years and 4 months, the E appellants' action was, without any doubt filed outside the period of 12 years prescribed by Section 16(2)(a) of the Limitation Law Cap. 118 of the Laws of Lagos State, 1994 for action to recover any piece of land. In other words, the appellants' action is statute barred as rightly found by F the court below. Infact the fate of the appellants does not end with the loss of their right of action alone, their title to the 2 1/2 plots of land in dispute has also been extinguished under the provisions of Section 21 of the same Limitation Law. To this end, no court can look into the merit of G the appellants' suit now dead to see whether the respondent had acquired a valid title to the land in dispute or not having regard to the principles of Lis Pendens being relied upon in this appeal by the appellants.

In the result, this appeal fails and the same is hereby dismissed. H The judgment of the court below delivered on 21-3-2001 is accordingly affirmed. (p. 2333 E)

NOTABLE POINTS OF INTEREST

ONU JSC

1. Rules of Court can not override Statutory Provision

The learned trial Judge in the first place, grossly misconstrued the pur-
 B port of Order 33 Rules 1, 2 and 3 which make no provision that a State-
 ment of Defence must first be filed. Indeed, he never adverted his mind
 to Section 16(2)(a) of the Limitation Law Cap. 118 Laws of Lagos State,
 1994. He also never adverted his mind to the fact that it is settled that
 C even mandatory Rules of court are not as sacrosanct as mandatory statu-
 ute or an Act. Also settled is that Rules of Court cannot override statu-
 tory provisions of the law. (p. 2337 E)

2. Issue of jurisdiction need not be pleaded before it is raised

D This court in the case of State v. Onagoruwa (supra) per Uwais, JSC., as
 he then was, observed thus:

*“Furthermore, the jurisdiction of the courts to determine an is-
 sue as to whether it has jurisdiction is not a procedural matter but a
 E substantive one since any court without jurisdiction is incompetent to
 determine a matter and if it does exercise the jurisdiction which it does
 not possess, its decision is a nullity.”*

Hence, I am of the respectful view that the issue of jurisdiction
 F raised as the preliminary objection by the respondent herein need not be
 pleaded once it could be obvious from the materials before the court and
 could be raised by a party and/or even suo motu by the court. (p. 2339D)

OGBUAGU JSC

G *3. Justiciability of an action is decided as a preliminary point*

Now as to the treatment of Preliminary Objection on a point of law chal-
 lenging the validity of the institution of a suit (as in the instant case lead-
 ing to this appeal), in the case of Akinbi v. The Military Governor, Ondo
 H State & Anor (1990) 3 NWLR (Pt. 140) 526 at 531, 532 CA., it was held
 that a preliminary objection on point of law challenging the validity of the
 institution of a suit, could only be determined at the initial stage, by refer-
 ence to the pleadings, particularly the Statement of Claim. That once the

issue cannot be determined on the pleadings then the court, ought to proceed to full trial of the case and decide the point afterwards. That a preliminary point, ceases to be one strictly speaking once the point could not be decided without evidence being led. That in such a case the point becomes a defence to the action. That the justiciability of an action, is decided as a preliminary point with reference to the plaintiff's pleading i.e. the Statement of Claim. Of course, and this is also settled, a preliminary question, is a question that has to be settled before going into other things. (p. 2348 D)

C

ONNOGHEN JSC (Dissenting)

4. Demurrer - Once pleadings are exchanged evidence must then be taken

Demurrer proceeding is said to be an old English Common Law Procedure employed when a party intends to challenge the pleadings of his opponent on point of law. In a demurrer proceeding, the basic essence is that the party raising same contends that even if all the allegations in the Statement of Claim are true, it still does not, in law, disclose a cause of action for the party contending to answer. In *Bambe v. Aderinmola* (1977) 1 S.C. (Reprint) 1; (1977) 1 S.C. 1 at 6, this court stated thus:

"The party who demurred would not proceed with his pleading but, having raised a point of law as to whether any case had been made out in the opponent's pleadings for him to answer, awaited the decision on that point."

From the above, it is very clear that in a demurrer proceeding the defendant is not required to file a Statement of Defence before raising the point(s) of law in contention. All he needs is the pleading of the plaintiff in respect of which the defendant is deemed to have admitted the facts stated therein for the purposes of the application only. In deciding the matter, the court, after hearing the application, either dismisses the suit or orders the defendant/applicant to answer the plaintiff's allegations of fact contained in the Statement of Claim. In *Odivo v. Obor* (supra), this court held that the trial Judge erred in law in upholding a preliminary objection without hearing evidence when pleadings had been filed by both parties, exchanged, and issues joined and that the preliminary objec-

G

H

tion would have been properly taken without hearing evidence if taken just after the Statement of Claim was filed and served on the defendant. That decision clearly shows that where pleadings have been filed and exchanged between the parties to the action, the case must proceed to trial and the legal point raised by the defendant would then be properly taken by the court after evidence. That was the case under demurrer procedure, which has been abolished by Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules 1994. (p. 2359 D)

5. Under O. 23, after exchange of pleadings, Point of law will still be first taken

The question now is, what is meant by the proceeding in lieu of demurrer. It is clear from the provisions of Order 23 Rules 2 & 3 supra, that under the proceeding in lieu of demurrer, any party is entitled to raise by his pleading any point of law and any point so raised may be disposed of by the trial Judge before, at or after the trial. Unlike in the abolished demurrer procedure where the applicant must not file a Statement of Defence before raising the points of law in contention, under the procedure in lieu of demurrer, the point(s) of law must be first raised in the Statement of Defence before the applicant can proceed to file his objection in which the point(s) of law is/are again raised for determination before the trial proper. In other words, issues must have been joined in the pleadings before objection is raised in limine. (p. 2360 C)

6. By rules of pleading, Limitation Statute must be pleaded

There is no doubt that the preliminary objection of the respondent is stated on the motion papers and also in the submission of both counsel to be grounded on Section 16(2)(a) of the Limitation Law Cap. 118 of the Laws of Lagos State 1994. Now apart from Order 23 Rule 2 requiring the respondent to raise the point of law in his pleading, it is settled law that certain facts must be specially pleaded before they can be made use of in a court of law. Some of the matters that must be specifically pleaded are mentioned in Order 17 rule II of the Lagos State High Court (Civil Procedure) Rules 1994. By the said rule, “the defendant or plaintiff (as

the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Limitation Law, Laws of Lagos State, lease, payment, performance, facts showing illegality either by enactment or by common law, or by the Law Reform (Contracts) Law, Laws of Lagos State.”

From the above, it is very clear and I hereby hold that to say that an action is statute barred is to raise a defence of statute of limitation. By the Rules of court supra, a defendant who wants to raise the defence of statute of limitation or that the action of the plaintiff is statute barred (as in the instant case) must specifically plead that defence. (p.2360 H)

7. Defence of Limitation Statute does not raise an issue of jurisdiction

On the sub-issue as to whether a defence of statute of limitation raises an issue of the jurisdiction of the trial court, I hold the view that it does not. Jurisdiction can be said to be the authority which a court has to determine or decide matters which are litigated before it or take cognisance of matters presented in a formal way for determination. The limits of such authority are imposed by the Constitution, Statute, Charter or Commission under which the court is constituted and can be extended or restricted by similar means. Where no restriction is imposed, we say that the jurisdiction so created is unlimited.

Jurisdiction is therefore a matter of hard core law which is donated by the Constitution and the enabling statute and is very crucial and sensitive in judicial proceedings though it may occasionally involve questions of facts also. This is because courts are creation of statutes. (p. 2362 A)

8. It is the claim before the Court that determines jurisdiction

I hold the view that to say that an action that is alleged to be statute barred is a matter affecting the competence of the court before which it

is instituted instead of competence of the cause or right of action so instituted is to stretch that word too far.

Generally speaking therefore, it is the claim before the court that determines the jurisdiction of the court when examined together with the statute creating and conferring jurisdiction on the court concerned. From the claim earlier reproduced in this judgment it is not in doubt that the trial court had jurisdiction to entertain same; the action being for possession injunction and damages for trespass. (p. 2363 B)

C 9. *Limitation law deals with competence of action, not of Court*

It is very clear that the period of limitation or limitation law affects the cause of action or validity of cause of action instituted outside the limitation period. It deals with the competence of the action so instituted, and has nothing to do with the greatest respect, with the jurisdiction or competence of the court to decide or determine the matter. That is why the statute of limitation is regarded as a defence to an action and by the provisions of the relevant Rules of Court, it must be specifically pleaded.

The question involved in the issue under consideration is not whether an issue of jurisdiction (if validly existing) cannot be raised at any stage in the proceedings and by motion without first filing a Statement of Defence, as learned counsel for the respondent would want us believe but whether the procedure under which a defendant may raise a point of law by way of defence to the claim of the plaintiff under the provisions of Order 23 supra to wit limitation law is by filing a preliminary objection in which the point(s) of law is/are raised without first filing a Statement of Defence in which the point(s) of law is/are pleaded prior to the raising of same in the Notice of Preliminary Objection, particularly where the point(s) of law do(es) not affect the jurisdiction of the court to entertain the matter. (p. 2364 C)

H **REPRESENTATION**

Omolaja Babinton, for the Appellants.

J.O. Odubela, (with him, O. Jolaawo), for the Respondent.

CASES REFERRED TO

- Oloriode v. Oyebi (1984) 1 SCNLR 390; (1984) 5 S.C. 1
 Oloba v. Akereja (1988) 7 S.C. (Pt. I) 1; (1988) 3 NWLR (Pt. 84) 508
 Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414 at 453-454 B
 Ndaeyo v. Ogunnaya (1977) 1 S.C. (Reprint) 7; (1977) 1 S.C. 11
 Chacharos v. Ekimpex Ltd. (1988) 1 NWLR (Pt. 68) 88
 Ajibona v. Kolawole (1996) 10 NWLR (Pt. 476) 22 at 35-36
 Akibu v. Azeez (2003) 1 S.C. (Pt. II) 71; (2003) 5 NWLR (Pt. 814) 643 C
 at 667-669
 Egbe v. Adefarasin (No. 2) (1987) 1 NWLR (Pt. 47) 1
 Savannah Bank of Nigeria Limited v. Pan Atlantic Shipping & Transport
 Agencies Limited (1987) 1 NWLR (Pt. 49) 213
 Thadani v. National Bank of Nigeria (1972) 1 S.C. (Reprint) 75; (1972) 1 D
 S.C., 105
 Katto v. Central Bank of Nigeria (1991) 11-13 S.C. 176; (1991) 13 SCNJ
 1 at 17
 Alhaji Edun v. Odan Community Ado family etc (1980) 8-10 S. C. (Re- E
 print) 67; (1980) 10 S.C. 103 at 134.

STATUTES & RULES REFERRED TO

- Federal High Court Rules, L.F.N. 1990; O. 27 F
 Lagos State High Court (Civil Procedure) Rules, 1994; O. 23, rr. 1,2 &
 3
 Limitation Law, Cap 118 Law of Lagos State 1994; ss. 16, 17, 19 & 21
 Rules of Supreme Court of England; O. 25 G

BOOKS REFERRED TO

- Black's Law Dictionary, 8th edn, Page 451
 Cross and Harris, Precedent in English Law 149 (4th Edn 1991)
 Edwin Bryant, The Law of Pleading under the codes of Civil Procedure H
 24 (2nd Edn: 1899)
 Louis - Phillipe Pigeon, Drafting and Interpreting Legislation, 60 (1988)

LEAD JUDGMENT BY MOHAMMED JSC

This is an appeal from the decision of the Court of Appeal, Lagos Division, delivered on 21-3-2001, allowing the appeal brought to it in this case from the Ruling of the Lagos State High Court of Justice given on B 15-10-1999, in which that court struck out a preliminary objection to its jurisdiction brought under Section 16(2)(a) of the Limitation Law Cap. 118, Laws of Lagos State, 1994. The Court of Appeal in its judgment allowing the appeal, set aside the Ruling of the trial High Court, sustained the preliminary objection and dismissed the plaintiffs' suit as being statute C barred.

The appellants who were the plaintiffs at the trial High Court filed their action on 5-12-1996 against the respondent who was the defendant and claimed in their Statement of Claim paragraph 17 as below:-

D "17. Whereof the plaintiffs claim as follows:-

(a) *The plaintiff (sic) claim against the defendant is for possession of 21/2 plots of land situate, lying and being at Ifako, Bariga, Gbagada, Lagos State, the land already adjudged as the property of late E DAVID TAIWO ELABANJO (the plaintiffs (sic) father) by the Supreme Court of Nigeria in suit No. SC/85/1985 ELABANJO v. TIJANI.*

(b) *Perpetual Injunction restraining the defendant, her servants, agents and privies from further trespassing on the land.*

F (c) *N50,000.00 damages for acts of trespass."*

On being served with the plaintiffs' Statement of Claim, the defendant without filing a Statement of Defence to highlight the points of law in her defence to the action, filed a notice of preliminary objection challenging the jurisdiction of the trial court to entertain the suit and specifically claimed:- G

"1. AN ORDER dismissing this suit as the Honourable Court lacks the jurisdiction to entertain the suit."

This relief was claimed by the defendant in her preliminary objection on the ground that:- H

"The action is statute barred having been brought in 1996, more than 12 years after the cause of action accrued and outside the prescribed statutory period within which the suit ought to have been insti-

tuted.”

After hearing the learned counsel on both sides on the defendant’s preliminary objection, the learned Judge struck out the objection for being incompetent in the following words:-

“I refer to Order 23 Rule 1 that demurrer shall not be allowed B
and hold that in the absence of Statement of Defence, the notice of Preliminary objection based on statute bar (sic) is incompetent. The Notice of Preliminary Objection dated 14-6-99 is struck out being incompetent.”

This decision was reached by the trial court without even looking C
into the merit of the preliminary objection clearly challenging its jurisdiction to entertain the action.

Aggrieved by this decision of the trial court, the defendant headed D
to the Court of Appeal, Lagos Division and filed her appeal against the ruling and raised the following two issues in her appellant’s brief of argument for the determination of the court.

“i. whether failure to file a Statement of Defence disentitles or E
disqualifies an applicant to raise an objection as to the jurisdiction of a court of law to entertain a suit.

ii. whether the respondents’ as plaintiffs’ action against the appellants was not statute barred having been commenced more than twelve (12) years after the cause of action arose.”

After hearing the appeal, the Court of Appeal resolved these issues F
in its judgment delivered on 21-3-2001 and allowed the appeal holding that the plaintiffs’ action was statute barred and consequently dismissed the same. The plaintiffs who faulted this decision of the Court of Appeal terminating their suit against the defendant have now appealed to G
this court seeking a final decision in the matter. The plaintiffs who are now the appellants in this court have raised two issues in their appellants’ brief of argument which read:-

“1. Issue One H

Whether the judgment of the lower court was not entered in total disregard of the provisions of Order 23 Rules 1,2 & 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994.

2. Issue Two

Whether the lower court was right in holding that the action of the appellants was statute barred."

The defendant now respondent in this court also raised two similar issues as identified in the appellants' brief though differently framed. The two issues in the respondent brief of argument are:-

"(a) Whether the learned Justices of the Court of Appeal were right in holding that a defendant can raise an objection as to jurisdiction of a court without first filing its Statement of Defence; (arising from ground one of appeal);

(b) Whether the learned Justices of the Court of Appeal were right in holding that the suit of the appellant was statute barred; (arising from ground two of the appeal)."

The issues as identified in the appellants' brief of argument shall serve as the basis for the determination of this appeal. Starting with issue one, learned appellants' counsel referred to the provision of Order 23 Rules 1,2 and 3 of the Lagos State High Court (Civil Procedure) Rules 1994 and argued that the respondent as the applicant before the trial High Court clearly failed to comply with the provisions of the rules in filing her preliminary objection by failing to file a Statement of Defence. Learned counsel cited and relied on the decision of the Court of Appeal in the case of *Disu v. Ajilowura* (2001)4 NWLR (Pt. 702) 76 which according to him represents the law on the application and effect of Order 23 Rules 1, 2 and 3. On practice under Demurrer proceedings, learned counsel quoted passages from the judgment of this court in *Fadare v. A.G. Oyo State* (1982) 4 S.C. (Reprint) 1; (1982) 1 All NLR (Pt. 1) 24 which was referred to in *Onibudo v. Akibu* (1982) 7 S.C. (Reprint) 29; (1982) 1 All NLR (Pt. 1)194 at 199-200, and submitted that Demurrer Proceedings having been specifically abolished by Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules 1994, the respondent ought to have filed a Statement of Defence wherein the point of law could have been raised and later canvassed in the Notice of the Preliminary Objection. Other cases relied upon by the learned counsel on how Preliminary Objection in lieu of Demurrer is raised include *Mobil Oil(Nig) Plc v. I.A.L.*

36 Inc. (2000) 4 S.C. (Pt.I) 85; (2000) 6 NWLR (Pt. 659) 146 at 175-176 and Brawal Shipping Ltd v. Onwadike & Co. Ltd. (2000) 6 S.C. (Pt, II) 133; (2000) 11 NWLR (Pt, 678) 387 at 407. Counsel therefore urged this court to allow the appeal and restore the decision of the trial court.

As for the respondent, her learned counsel also referred to the provisions of Order 23 Rules 1,2 and 3 of the Lagos High Court (Civil Procedure) Rules, 1994 and pointed out that the objection of the respondent to the appellants' action was not brought under the provisions of the Rules but under Section 16(2) (a) of the Limitation Law Cap. 118 Laws of Lagos State, 1994, which enjoined the appellants to file their action against the respondent within 12 years after the cause of action had accrued. Learned counsel pointed out that the steps taken by the respondent/applicant in raising her preliminary objection before filing her Statement of Defence were in line with the decisions in *Egbe v. Alhaji* (1990) 3 S.C. (Pt. I) 63; (1990)1 NWLR (Pt. 128) 546 at 591; *Onibudo & Ors v. Akibu & Ors.* (1982)7 S.C. (Reprint) 29; (1982) All NLR 207 at 214; *Odivo v. Obor & Anor.* (1974) 2 S.C. (Reprint) 18; (1974) NSCC 103 at 107; *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414 at 466; and *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33 at 48, because the Preliminary Objection was challenging the jurisdiction of the trial court. Counsel observed that issue of jurisdiction needed not to have been pleaded in a Statement of Defence before it could be raised provided the objection is supported by enough material on which a decision could be taken by the court. With regard to the cases of *Fadare v. A.G. Oyo State* (supra); *Mobil Oil (Nig) Plc v. I.A.L. 36 Inc.* (supra) and *Brawal Shipping Ltd v. Onwadike & Co. Ltd.* (supra) cited and relied upon by the appellants, learned counsel believed that the decisions were made per incuriam and that in any case, the failure of the respondent to comply with Order 23 Rules 1, 2 and 3, is a mere irregularity which had been cured by the provisions of Order 5 Rule 1 of the same Lagos High Court Rules.

In the reply brief, the appellants maintained that rules of court are meant to be obeyed and that the respondent having regard to the decisions in several cases particularly the case of *Ekpan v. Uyo* (1986) 3 NWLR (Pt. 26) 63 at 73, is bound to comply with Order 23 Rules 1,2

and 3 of the Lagos High Court Rules, stressing that it is not correct that the decisions of this court on the interpretation of Order 23 Rules 1,2 and 3, were given per incuriam. Learned counsel concluded that it is settled law that statute of limitation must be pleaded and proved if the decision of this court in the case of Savannah Bank v. Pan Atlantic (1987) 1 NWLR (Pt. 49) 212 at 259, is taken into consideration because objection on statute of limitation does not amount to a challenge of the jurisdiction of court. The case of Madukolu & Ors. v. Nkedilim (1962) 1 All NLR (Pt. 4) 587 at 589-590 was also relied upon.

The complaint of the appellants in their first issue in this appeal is that the court below in its judgment entered in favour of the respondent in allowing her appeal, was in complete or in total disregard of the provisions of Order 23 Rules 1, 2 and 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994. These rules which are relevant in this respect are:-

- “1. No demurrer shall be allowed.*
- 2. Any party shall be entitled to raise by his pleading any point of law and, unless the court or fudge in chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.*
- 3. If in the opinion of the court or a Judge in chambers, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set off, counter-claim, or reply therein, the court or Judge may thereupon dismiss the action or make such other order therein as may be just.”*

By these rules quoted above, there is no doubt whatsoever that proceedings by way of demurrer have been abolished by Rule 1 and in its place Rules 2 and 3 are to be used by parties in raising any point of law in their pleadings, namely, Statement of Claim, Statement of Defence, counter-claim or reply to a counter claim for determination and disposal by the learned trial Judge in the cause of the hearing of the matter or in the judgment at the end of the trial. The rules plainly deal with the procedure to be followed by parties wishing to rely on points of law to raise issues for determi-

nation in the course of the trial of the action or after the trial in the final judgment of the trial court. Indeed, the application of Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules, 1994 was explained by this court in Mobil Oil (Nig) Plc, v. I. A. L. 36 Inc. (2000) 4 S.C. (Pt. I) 85; (2000) 6 NWLR (pt. 659) 146 at 175-176 B relied upon by the appellants where Iguh, JSC., said:-

“I think I should point out that an application by way of demurrer under the Federal High Court (Civil Procedure) Rules, 1976 must not be confused with or mistaken for an application in lieu of demurrer applicable presently in Lagos State and Western State. In the latter class of applications, the points of law desired to be raised by the defendant in a preliminary issue are required to be set out in the Statement of Defence before such application in lieu of demurrer is raised. C
“ D

By this dictum, all what is being explained is that a defendant wishing to rely on points of law to raise a preliminary issue, is required to set out such points of law in the Statement of Defence before the preliminary issue is regarded as properly raised. E

Returning to the present case, it is important to examine the application of the respondent at the trial High Court reproduced at page 5 of the record of this appeal. It reads:-

“ Not ice of Preliminary Objection Brought Pursuant to F
(i) Section 16(2)(a) Limitation Law Cap. 118 Laws of Lagos State, 1994.

(ii) Inherent powers of the Honourable Court.

TAKE NOTICE that this Honourable Court will be moved on Monday, the 5th day of July, 1999 at the hour of 9.00 O’clock in the forenoon or so soon thereafter as counsel may be heard on behalf of the Defendant/ Applicant for:- G

(i) AN ORDER dismissing this suit as the Honourable Court lacks the jurisdiction to entertain the suit. H

(ii) AND FOR SUCH further order(s) as the Honourable Court may deem fit to make in the circumstances.

GROUND FOR THE APPLICATION

This action is statute barred having been brought In 1996, more than IS years after the cause of action accrued and outside the prescribed statutory period within which the suit ought to have been instituted.

AND FURTHER take Notice that the Defendant/ Applicant in addition to the Affidavit in support, intends to rely on all processes already filed before the Honourable Court in the determination of this Preliminary Objection.

DATED THIS 14th DAY OF JUNE, 1999.”

On the face of this application one cannot but agree entirely with the learned counsel to the respondent that the point of law raised by the respondent in the application before the trial High Court is not an ordinary point of law that could have been raised under Order 23 of the Lagos State High Court (Civil Procedure) Rules 1994. The application was plainly brought under the provisions of the Limitation Law, Cap. 118 of the Laws of Lagos State, 1994 to challenge the jurisdiction of the trial court that it has no jurisdiction to entertain the appellants’ action for their failure to bring the action within the period of 12 years prescribed by the law. As the respondent being defendant had perceived that the action as constituted before the trial court against her was not worth defending, was perfectly justified in refusing to avail herself of the provisions of Order 23 of the High Court Rules, by filing her Statement of Defence before raising her objection against the jurisdiction of the trial court. This is because the law is trite that an objection that a court has no jurisdiction to entertain a matter or action is certainly not an ordinary point of law contemplated under Order 23 Rules 2 and 3 of the Lagos State High Court Civil Procedure Rules. Issue of jurisdiction is very fundamental. It can be raised at any stage of the proceedings in the High Court, the Court of Appeal and in this court by the parties or suo motu by the court itself. See *Oloriode v. Oyebi* (1984) 1 SCNLR 390; (1984) 5 S.C. 1; *Oloba v. Akereja* (1988) 7 S.C. (Pt. I) 1; (1988) 3 NWLR (Pt. 84) 508 and *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414 at 453-454. Therefore, it was perfectly in order for the trial court which heard the Preliminary

Objection to have ruled on it one way or the other, rather than striking it out on the ground that no Statement of Defence was filed before it was brought. The trial court was wrong in taking this stand as found by the court below whose judgment was not given in total disregard of the provisions of Order 23 of the Lagos High Court Rules as assumed by the appellants because being an issue of jurisdiction, these rules cannot dictate when and how it can be raised.

It is now beyond argument that because issue of jurisdiction is regarded as a threshold issue and a lifeline for continuing any proceedings, objection to it ought to be taken at the earliest opportunity as was done in the present case if there are sufficient materials before the court to consider it and a decision reached on it before any other step in the proceedings is taken because if there is no jurisdiction, the entire proceedings are a nullity no matter how well conducted. See *Ndaeyo v. Ogunnaya* (1977) 1 S.C. (Reprint) 7; (1977) 1 S.C. 11; *Chacharos v. Ekimpex Ltd.* (1988) 1 NWLR (Pt. 68) 88; *Oloba v. Akereja* (1988) 7 S.C. (Pt. I) 1; (1988) 3 NWLR (Pt. 84) 508; *Bakare v. Attorney-General of the Federation* (1990) 9-10 S.C. 26; (1990) 5 NWLR (Pt. 152) 516 and *Jeric (Nigeria) Ltd, v. Union Bank of Nigeria Plc.* (2000) 12 S.C. (Pt. II) 133; (2000) 15 NWLR (Pt. 691) 447. It is quite clear from these decisions of this court that at any stage sufficient facts or materials are available to raise the issue of jurisdiction, or that it has become apparent to any party to the action that it can be canvassed, there is no reason why there should be any delay in raising it. In *Petrojessica Enterprises Ltd, v. Leventis Technical Co. Ltd.* (1993) S NWLR (Pt. 244) 675 at 693, *Belgore, JSC*, put it plainly thus:-

“Jurisdiction is the very basis on which any tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity xxxx. This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this court; afortiori the court can suo motu raise it. It is desirable that Preliminary Objection be raised early on the issue of jurisdiction;

but once it is apparent to any party that the court may not have jurisdiction, it can be raised even viva voce as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs and to avoid a trial in nullity.”

B In the instant case, all the circumstances and attributes outlined
in the Petrojessica v. Leventis Technical (Supra), were on the ground
when the respondent filed her preliminary objection at the trial court which
erroneously refused to rule on it on the alleged ground that it was not
competent having been filed before filing a Statement of Defence. To
C say, as did the trial court and canvassed by the appellants in their argu-
ments before this court, that objection to jurisdiction should only be taken
after the filing of a Statement of Defence, is indeed a misconception.
This entirely depends on what materials were available. Objection to ju-
D risdiction could be taken on the basis of the Statement of Claim as in
Izenkwe v. Nnadozie (1953) 14 WACA 361 at 363; Adeyemi v. Opeyori
(1976) 9-10 S.C. (Reprint) 18; (1976) 9-10 S.C 31 and Kasikwu Farms
Ltd v. Attorney-General of Bendel State (1986) 1 NWLR (Pt. 19) 695. It
E could be taken on the evidence received as was the case in Barclays Bank
of Nigeria Ltd v. Central Bank of Nigeria (1976) 6 S.C (Reprint) 115;
(1976) 1 All NLR 409; or by a motion on notice supported by affidavit
giving the facts upon which reliance is placed as in National Bank (Nige-
F ria) Ltd v. Shoyoye (1977) 5 S.C. (Reprint) 110; (1977) 5 S.C. 181 at
194. Intact, it could be taken even on the face of the writ of summons
before filing Statement of Claim. See Attorney-General Kwara State v.
Olawale (1993) 1 NWLR (Pt. 272) 645 at 674-675 and the recent deci-
sion in Arjay Ltd v. Airline Management Support Ltd (2003) 2-3 S.C. 1;
G (2003) 7 NWLR (Pt. 820) 577 at 601 where Onu, JSC., was confronted
with the issue of raising preliminary objection on jurisdiction before a
Federal High Court before filing a Statement of Claim as required by
Order xxvii, of the Federal High Court Rules Cap. 134, Laws of the
H Federation of Nigeria, 1990, had this to say:-

“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 jurisdiction and a demurrer. I 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 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 writ of summons and affidavits. In support of an interlocutory application, as in the case in hand. "

Taking into consideration that at the time the respondent filed her Preliminary Objection to the jurisdiction of the trial court to entertain the appellants' suit, not only the writ of summons and the Statement of Claim had been filed and served but that the Preliminary Objection was also supported by affidavit with a number of relevant documents exhibited to it together with a counter affidavit filed in opposition thereof, the fact that no Statement of Defence was filed at that stage would not have prevented the trial court from determining the objection which is quite competent on the adequate materials already before the court. For this reason, the trial court was wrong to have struck out the application as rightly found by the court below.

The cases of *Fadare v. A.G of Oyo Suite (supra)*, *Mobil Oil (Nig) Plc v. IAL. 36 Inc. (supra)* and *Brawal Shipping Ltd v. Onwadike & Co. Ltd (supra)* cited by the appellant are not decisions given per curiam as erroneously assumed by the learned counsel to the respondent. However, the circumstances under which those decisions were given are not present in the present case where the point of law involves objection to jurisdiction. Furthermore, the case of *Savannah Bank v. Pan Atlantic (supra)* relied upon by the appellants was decided on its own peculiar facts where the defence under limitation statutes generally was considered. In the present case however, a challenge to the jurisdiction of court was involved under specific provisions of the Limitation Law of Lagos

State 1994 whose provisions are not the same as other Limitation Laws generally.

The second issue is whether the court below was right in holding that the action of the appellants was statute barred. In his argument in support of this issue, the learned counsel to the appellants observed that when the appellants sighted the respondent on the land in dispute in 1984, there was already a litigation between the predecessor-in-title of the appellants and the predecessor-in-title of the respondent over a large area of land, portion of which is in dispute in the present case. Learned counsel pointed out that the suit which originated from the Lagos High Court, came on appeal to the Court of Appeal and then to this court where judgment was delivered on 12-12-86. On the facts pleaded in the appellants' Statement of Claim, stated the learned counsel, the question of the doctrine of Lis Pendens was raised regarding the conduct of the respondent in acquiring the property in dispute but the court below refused to consider it in its judgment now on appeal. With regard to the date the appellants' action accrued in the present case, learned counsel argued that although the respondent was sighted on the land in dispute in 1984, the right of action did not accrue to the appellants until 12-12-1986, when the case on the dispute relating to the title on the larger portion of the land was concluded. This, according to counsel, turned the respondent into a party who acquired title to a piece of land while litigation over the control of the land was going on in court. Relying on the cases of *Bamgboye v. Olusoga* (1996) 4 NWLR (Pt. 444) 520; *Osagie v. Oyeyinka* (1987) 3 NWLR (59) 144; *Clay Ind. (Nig.) Ltd, v. Aina* (1997) 8 NWLR (Pt. 516) 208 and *Alakija v. Abdulai* (1998) 5 S.C. 1: (1998) 6 NWLR (Pt. 552) 1 at 17, counsel submitted that the Deed of Transfer executed by the respondent and her vendor for the transfer of title to the land in dispute having been caught by the doctrine of Lis Pendens, is null and void and did not transfer any title in the land in dispute to the respondent. Learned counsel finally concluded that as pending litigation over the portion of the land incorporating the land in dispute was not concluded until 12-12-1986, the action of the appellants filed at the trial court on 6-12-1996 was not statute barred.

For the respondent, it was argued by her learned counsel that the appellants' suit against the respondent related to land and that under Section 16(2)(a) of the Limitation Law Cap. 118 Laws of Lagos State, no such suit shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it. Quoting Paragraphs 7 to 11 of the appellants' Statement of Claim, learned counsel said it is clear from these paragraphs, particularly Paragraph 7, that the appellants' cause of action had accrued in August 1984 when the respondent was sighted on the land in dispute; that on the face of the Writ of Summons, the action was not filed until 5-12-1996, a period of twelve years and four months; that this means the appellants have lost their right of action and cannot enforce any right whatsoever on the land. In support of this contention, the respondent's counsel placed reliance on *Egbe v. Adefarasin* (1987) 1 NWLR (Pt. 471 1: *Sosan v. Ademuyiwa* (1986) 3 NWLR (pt. 27) 241 at 243; *Ajibona v. Kolawole* (1996) 10 NWLR (Pt. 467) 22 at 35-36 and *Akibu v. Azeez* (2003) 1 S.C. (Pt. II) 71 at 86 and urged this court to affirm the decision of the court below that the action of the appellants was statute barred and dismiss the appeal.

In a short reply in the appellants' reply brief, the appellants insisted that their action was not statute barred because the principle of law that time does not run when litigation on a matter has not ended, applied to their case to shift the date the cause of action arose from August 1984 as pleaded in paragraph 7 of their Statement of Claim, to 12-12-1986 when litigation on the larger portion of the land containing the smaller portion of the land in dispute came to an end.

The second issue under consideration now is whether the court below was right in holding that the action of the appellants was statute barred. What has to be determined in this issue is whether the action of the appellants was filed within the time prescribed by the Limitation Law Cap. 118 of the Laws of Lagos State 1994. Sections 16, 17, 19 and 21 of this law which are relevant provide:-

“16(1) Subject to the provisions of subsections (8) and (3) of this section, no action shall be brought by a State authority to recover any land after the expiration of twenty years from the date on which the

right of action accrued to the State authority, or if it first accrued to some person through whom the State authority claims, to that person.

(2) The following provisions shall apply to an action by a person to recover land:-

B (a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;

C (b) if the right of action accrued to a State authority, the action may be brought at any time before the expiration of the period during which the action could have been brought by the State authority, or of twelve years from the date on which the right of action accrued to some person other than the State authority, whichever period first expires.

D (3) For the purposes of this Law, a right of action to recover any land which accrued to the Republic or to the Lagos State before the commencement of this Law shall be deemed to have become exercisable by an appropriate State authority on the date on which it first accrued to
E the Republic or to the Lagos State, as the case may be.

17 Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof and has while entitled thereto been dispossessed or has discontinued his possession, the right of action shall be deemed to have accrued on the date of
F the dispossession or discontinuance.

19 (1) No right of action to recover land shall be to deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.
G

(2) Where:-

(a) under the provision of this Law, a right of action to recover land is deemed to accrue on a certain date; and
H (b) no person is in adverse possession of the land on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

(3) Where a right of action to recover land has accrued, and there-

after, before the right of action is barred, the land ceases to be in adverse possession, the right of action shall no longer be deemed to have accrued and no fresh right of action shall be deemed to accrue unless and until the land is again taken into adverse possession.

21. On the expiration of the period fixed by this Law for any person to bring an action to recover land, the title of that person to the land shall be extinguished.”

On a careful reading of the provisions of the Lagos State limitation Law reproduced above, it becomes quite clear that the provisions do not merely deny the right of action in Section 16 thereof but completely extinguish an existing right or title to land at the expiration of the period of limitation of twenty years for the State and twelve years for other parties from the date of the accrual of the right of action. See *Ajibona v. Kolawole* (1996) 10 NWLR (Pt. 476) 22 at 35-36 and *Akibu v. Azeez* (2003) 1 S.C. (Pt. II) 71; (2003) 5 NWLR (Pt. 814) 643 at 667-669, where these provisions of the Lagos State Limitation Law 1994, came under consideration by this court. The provision of the law are quite clear and unambiguous. What remains is the application of the law to the facts and circumstances of the present case in which the area of the dispute between the parties in their submissions has been narrowed down to the date on which the appellants’ cause of action in their claim for possession of 21/2 plots of land, damages for trespass and injunction against the respondent accrued.

This issue can not be resolved effectively without stating what a cause of action is all about. A cause of action has been defined in the Dictionary of English Law, Second Impression, page 395 as “the fact or combination of facts which give rise to a right to sue.” This definition had been closely adopted in many decisions of this court. Some of these decisions are, *Egbe v. Adefarasin* (No. 2) (1987) 1 NWLR (Pt. 47) 1; *Savannah Bank of Nigeria Limited v. H Pan Atlantic Shipping & Transport Agencies Limited* (1987) 1 NWLR (Pt. 49) 213 and *Thadani v. National Bank of Nigeria* (1972) 1 S.C. (Reprint) 75; (1972) 1 S.C, 105. In a recent decision of this court in

P.N. Udoh Trading Company Limited v. Abere (2001) 5 S.C. (Pt.II) 64; (2001) 11 NWLR (Pt. 723) 113 at 129, the term was defined thus:-

“Cause of action had been defined by courts to mean a combination of facts and circumstances giving rise to the right to file a claim in court for remedy. It includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle the plaintiff to succeed.”

In the instant case, the appellants' Statement of Claim as plaintiffs at the trial court and their counter affidavit filed by them as respondents in opposing the respondent's application challenging the jurisdiction of the trial court, are relevant in tracing the time when the appellants' cause of action arose. Paragraph 4 of the appellants' Statement of Claim which disclosed their interest in the land in dispute states

“4. The land in dispute forms part and portion of the land sold to late D.T. Elabanjo by virtue of the Deed of Conveyance dated 5th day of November, 1969 and registered No 19 at page 1 in volume 1305. The survey plan of Elabanjo land and the Deed of Conveyance will be relied upon and also the composite plan of the land in dispute.”

By this paragraph, the appellants have traced their rights and interest in the land in dispute as representatives of Elabanjo family to 1969. The rights of the appellants in the land in dispute was however infringed by the respondent who was seen on the land in August 1984 as pleaded in paragraph 7 of the Statement of Claim as follows:-

7. The plaintiff slates that when the defendant was sighted on the land in August 1984, a letter was defendant was, writtethe D.P.O Pedro Station and the defendant was warned to steer clear from land since the action in respect of the land was still pending at the Court of Appeal.”

In the appellants' letter to the D. P.O., Pedro Station dated 15-8-1984, the appellants visibly complained of alleged acts of trespass on the land against the respondent who was not infact merely sighted on the land but also brought caterpillar and started preparing the land with the support of hooligans and workers to put up structures thereon. To me,

the combination of these facts and circumstances prevailing in August 1984, clearly gave rise to the appellants' right to file a claim for the possession of the land in dispute, damages for trespass and injunction restraining the respondent from committing further acts of trespass on the land and not to have been contented with a complaint to the D.P.O. or B
wail until after 12 years to seek the same remedy in court. From the facts and circumstances therefore. I say the cause of action in this case accrued in August 1984. Even if the excuse of the appellants for their inaction is placed on the situation that litigation on the land in dispute was still C
going until 12-12-1986 when the dispute ended in this court, why did the appellants refuse to seek remedy in court against the respondent until 5-12-1996 nearly 10 years after the conclusion of the case which the appellants themselves stated was not between the present parties in this appeal? The result of the appellants' failure to take appropriate action D
resulted in leaving the respondent in full control and possession of the 21/2 plots of land in dispute from August 1984 to December 1996, thereby bringing the appellants' action into the full grip of the provisions of Sections 16(2)(a) and 21 of the Limitation Law Cap. 118 of the Laws of E
Lagos State, 1994 earlier quoted in this judgment.

**Guided by the decision of this court in Egbe v. Adefarasin (No. 2) (supra), the period of limitation in any limitation statute is determined by looking at the Writ of Summons and the Statement F
of Claim alleging when the wrong was committed which gave rise to the cause of action and by comparing that date with the date on which the Writ of Summons was filed. If the time on the Writ of Summons is beyond the period allowed by the Limitation Law, the action is statute barred. Looking at the Writ of Summons in the G
case at hand, the appellants' suit claiming possession of the 2 1/2 plots of land in dispute, damages for trespass and perpetual injunction was filed on 5-12-1996. The Statement of Claim of the appellants who sued in a representative capacity for the Elabanjo family H
who acquired interest in the larger portion of land containing the land in dispute since 1969, shows that the respondent trespassed on to the land in August 1984 when she brought a caterpillar to level**

the land in preparation for putting up structures thereon. On these facts, to say that the cause of action giving the appellants the right to sue and seek remedy against the respondent who was in possession arose in August 1984, can hardly be disputed. Thus, by waiting until 5-12-1996 when their action was filed against the respondent, a period of 12 years and 4 months, the appellants' action was, without any doubt filed outside the period of 12 years prescribed by Section 16(2)(a) of the Limitation Law Cap. 118 of the Laws of Lagos State, 1994 for action to recover any piece of land. In other words, the appellants' action is statute barred as rightly found by the court below. Infact the fate of the appellants does not end with the loss of their right of action alone, their title to the 2 1/2 plots of land in dispute has also been extinguished under the provisions of Section 21 of the same Limitation Law. To this end, no court can look into the merit of the appellants' suit now dead to see whether the respondent had acquired a valid title to the land in dispute or not having regard to the principles of *Lis Pendens* being relied upon in this appeal by the appellants.

In the result, this appeal fails and the same is hereby dismissed. The judgment of the court below delivered on 21-3-2001 is accordingly affirmed.

There shall be N10,000.00 costs against the appellants in favour of the respondent

ONU JSC

The two issues that have ultimately arisen for the consideration of this appeal and decisively given in the judgment of my learned brother, Mohammed, JSC., with which I am in entire agreement, are:

"1. ISSUE NO. 1

Whether the judgment of the lower court was not entered in total disregard of the provisions of Order 23 Rules 1,2 & 3 of the High Court of Lagos (Civil Procedure) Rules, 1994.

2. ISSUE NO. 2

Whether the lower court was right in holding that the action of the

appellants was statute barred; arising from ground two of appeal.”

Commencing with Issue 1, the learned appellants’ counsel referred to the provisions of Order 23 Rules 1,2 and 3 of the Lagos State High Court (Civil Procedure) Rules and argued that the respondent as the applicant before the trial High Court clearly failed to comply with the provisions of the rules in filing her preliminary objection by failing to file a Statement of Defence. He cited and relied on the decision of the Court of Appeal in *Disu v. Ajilowura* (2001) 4 NWLR (Pt. 702) 76, which in his view, represents the law on the application and effect of Order 23 Rules 1,2 and 3. On practice under Demurrer proceedings, learned counsel referred to passages from the judgment of this court in *Fadare v. A.G. of Oyo State* (1982) 4 S.C. (Reprint) 1; (1982)1 All NLR (Pt. 1)24 which was referred to in *Onibudo v. Akibu* (1982) 7 S.C. (Reprint) 29: (1982) 1 All NLR (Pt.1) 194 at pages 199-200, and submitted that Demurrer proceedings were specifically abolished by Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules, 1994, adding that, the respondent ought to have filed a Statement of Defence raising the point of law and later canvass the same in the Notice of Preliminary objection. Other cases cited in support thereof by learned counsel on how Preliminary Objection in lieu of Demurrer include *Mobil Oil (Nig) Plc v. I. A. L 36 Inc.* (2000) 4 S.C. (Pt. 1) 85; (2000) 6 NWLR (Pt. 659) 146 at 175 - 176 and *Brawal Shipping Ltd v. Onwadike & Co. Ltd.* (2000) 6 S.C. (Pt. II) 133; (2000) 11 NWLR (Pt. 678) 387 at 407. Counsel therefore urged us upon the foregoing to allow the appeal and restore the decision of the trial court.

In response, learned counsel for the respondent also referred us to the provisions of Order 23 Rules 1, 2 and 3 of the Lagos High Court (Civil Procedure) Rules, 1994 and stressed that the objection of the respondent to the appellants’ action was not brought under the provisions of the Rules but under Section 16(2)(a) of the Limitation Law Cap. 118 Laws of Lagos State, 1994, which enacts that the appellants file their action against the respondent within 12 years after the cause of action had accrued. Learned counsel pointed out that the steps taken by the respondent in raising her preliminary objection before filing her State-

ment of Defence, were in line with the decisions in *Egbe v. Alhaji* (1990) 3 S.C. (Pt. I) 63; (1990) 1 NWLR (Pt. 128) 546 at 591: *Onibudo & Ors. v. Akibu* (1982) 7 S.C. (Reprint) 29; (1982) All NLR 207 at 214: *Odive v. Obor & Anor.* (1974) 2 S.C. (Reprint) 18; (1974) NSCC 103 at 107; *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 537) 414 at 466 and *State v. Onagoruwa* (1992) 2 NWLR (Pt. 221) 33 at 48; because the Preliminary Objection was challenging the jurisdiction of the trial court. Counsel observed that issue of jurisdiction needed not to have been pleaded in a Statement of Defence before it could be raised provided the objection is supported by enough materials on which a decision could be taken by the court. Learned counsel for the respondent with reference to the cases of *Fadare v. A.G. Oyo State* (supra); *Mobil Oil (Nig.) Plc v. I.A.L 36 Inc* (supra) and *Brawal Shipping Ltd v. Onwadike & Co. Ltd* (supra) cited and relied upon by the appellants, said that the decisions were made per incuriam and that, in any case, the failure of the respondent to comply with Order 23 Rules 1,2 and 3, is a mere irregularity which had been cured by the provisions of Order 5 Rule 1 of the same Lagos High Court Rules.

In the reply brief, the appellants submitted that the rules of court are meant to be obeyed and that the respondent having regard to the decisions in several cases particularly the case of *Ekpan v. Uyo* (1986) 3 NWLR (Pt. 26) 63 at 73, is bound to comply with Order 23 Rules 1,2 and 3 of the Lagos State High Court Rules, emphasising that it is not correct that the decisions of this court on the interpretation of Order 23 Rules 1,2 and 3, were given per incuriam. Learned counsel concluded that it is settled law that statute of limitation must be pleaded and proved if the decision of this court in the case of *Savannah Bank v. Plan Atlantic* (1987) 1 NWLR (Pt. 49) 212 at 259, is taken into consideration because objection on statute of limitation does not amount to a challenge of the jurisdiction of court as exemplified in the case of *Madukolu & Ors. v. Nkemdilim* (1962) 1 All NLR (Pt. 4) 587 at 589-590.

Now, the Statement of Claim of the appellants was filed on 7th December, 1998. After the respondent was served, she filed her Preliminary Objection, praying inter alia, for:

“AN ORDER dismissing this suit as the Honourable Court lacks the jurisdiction to entertain the suit.”

The ground for the application, is stated to be:

“The action is statute barred having been brought in 1996, more than 12 years after the cause of action accrued and outside the prescribed statutory period within which the suit ought to have been instituted.”

The learned trial Judge peremptorily raised the provision of the said Rule and summarily struck out the said Notice of Preliminary Objection in the following words:

“I refer to Order 23 Rule 1 that demurrer shall not be allowed and hold that in the absence of Statement of Defence, the Notice of Preliminary Objection based on statute bar (sic) is incompetent. The Notice of Preliminary Objection dated 14/6/99 is struck out for being incompetent.”

1, As indeed transpired, learned counsel for the respondent/applicant Mr . Okpara referred the trial court to the case of
Egbe v. The Hon. Justice Adefarasin (supra) rat
o 2.

The learned trial Judge in the first place, grossly misconstrued the purport of Order 33 Rules 1, 2 and 3 which make no provision that a Statement of Defence must first be filed. Indeed, he never adverted his mind to Section 16(2)(a) of the Limitation Law Cap. 118 Laws of Lagos State, 1994. He also never adverted his mind to the fact that it is settled that even mandatory Rules of court are not as sacrosanct as mandatory statute or an Act. See Katto v. Central Bank of Nigeria (1991) 11-13 S.C. 176; (1991) 13 SCNJ 1 at 17. Also settled is that Rules of Court cannot override statutory provisions of the law. See Alhaji Edun v. Odan Community Ado family etc (1980) 8-10 S. C. (Reprint) 67; (1980) 10 S.C. 103 at 134.

The essence of the administration of justice, it must be emphasised, H is to make access to justice as quickly and as cheap as possible.

Hence, the filing of an objection alone as in the case in hand which disposes of the entire case will definitely make the preparation and filing

of a Statement of Defence unnecessary and therefore eliminate the additional time, effort, money and cost in the preparation and filing of a Statement of Defence. This court in the case of *Egbe v. Alhaji* (supra) paras E - F held that:

B *“Under Order 22 Rule 3 of the High Court of Lagos State (Civil Procedure) Rules, 1972, a defendant who knows that there is a point of in law which can determine the action in his favour in limine can apply to the court by way of motion or as a point of his pleading to dismiss the action without evidence having been taken.”*

C This court also in the case of *Alhaji I. Onibudo & Ors. v. Akibu* (supra) at 214 held that:

D *“The Preliminary point of law can be taken after the receipt of the Statement of Claim and before any defence is filed. The party in such a case may rely on point of law even if the issues of fact in the Statement of Claim are conceded. If he fails, an order would be made by the court ordering the filing of a Statement of Defence and the suit would proceed to trial.”*

E Similarly, in the case of *Odivo v. Obor & Anor.* (1974) 2 S.C. (Reprint) 18; (1974) NSCC 103 at 107, Elias, C/N., stated that:

F *“The learned trial Judge should have pointed 35 out to counsel for the defendant that the Preliminary Objection should have been made after the delivery to him of the Statement of Claim and before filing his Statement of Defence.”*

I am of the firm view therefore that the respondent was in order at the trial court when she filed her Preliminary Objection on the jurisdiction of the court without first filling her Statement of Defence.

G Consequently, the learned Justices of the court below were in my view right in upholding the appeal of the respondent and dismissing the suit of the respondents, the appellants herein.

H What must be noted here is that the point of law raised fundamentally affected the jurisdiction of the court which can be raised at any stage of the proceedings. In fact, this court in the case of *Kotoye v. Saraki* (1994) 7 NWLR (Pt. 357) 414 at 466 per Adio, JSC., stated that:

“..... an objection that a court has no jurisdiction to entertain a

matter or an action is very fundamental. It can be raised at any stage of the proceedings in the High Court, Court of Appeal and in this court by the parties or by the court."

See Oloriode v. Oyebe (1994) 1 SCNLR 390 and Oloba v. Akereja (1988) 7 S.C (Pt. I) 1; (1988) 3 NWLR (Pt. 84) 508. So, in my opinion, B there was nothing wrong with the consideration of it by the court below especially when, in this case, the determination of the question was a main or vital issue.

I am of the view that the issue of jurisdiction raised by the respondent herein as defendant in the trial court was more than a mere procedural matter which requires that a Statement of Defence should contain a point of law before it is set down to be heard before or after the trial. The Preliminary Objection brought by the respondent herein, in my firm view, in the trial court clearly showed that it was not brought pursuant to the Rules of court but brought under the law relating to the Limitation of Actions under the Laws of Lagos State. D

This court in the case of State v. Onagoruwa (supra) per Uwais, JSC., as he then was, observed thus: E

"Furthermore, the jurisdiction of the courts to determine an issue as to whether it has jurisdiction is not a procedural matter but a substantive one since any court without jurisdiction is incompetent to determine a matter and if it does exercise the jurisdiction which it does not possess, its decision is a nullity." F

Hence, I am of the respectful view that the issue of jurisdiction raised as the preliminary objection by the respondent herein need not be pleaded once it could be obvious from the materials before the court and could be raised by a party and/or even suo motu by the court. For, as I had the occasion to point out in Kotoye v. Saraki (supra) at pages 453-454 Paragraphs A-B: G

"..... hence in the instant case, the fact that the defendant has not included any aspect of the question in his ground of appeal or in the questions for determination formulated in his briefs of argument before the court below, can in any way curtain (sic) the jurisdiction of the trial court below to decide whether or not the jurisdiction of the trial court has

been ousted.....”

Indeed, as earlier demonstrated, the learned counsel to the respondent cited the case of *Lasisi Fadare v. A. G. of Oyo State* (supra): *Mobil Oil (Nig.) Plc v. IAL* at pages 175-176 (supra and *Brawal Shipping Ltd v. Onwadike* pages 387 at 407, (supra) as decisions made per incuriam and urging us not to follow them as the objection was premature but rather to follow *Onibudo v. Akibu* (supra); *Egbe. v. Alhaji* (supra); *Odive v. Obor& Anor.* (supra) and *Bambe & Ors. v. Aderinola & Ors.* (1977) 1 S.C. (Reprint) 1; (1977) NSCC (Vol. II) at line 4 lines 11-20 where it was held:

“In constructing the provisions of rule 1, it will be wrong to ignore the provisions of Rules 2 to 4. Order 22 is similar to Order 25 of the Rules of the Supreme Court applicable to England in 1963. Order 22 not only abolishes demurrers but substitute a more summary process for getting rid of pleadings which show no reasonable cause of action (1963 the Annual Practice page 571). As the objection taken in the instant case could, if upheld, dispose of the whole action, we are of the view that it comes within the ambit of Order 22. We find ourselves unable to support the view expressed by the learned trial Judge that the objection was premature.”

See also *Okoye v. Nigerian Const. & Furniture Co. Ltd.* (1991) 7 S.C. (Pt. III) 33; (1991) 6 NWLR (Pt. 199) 501 at 540 where this court per Nnaemeka-Agu, JSC., at paragraphs E-G held inter alia -

“Originally, demurrer, was a form of pleading before it was abolished by the Deodands Act, 1846 whereby proceedings in lieu of demurrer was substituted. The latter procedure, however, retained much of the essential characteristics of the old one. It has remained essentially a question of pleading; under a demurrer, a party objected that his opponent’s pleading in point of law, disclosed no cause of action or ground of defence, as the case may be, when a demurrer was pleaded, the question raised was forthwith set down for argument and decision. Now under a proceeding in lieu of a demurrer, the issue still depends on the pleadings but may be one of law or partly of law and partly of fact, which the trial Judge may generally dispose of before, at or after the trial How-

ever under Order 29 Rule 3 of our local rules, it is disposed of before the defendant's pleading, if necessary."

One may ask, that assuming without conceding that the Rules of Court are not complied with as is being alleged, the provisions of Order 5 Rule I of the High Court of Lagos State (Civil Procedure) Rules 1994 is to the effect that non-compliance with the Rules of Court should be treated as a mere irregularity and should not nullify the proceedings. The foregoing expression of the principle of law epitomises the procedural backing my learned brother, Mohammed. JSC., had when in this his judgment he categorically held and I am of the same firm view, that "To say, as did the trial court and canvassed by the appellants in their arguments before this court, that objection to jurisdiction should only be taken after filing a Statement of Defence, is indeed a misconception. "My learned brother went on to demonstrate his stance by cataloguing a body of case law such as *Izenkwe v. Nnadozie* (1953) 14 WACA 361 at 363; *Adeyemi v. Opeyori* (1976) 9-10 S.C. (Reprint) 18; (1976) 9-10 S.C. 31 and *Kasikwu Farms Ltd, v. A.G. of Bendel State* (1986) 1 NWLR (Pt. 19) 695; adding that it could be taken on the evidence received as in the case of *Barclays Bank v. Central Bank* (1976) 6 S.C. (Reprint) 115; (1976) 1 All NLR 409; or by a motion on notice supported by affidavit giving facts upon which reliance is placed as in *National Bank (Nigeria) Ltd v. Shoyoye* (1977) 5 S.C. (Reprint) 110; (1977) 5 S.C. 194; that in fact, it could be taken even on the face of the writ of summons before filing a Statement of Claim as in *Attorney-General Kwara State v. Olawale* (1993) 1 NWLR (Pt. 272) 645 at 674-675 as well as in the recent decision of this court in *Arjay Ltd v. Airline Management Support Ltd.* (2003) 2-3 S.C. 1; (2003) 7 NWLR (Pt. 820) 577 at 601 where, confronted with the issue of raising preliminary objection on jurisdiction before a Federal High Court before filing a Statement of Claim as required by Order xxvii of the Federal High Court Rules Cap. 134, Laws of the Federation of Nigeria, 1990, I observed as follows:

"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 appellants' submission that there is a difference between an objection to jurisdiction and a demurrer. I 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 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 Wilt of Summons and affidavits in support of an in interlocutory application as in the case in hand," (Underlining above is for emphasis).

From all I have been saying, I hold that the respondent herein had no need to file her Statement of Defence before raising the issue of jurisdiction as a preliminary point.

ISSUE NO. TWO

The second issue for determination is whether the learned Justices of the court below were right in holding that the suit of the appellants was statute barred.

The claims of the appellants relate to land and the relevant provisions are contained in Section 16(2) of the Limitation Law Cap.118, Laws of Lagos State. Schedule 16(2) of the Law provides:

"The following provisions shall apply to an action by a person to recover land;

(a) subject to Paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to some person through whom he claims, to that person."

From the above statutory provision, it becomes clear that the appellants have twelve years within which to maintain an action relating to the land in dispute with the respondent.

The question then is, what criteria does a court apply in determining which action is statute barred?

This court in the case of Egbe v. Adefarasin (supra) at pages 3-4 held that:

“A cause of action is thus said to be statute barred if in respect of it proceedings cannot be brought because the period laid down by the Limitation Law or Act had elapsed,”

B

As Oputa, JSC., succinctly put it:

“How does one determine the period of limitation? The answer is simple - by looking at the Writ of Summons and the Statement of Claim alleging when the wrong was committed which gave the plaintiff a cause of action and by comparing that date on which the Writ of Summons was filed. This can be done without taking oral evidence from witnesses. If the time on the Writ is beyond the period allowed by the Limitation Laws, the action is statute barred.”

C

This court next proceeded by stating that:

D

“A statute of limitation removes the right to action, the right of enforcement, the right to judicial relief and leaves the plaintiff with a bare and empty cause of action which he cannot enforce.”

Now, let us cast a cursory look at the appellants' Statement of Claim at pages 2-4 of the Record of Appeal to see if the appellants' claims are not statute barred. Paragraphs 7, 8,9,10 and 11 of appellants' Statement of Claim, fundamental and strategic to their action are hereunder reproduced thus:

E

“7. The plaintiff states that when the defendant was sighted on the land in August 1984, a letter was written to the D.P.O, Pedro Station and the defendant was warned to steer clear from the land since the action in respect of the land was still pending at the Court of Appeal.

F

As at that time, it was difficult for the plaintiffs' family to indemnify (mean identify) the defendant's real name and she was just referred to as the other Alhaja or Friend to Madam Shita.

G

9. The defendant also brought hooligans and workers to the land to start erecting a building on the land.

H

10. They were challenged and the defendant's representative stated clearly that they bought the land through Alhaja Adebimpe Tijani and the fact that the matter was still pending in court was explained to them.

11. The copies of the letters of the plaintiffs' family to the Police at Pedro Police Station and Commissioner of Police all written in 1984 will be relied upon at the trial of this suit."

To determine when the cause of action in this suit arose, it is very clear and obvious on the face of the appellant's Statement of Claim, particularly paragraph 7 thereof that the respondent herein was sited on the land in August 1984, which is the date, in my view, that the cause of action arose.

Looking back at the Writ of Summons and the Statement of Claim when they were filed in court, page 1 reveals that it was filed on 5th December, 1996, period of twelve years and four months back in time between the time the cause of action arose and the filing of the suit in court by the appellants herein.

Now Section 16(2) of the Limitation law Cap. 118 of Lagos State clearly provides that such an action must be brought within 12 years. I am therefore of the view that the appellants having waited between August 1984 and 5th December, 1996, a period of twelve years and four months, have no right of action any longer and afortiori have no right of action any longer and cannot enforce any right whatsoever on the land. Hence, what they have is a bare and empty cause of action.

In the case of *Sosan v. Ademuyiwa* (1986) 3 NWLR (Pt. 27) 241 at 243 paragraph F- G, this court held that:

"Where an action has become barred by operation of the Limitation Act (or law), the effect is that the cause of action (or the plaintiffs' title in the action of declaration of title as in this case) becomes extinguished by operation of law and can no longer be maintained in the court."

In the instant case therefore, the cause of action having arisen in August 1984 and the action having been brought in December, 1996, the appellants' title has already become extinguished by virtue of Section 16(2) of the Limitation Law of Lagos State (ibid)

Similarly in *Ajibona v. Kolawole* (1996) 10 NWLR (Pt. 467) 22 at 35-36 paras. H - A, this court held that:

"The Limitation Law of Lagos State on land matters does not

merely deny the right of action. It completely extinguishes an existing right at the expiration of twelve (12) years from the date of the accrued right of action.”

In the case of Akibu v. Azeez (2003) 1 SC. (Pt. 11) 71 at 86, this court in interpreting the same Section 16(2) of the Limitation Law of Lagos State, Cap. 188, held that:

“On the reading of the provisions of the Limitation Law of Lagos State as a whole, they do not merely deny the right of action. They completely extinguish an existing right at the expiration of twelve years from the accrual of the right of action.”

Having regard to the foregoing supported by the avalanche of decided authorities considered along with the contemporary procedural law as it is, I am of the humble view that the action of the appellants herein as plaintiffs in the trial court is clearly statute barred.

In conclusion, I find myself inexorably in agreement with the conclusion arrived at by my learned brother, Mohammed, JSC., and find no merit in this appeal which I accordingly dismiss with N10, 000 costs in favour of the respondent payable by the appellants.

MUSDAPHER JSC

I have had the honour to read before now, the judgment of my Lord, Mohammed, JSC, just delivered. For the same reasons so comprehensively set out which I respectfully adopt as mine, I too do hereby dismiss the appeal and affirm the decision of the Court of Appeal delivered on the 21/3/2001. I abide by the order for costs contained in the lead judgment.

OGBUAGU JSC

I have had the advantage of reading before now, the lead judgment of my learned brother, Mohammed, JSC., just delivered by him.

The controversy in this appeal that calls for consideration and determination is in my respectful view, the intendment or indeed, the strict interpretation of Order 23 Rules 1, 2, and 3 of the Lagos State High Court (Civil Procedure) Rules, 1994 (hereinafter called “the Rules”). The

Title/heading is,

“Proceedings in Lieu of Demurrer”.

Rule 1 provides that No demurrer shall be allowed.

Rule 2 provides as follows:

B *“Any party shall be entitled to raise by his pleadings any point of law and, unless the court or a Judge in Chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial”.* (The underlining mine)

Rule 3 reads as follows:

C *“If in the opinion of the court or a Judge in Chambers, the decision of such point of law substantially dispose of the whole action, or of any distinct cause of action, ground of defence, set-off, counter claim, or reply therein, the court or Judge may thereupon dismiss the*
D *action or make such other order therein as may be just”.* (The underlining mine)

I note that in the Appellants’ Briefs, there is a mix up or jumbling in the reproduction of the said Rule 3. It cannot be over-emphasized that
E it behoves all learned counsel filing briefs or any other documents for that matter in this court, to read and scrutinize the same before filing the same. Failure to do so, sometimes, can be irritating.

Now, it is firmly settled in a string of decided authorities, that in
F the interpretation/construction of a statute, the cardinal principle is to give the words used, their ordinary meaning without resort to any internal or external aid. See Attorney-General of Ondo State v. Attorney-General of Ekiti State (2001) 9-10 S.C 116; (2001) 10 SCNJ 117, In other words, ordinary meaning is to be given effect. See Alhaji Ibrahim v.
G Galadima Barde (1996) 12 SCNJ 1 at 38, per Uwaifo, JSC, citing some other cases therein and City Engineering (Nig.) Ltd. v. Nigeria Airports Authority (1999) 6 S.C (Pt.II) 41; (1999) 6 SCNJ 263. That being the state of the law, in my humble but firm view, the words “shall be entitled
H to raise by his pleadings any point of law” mean dearly and no more than that any party, shall not be prevented in any way or manner whatsoever, from raising by his pleading, any point of law. It does not mean to me that the party so entitled, must raise the point in his/by pleading. That

does not mean in my respectful view, that he must file a Statement of Defence before he can raise such point of law.

To underscore this in my view, the whole of the rules in the said Order 23 must be read together, i.e. conjunctively and not distinctively or separately. That is to say, since demurrer has been abolished, any party shall be entitled to raise by or in his pleading any point of law. That any such point raised, shall be disposed off by the Judge who tries the cause at or after the trial. That if in the opinion of the court or a judge in Chambers, the decision of such is point of law substantially disposes of the whole action, or any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the court or Judge may thereupon dismiss the action or make such other order therein as may be just. All these to my mind, are simple provisions in very clear English words or language. To suggest that a party to raise such point of law, must have filed a Statement of Defence in which the point of law must be raised, with profound and greatest respect, is clearly absurd to me. I am sure that is certainly, not the intention of the lawmakers. It could never be.

Surely and certainly, it is now firmly established, that a point of law can be raised on a Preliminary Objection, if the point of law, will be decisive of the whole litigation. See *L.C. & D. Railway v. S.E. Railway* (1888) 53 L.T. III; *Everett v. Ribbands* (1952) 2 QB 198 at 206 and *Yeoman Credit Ltd, v. Latter* (1961) 2 All ER 281 at 299. Even if it is raised on ground of jurisdiction, the court looks at the plaintiff's Statement of Claim and not on the defence. See *Chief Adeyemi & Ors .v. Opeyori* (1976) 9-10 S.C. (Reprint) 18; (1976) 9-10 S.C. 31 at 51 and *Western Steel Works Ltd. & Anor. v. Iron & Steel Workers Union of Nigeria & Anor* (1987) 1 NWLR (Pt.) at 301-302; (1987) 2 SCNJ 1 just to mention a few. i.e. jurisdiction is determined on the plaintiff's demand and not on the defendant's answer. See *Ajoka Izenkwe & Ors. v. Nnadozie* 14 WACA 361. That is why the issue of jurisdiction, is decided when the point is taken. See *Adani v. Igwe* (1956) 2 FSC 87 at 88.

It is noteworthy that the same Lagos State that made the said Rules, also enacted the Limitation Law, Cap. 118 of the Laws of Lagos State, 1994 the same year as the Rules.

Section 16(2)(a) of the Law provides as follows:

“The following provisions shall apply to an action by a person to recover land:

(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person”. (The underlining mine)

I have no doubt in my mind, that the appellants, conscious of the above provisions, formulated Issue 2 in their Brief, That issue reads as follows:

“Whether the lower court was right in holding that the action of the appellants was statute barred”.

Now as to the treatment of Preliminary Objection on a point of law challenging the validity of the institution of a suit (as in the instant case leading to this appeal), in the case of *Akinbi v. The Military Governor, Ondo State & Anor* (1990) 3 NWLR (Pt. 140) 526 at 531, 532 CA., it was held that a preliminary objection on point of law challenging the validity of the institution of a suit, could only be determined at the initial stage, by reference to the pleadings/ particularly the Statement of Claim. That once the issue cannot be determined on the pleadings then the court, ought to proceed to full trial of the case and decide the point afterwards. That a preliminary point, ceases to be one strictly speaking once the point could not be decided without evidence being led. That in such a case the point becomes a defence to the action. That the justiciability of an action, is decided as a preliminary point with reference to the plaintiff’s pleading i.e. the Statement of Claim. The case of *Shell B. P. Petroleum Development Co. v. Onasanya* (1976) 6 S.C, (Reprint) 57; (1976) 6 S.C. 89 at 94, was therein referred to. Of course, and this is also settled, a preliminary question, is a question that has to be settled before going into other things. See *Oroh & 25 Ors. v. Buraimoh* (1990) 2 NWLR (Pt. 134) 641 CA.

Now, the Statement of Claim of the appellants, was filed on 7th December, 1998. After the respondents were served, they filed their Notice

of Preliminary Objection, praying, inter alia, for:

“(i) An order dismissing this suit as the honourable court lacks the jurisdiction to entertain the suit”.

The ground for the application, is stated to be,

“The action is statute barred having been brought in 1996, more B that 12 years after the cause of action accrued and outside the prescribed statutory period within which the suit ought to have been instituted”.

The learned trial Judge, Adeyinka, J., peremptorily, raised the provision of the said Rule and summarily, struck out the said Notice of C Preliminary Objection on these words,

“I refer to Order 23 Rule 1 that demurrer shall not be allowed and hold that in the absence of Statement of Defence, the Notice of Preliminary Objection based on statute bar (sic) is incompetent. The Notice of Preliminary Objection dated 14/6/99 is struck out for being incompe- D tent”.

Wonderful!

Remarkably, the learned counsel for the respondent/applicant, Mrs. Okpara, had referred the court to the case of Egbe v. The Hon. E Justice Adefarasin (1987) 1 NWLR (Pt. 47) 1 at 4 ratio 2 (it is also reported in (1987) 1 SCNJ 1).

In the first place, the learned trial Judge, with respect, grossly misconstrued the provisions of the entire Order 23 (1) (2) and (3) of the F Rules which never provided that a Statement of Defence, must first be filed. He never adverted his mind to Section 16(2) (a) of the Limitation Law Cap. 118 Laws of Lagos State, 1994. He also did not advert his mind to the fact that it is settled that even mandatory rules of court, are G not as sacrosanct as mandatory statutes or an Act. See Katto v. Central Bank of Nigeria (1991) 11-12 S.C. 176; 3 (1991) 9 NWLR (Pt. 214) 125, 126; (1991) 12 SCNJ 1 at 17. Also settled, is that Rules of Court, cannot override statutory provisions of law. See Alhaji Edun v. Odan Commu- H nity, Ado Family etc. (1980) 10-11 S.C. (Reprint) 67; (1980) 10-11 S.C. 103 at 124.

It is even settled that a judicial interpretation, must construe a provision to save it and should by interpretation, avoid making nonsense

of the statute (and I will add Rule) so as not to defeat the manifestation of the law. See Nabham v. Nabham (1967) 1 ANLR 74.

In the case of Barnes v. Jarius (1953) 1 WLR 649, Lord Goddard, CJ., stated that in certain amount, commonsense must be applied in constructing statutes (and I will add Rules of court) and the object of the statute has to be considered.

Now, in the case of Hon. Justice Kalu Anya & 3 Ors v. Dr. Festus Iyayi (1993) 17 NWLR (Pt. 305) 294 at 309-310; (1993) 9 SCNJ (Pt. 1) 53, this court per Karibi-Whyte, JSC., in stating three distinct instances, held inter alia, as follows:

"However, a defendant who conceives that ex facie he has a good ground of law which if raised will determine the action in limine if entitled to raise such ground of law. See Martins v. Administrator-General of the Federation and & Anor. (1962) 1 SCNLR 209; (1962) 1 ANLR 120..." (The underlining mine)

This is exactly, what the respondent/applicant did in the instant matter. His Lordship, went on thus:

"..... In the determination of an action before the court, the defendant may, without filing a defence, apply to strike out the action as disclosing no cause of action on the Writ of Summons and Statement of Claim. In this case, he relies on the Writ of Summons and Statement of Claim for his contention. See Habib v. Principal Immigration Officer (1958) SCNLR 219; (1985) 3 FSC 75. (The underlining mine)

The learned Jurist then concluded thus:

".....He may also in his Statement of Defence rely on the ground of law he considers a complete answer to the claim of the plaintiff. See Gold Coast & Ashanti Electrical Power Development Authority v. Attorney General (1937) 4 WACA 215. This ground of law will then be argued as a preliminary point. If successful, then the action of the plaintiff ends. See Aina v. The Trustees of Nigeria Railway Pensions Fund (1970) 1 All NLR 281".

Even a court seized with such a matter, can raise the issue or point of law suo motu. However, it is instructive to note that this court, in the case of Alhaji A. Onibudo & Ors, v. Alhaji A. W. Akibu & Ors. (1982) 7

S.C. (Reprint) 29; (1982) 1 ANLR 207; (1982) 1 ANLR (Pt.1) 194 at 199-200 per Aniagolu, JSC., at page 213, stated as follows;

“Provisions have been made, in lieu of the old procedure of Demurrer which in most cases have been abolished, in the High Court Rules of the various States in the country, for peremptorily disposing of cases at the close of plaintiff’s Statement of Claim or at the close of both the plaintiff’s and defendant’s pleadings.....

In each case, the court is empowered to dismiss the plaintiff’s case, or strike out the pleadings of either the plaintiff or the defendant or both, or act upon any point of law on which the court is satisfied the case may be disposed of, either in part or in whole”. (The underlining mine)

His Lordship stated that the court may do the above, and often does this, without hearing evidence. He referred to the misconception held by some persons, based on the case of Odiva (spelt Odiye) v. Obor (1974) 3 S.C. (Reprint) 18; (1974) 2 S.C. 21 at 31 about the need to hear evidence, and stated that this court rejected the said misconception in S.C. 29/1981 Lasisi Fadare & Ors. v. Attorney-General of Oyo State decided on 2nd April (1982) (yet unreported). (Note:-It is now reported in (1982) 4 S.C. (Reprint) 1; (1982) 4 S.C 1 at 16 and (1982) NSCC 52 at 60. His Lordship at page 214, reproduced part of what this court held in the case, thus:

“..... the preliminary point of law can be taken after the receipt of the Statement of Claim and before any defence is filed. The party in such a case relies on point of law even if the issues of fact in the Statement of Claim are conceded. If he fails, an order would be made by the court ordering the filing of a Statement of Defence and the suit would proceed to trial”. (The underlining mine)

Even commonsensically, this is what should and ought to happen where the preliminary objection fails. It will be absolutely a palpable misconception, (as was the case by the learned trial Judge) for anybody or court, to insist that because the Rules have abolished Demurrer, that a defendant to raise a preliminary objection on the competency of the suit, must first and foremost, file a Statement of Defence. I respectfully, refuse to accept and will not accept such suggestion at least, having regard to

the decided authorities referred to by me in this judgment. Incidentally, both learned counsel for the parties, also cried and relied on Onibudo v. Akibu (supra).

The learned Jurist finally slated as follows still at page 214 of the
B ANLR,

“In the Lagos State, from where this case originated, (I add like instant case) similar provision has been made which would have enabled the defendants to peremptorily have the case struck out or dismissed, without filling their Statement of Defence, or going into any form of Defence, or going into any form of trial” (The underlining mine)
C

On this authority and the others that I have painstakingly referred to and reproduced, I rest this judgment. I hold that the court below, was justified and right when it finally stated at page 163 of the
D Records, as follows:

“In the final analysis, I adjudge this appeal to be meritorious. It is accordingly allowed. The order of the court below striking out the Notice of Preliminary Objection is hereby set-aside. In its place is an order sustaining the Preliminary Objection and consequently dismissing the plaintiff’s/respondent’s suit in toto.”
E

I respectfully endorse the above. Indeed, the court below - per Aderemi, JCA., also referred to Onibudo & Ors. v. Akibu & Ors. (supra)
F and stated at page 162 of the Records, inter alia, as follows:

“Being bound by the decision of the Full Court of the Supreme Court in the Onibudo’s case, I do not hesitate to say that the trial Judge was in error to hold that i n the absence of Statement of Defence, based on Statute of Limitation as incompetent.....”.
G

I agree and I have said so in this judgment. In fact, my stance, clearly and eloquently is supported, by the decisions of this court, in the cases of Tijani Bambe & Ors. v. Alhaji Aderionola & Ors (1977) 1 S.C. (Reprint) 1; (1977) NSCC (Vol. II) 1 at 4; (it is also reported in (1977)1
H S.C 1) and Okoye & 7 or Nigerian Construction & Furniture Co., Ltd. (1991) 6 NWLR (Pt.199) 501 at 540 - per Nnameka-Agu, JSC., both cited and relied on by the learned counsel for the respondent in their Brief (it is also reported in (1991) 7 SCNJ 365). But before concluding this

judgment, I will briefly touch on the second issue of the parties.

In the case of Egbe Adefarasin (supra), Aniagolu, JSC., stated that;

“..... if the action was barred by statute, no amount of resort to the merit of appellant’s contention will serve to keep the action in being”.

In the case of Alhaji Ajibona v .Alhaji Kolawale & Anor. (1996)10 NWLR (Pt.476) 22; (1996) 1 2 SCNJ 270 at 283, Ayoola, JSC, in his dissenting judgment stated, inter alia, as follows:

“On the reading of the provisions of the Limitation Law of Lagos State as a whole, they do not merely deny the right of action they completely extinguish an existing right at the expiration of twelve years from the accrual of the right of action. On a cumulative reading of the entire provisions of the Limitation Law and in particular, Sections 16, 17, 19 and 21 thereof, knowledge on the part, of the knowledge of the plaintiff is immaterial. The words of the Limitation Law of Lagos State are clear and unambiguous and must therefore be accorded their ordinary meaning”.

(The underlining mine)

In the recent case of Alhaji Akibu & 3 Ors. v. Azeez & Anor. (2003) 1 S.C. (Pt.II) 71; (2003) 1 SCNJ 393, Ogundare, JSC., (of blessed memory) at page 411, stated inter alia, as follows:

“While knowledge of the true owner of land of the adverse possession of another is essential to the success of the equitable defences of laches and acquiescence, this is not material under Limitation Law.....”.

Tobi, JSC., on his part and at page 414, stated inter alia, as follows:

“Knowledge of trespass or adverse possession is not a pre-condition to a successful plea of the Limitation Law of Lagos State. In other words, a party who pleads the defence that an action is statute-barred, need not satisfy the court that the plaintiff had knowledge of the trespass or adverse possession. See Ajibona v. Kolawale (1996) 10 NWLR (Pt.476) 22 at 36”. The pronouncement of Ogwuegbu, JSC., in the case, was therein reproduced.

I am not going to bother myself into going into the computation of when time begins to run. This have been stated in many decided cases including *Fadare v. Attorney-General of Oyo State* (supra): *Odubeko v. Fowler & Anor.* (1993) 7 NWLR (Pt.308) 637; (1993) 9 SCNJ (Pt.II) 185; *Egboigbe v. The NNPC* (1994) 5 NWLR (Pt.347) 649; (1994) 6 SCNJ (Pt.I) 71 at 78; *Aina v. Jinadu* (1992) 4 NWLR (Pt.333) 91 at 110, and recently, *Oba Aremo II v. Adekanye & 2 Ors.* (2004) 7 S.C (Pt.II) 28 and *Chief Woherem J.P. v. Emereuwa & 4 Ors.* (2004) 6-7 S.C. 161; (2004) 13 NWLR (Pt.890) 398; (2004) 7 SCNJ 114 at 132 and many others.

Without much ado, I render my answer to this issue, in the affirmative.

In conclusion, it is from the foregoing and the more detailed lead judgment of my learned brother, Mohammed, JSC., that I too, find no merit in this appeal. I dismiss the same. I also award N10,000.00 (Ten Thousand Naira) cost in favour of the respondent payable to him by the appellants.

ONNOGHEN JSC (Dissenting)

This is an appeal against the judgment of the Court of Appeal holden at Lagos in appeal No.CA/L/475/1999 delivered on the 21st day of March, 2001 in which the court set aside the ruling of Adeyinka, J., of the Lagos State High Court sitting at Ikeja in suit No.ID/354/96 delivered on 15th October, 1999 in which the trial Judge dismissed the preliminary objection of the present respondent.

The facts relevant to this appeal are that on the 23rd day of April, 1997, the appellants through counsel filed a Statement of Claim in which they claimed against the respondent as follows:-

“17. Whereof the plaintiffs claim as follows:-

(a) The plaintiffs claim against the defendant is for possession of 21/2 plots of land situate, lying and being at Ifako, Bariga Gbagada, Lagos State, the land already adjudged as the property of late David Taiwo Elebajo (the plaintiffs’ father) by the Supreme Court of Nigeria in suit No.SC/85/1985 Elabanjo v. Tijani.

(b) Perpetual injunction restraining the defendant, her servants, agents and privies from further trespassing on the land.

(c) N50,000.00 damages for acts of trespass.”

Following the filing of the said Statement of Claim, learned counsel for the respondent filed a notice of preliminary objection in which he prayed the trial court for the following relief :-

“(1) An order dismissing this suit as the Honourable Court lacks the jurisdiction to entertain the suit.”

The ground on which the said objection is based is stated to be:

“The action is statute barred having been brought in 1996, more than 12 years after the cause of action accrued and outside the prescribed statutory period within which the suit ought to have been instituted.”

On the Notice of Preliminary Objection, it is stated that the objection is “brought pursuant to Section 16(2)(a) Limitation Law, Cap. 118 Laws of Lagos State, 1994.” It is very important to note that at the time the said preliminary objection was filed and, in fact till its determination, no Statement of Defence was filed by the respondent in the action.

After listening to both counsel, the learned trial Judge ruled as follows:-

“I refer to Order 23 Rule 1 that demurer shall not be allowed and hold that in the absence of Statement of Defence, the Notice of Preliminary Objection based on statute bar (sic) is incompetent. The Notice of Preliminary Objection dated 14/6/99 is struck out being incompetent.”

The respondent in the instant appeal was not satisfied with the above ruling and appealed to the Court of Appeal, which as I earlier stated in this judgment allowed the appeal and set aside the ruling of the trial court and in its place made an order sustaining the preliminary objection and dismissed the appellants’ suit.

Appellants are dissatisfied with that judgment and have consequently appealed to this court, on two grounds of appeal out of which learned counsel for the appellants, Chief G. O. Oduwale in the appellants’ brief of argument “filed on 21/1/03 and adopted in argument of the ap-

peal has formulated the following two issues for the determination of the appeal:

- “1. Whether the judgment of the lower court was not entered in total disregard of the provisions of Order 23 Rules 1,2 & 3 of the High Court of Lagos State (Civil Procedure) Rules, 1994.
2. Whether the lower court was right in holding that the action of the appellants was statute barred.”

On the other hand, learned counsel for the respondent, John O. Odubela, Esq., in the respondent’s brief filed on 21/9/04 and adopted in argument also formulated two issues for determination.

The issues are as follows:

- “(a) Whether the learned Justices of the Court of Appeal were right in holding that a defendant can raise an objection as to jurisdiction of a court without first filing its Statement of Defence; (arising from ground one of appeal);
- (b) Whether the learned Justices of the Court of Appeal were right in holding that the suit of the appellant (sic) was statute barred; (arising from ground two of appeal.”

Looking closely at the issues as formulated by both counsel, it is very clear that they are the same though differently worded. I, however, intend to use the issues as formulated by the learned counsel for the appellants in this judgment.

In arguing Issue No. 1, learned counsel for the appellants referred the court to the provisions of Order 23 Rules 1, 2 and 3 of the Lagos State High Court (Civil Procedure) Rules 1994 which he reproduced and submitted that under the said Rules, the respondent ought to have filed a Statement of Defence wherein the point of law intended to be argued is raised, since the procedure of demurrer has been abolished. Learned counsel then referred the court to the case of Mobil Oil (Nig.) Plc v. IAL . 36 Inc. (2000) 4 S.C. (Pt.I) 85; (2000) 6 NWLR (Pt.659) 146 at 175-176 per Iguh, JSC., and Brawal Shipping Ltd, v. Onwadike & Co. Ltd. (2000) 6 S.C. (Pt.II) 133; (2000) 11 NWLR (Pt.678) 387 at 407 and submitted that the Court of Appeal ought to have upheld the decision of the trial court and urged the court to resolve the issue in favour of the

appellants.

On his part, learned counsel for the respondent also referred to the provisions of Order 23 Rules 1, 2 and 3 *supra* and submitted that “the point of law raised by the respondent was not an ordinary point of law that will be strictly regulated by the provisions of Order 23 of the Rules of Court; that the essence of administration of justice is to make access to justice as quickly and cheap as possible, hence the filing of objection without prior filing a Statement of Defence eliminates additional time, effort, money and cost.” Learned counsel then referred the court to the case of *Egbe v. Alhaji* (1990) 3 S.C. (Pt.I) 63; (1990) 1 NWLR (Pt. 128) 546 at 591; *Onibudo v. Akibu* (1982) 7 S.C. (Reprint) 29; (1982) All I NLR 207 at 214; *Odive v. Obor* (1974) 2 S.C. (Reprint) 18; (1974) NSCC 103 at 107 all to the effect that a defendant who knows that there is a point of law which can determine the action in his favour in limine can apply to the court by way of motion to dismiss the action after the delivery of the Statement of Claim to him and before filing his Statement of Defence in the action. Learned counsel then submitted that the respondent was therefore in order when she filed her preliminary objection on the jurisdiction of the court without first filing her Statement of Defence. Citing and relying on the case of *Kotoye v. Saraki* (1994) 7 NWLR (Pt.357) 414 at 466; *Oloriode v. Oyebi* (1994) 1 SCNLR 390; *Oloba v. Akereja* (1988) 7 S.C. (Pt.I) 1; (1988) 3 NWLR (Pt.84) 508, learned counsel submitted that where a point of law raised fundamentally affects the jurisdiction of the court, it can be raised at any stage of the proceedings and that it is “more than a mere procedural matter which requires that a Statement of Defence should contain a point of law before it is set down to be heard before the trial,” and that the present objection “was not brought pursuant to the Rules of Court but brought under the law relating to the Limitation of Actions under the Laws of Lagos State.”

Learned counsel further argued that an issue of jurisdiction is a substantial matter and need not be pleaded once it could be obvious from the materials before the court and can be raised by a party and or even suo motu by the court; that the case of *Fadare v. A.G. Oyo State* (1982) 4 S.C. (Reprint) 1; (1982) 1 All NLR (Pt.I) 24; *Mobil Oil (Nig.) Plc v. IAJ*

36 Inc. (2000) 4 S.C. (Pt.I) 85; (2000) 6 NWLR (Pt.659) 146 at 175-176 and *Brawal Shipping Ltd. v. Onwadike & Co. Ltd.* (2000) 6 S.C. (Pt.II) 133; (2000) 11 NWLR (Pt.678) 387 at 407 cited and relied upon by his learned friend were decisions made per incuriam and urged the court to rather follow the decisions in *Onibudo v. Akibu* (supra), *Egbe v. Alhaji* (supra); *Odivo v. Obor* (supra) and *Bambe v. Aderionla* (1977) 1 S.C. (Reprint) 1; (1977) NSCC (Vol.II) 1 at 4; *Okoye v. Nigerian Construction & Furniture Co. Ltd.* (1991) 7 S.C. (Pt.III) 33; (1991) 6 NWLR (1999) 501 at 540. Finally and by way of alternative, learned counsel submitted that where the Rules of Court have not been complied with as being alleged, by the provisions of Order 5 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 1994, the non-compliance should be treated as a mere irregularity which should not nullify the proceedings and urged the court to resolve the issue in favour of the respondent.

In a reply brief filed on 20/10/04, learned counsel for the appellants referred to the case of *Solanke v. Solanke* (1974) 1 S.C. (Reprint) 101; (1974) 1 S.C. 141 at 150; *Nishizawa Ltd. v. Jethwani* (1984) 12 S.C. 234 at 285 and *Ekpan v. Uyo* (1986) 3 NWLR (Pt.26) 63 at 76 all to the effect that Rules of Court are meant to be obeyed and that Order 23 Rules 1-3 of the Lagos State High Court (Civil Procedure) Rules 1994 ought to be followed; that it is not true that the decisions of this court on interpretation of Order 23 Rules 1-3 supra were made per incuriam. Learned counsel further submitted that it is settled law that statute of limitation must be pleaded and proved relying on *Savannah Bank v. Pan Atlantic* (1987) 1 NWLR (Pt.49) 212 at 259; that an objection on statute of limitation does not amount to a challenge of the jurisdiction of the trial court particularly as what makes a court to have jurisdiction have been stated in the case of *Madukolu v. Nkemdilim* (1962) 1 All NLR (Pt.I) at 589-590; that time does not run when litigation on a matter has not ended and still urged the court to resolve the issue in favour of the appellants.

Order 23 supra is headed Proceeding in Lieu of Demurrer and provides in Rules 1-3 thus:

“1. No demurrer shall be allowed.

2. Any party shall be entitled to raise by his pleading any point

of law and, unless the court or a Judge in chambers otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.

3. *If, in the opinion of the court or a Judge in chambers, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the court or Judge may there upon dismiss the action or make such other order therein as may be just.”*

From the reproduced Rule 1 of Order 23, it is very clear that the procedure hitherto known as demurrer was abolished in civil proceedings in the Lagos State High Court and in its place is the procedure under Rules 2 and 3 of the said Order 23, which is a procedure in lieu or place of or substitute for demurrer proceeding.

Before we can understand the present procedure, it is necessary to look at what demurrer proceeding looks like.

Demurrer proceeding is said to be an old English Common Law Procedure employed when a party intends to challenge the pleadings of his opponent on point of law. In a demurrer proceeding, the basic essence is that the party raising same contends that even if all the allegations in the Statement of Claim are true, it still does not, in law, disclose a cause of action for the party contending to answer. In *Bambe v. Aderinmola* (1977) 1 S.C. (Reprint) 1; (1977) 1 S.C. 1 at 6, this court stated thus:

“The party who demurred would not proceed with his pleading but, having raised a point of law as to whether any case had been made out in the opponent’s pleadings for him to answer, awaited the decision on that point.”

From the above, it is very clear that in a demurrer proceeding the defendant is not required to file a Statement of Defence before raising the point(s) of law in contention. All he needs is the pleading of the plaintiff in respect of which the defendant is deemed to have admitted the facts stated therein for the purposes of the application only. In deciding the matter, the court, after hearing the application, either dismisses the suit or orders the defendant/applicant to answer the plaintiff’s allegations of fact contained in the Statement of Claim. In *Odivo v. Obor* (supra),

this court held that the trial Judge erred in law in upholding a preliminary objection without hearing evidence when pleadings had been filed by both parties, exchanged, and issues joined and that the preliminary objection would have been properly taken without hearing evidence if taken just after the Statement of Claim was filed and served on the defendant. That decision clearly shows that where pleadings have been filed and exchanged between the parties to the action, the case must proceed to trial and the legal point raised by the defendant would then be properly taken by the court after evidence. That was the case under demurrer procedure, which has been abolished by Order 23 Rule 1 of the Lagos State High Court (Civil Procedure) Rules 1994.

The question now is, what is meant by the proceeding in lieu of demurrer. It is clear from the provisions of Order 23 Rules 2 & 3 supra, that under the proceeding in lieu of demurrer, any party is entitled to raise by his pleading any point of law and any point so raised may be disposed of by the trial Judge before, at or after the trial. Unlike in the abolished demurrer procedure where the applicant must not file a Statement of Defence before raising the points of law in contention, under the procedure in lieu of demurrer, the point(s) of law must be first raised in the Statement of Defence before the applicant can proceed to file his objection in which the point(s) of law is/are again raised for determination before the trial proper. In other words, issues must have been joined in the pleadings before objection is raised in limine.

In the instant case, it is not disputed that at the time the preliminary objection was raised by the respondent, only the Statement of Claim had been filed by the appellants and served on the respondent and that the respondent had filed no Statement of Defence in which the point of law in contention is raised as required by Order 23 Rules 2 & 3 supra. The question is basically whether the procedure adopted by the respondent is proper or whether the preliminary objection is competent. The trial Judge held that it was not competent and struck same out while the lower court held that it was proper and upheld same. There is no doubt that the preliminary objection of the respondent is stated on the motion papers and also in the submission of both counsel to be grounded on Section

16(2)(a) of the Limitation Law Cap. 118 of the Laws of Lagos State 1994. Now apart from Order 23 Rule 2 requiring the respondent to raise the point of law in his pleading, it is settled law that certain facts must be specially pleaded before they can be made use of in a court of law. Some of the matters that must be specifically pleaded are mentioned in Order B 17 rule II of the Lagos State High Court (Civil Procedure) Rules 1994. By the said rule, “the defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point C of law and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as for instance, fraud, Limitation Law, Laws of Lagos State, lease, payment, performance, facts showing illegality either by enactment or by common D law, or by the Law Reform (Contracts) Law, Laws of Lagos State.”

From the above, it is very clear and I hereby hold that to say that an action is statute barred is to raise a defence of statute of limitation. By the Rules of court supra, a defendant who wants to raise the defence E of statute of limitation or that the action of the plaintiff is statute barred (as in the instant case) must specifically plead that defence. In Ketu v. Onikoro (1984) 10 S.C. 265 at 267- 268, Obaseki, JSC., stated the law as follows:

“It is cardinal rule of pleading that such specific matters as limitation F law must be expressly set out or pleaded in the Statement of Defence. Once it is not pleaded; the defendant cannot be granted the protection of that law. In this case, it is not pleaded and even if it is applicable, the court cannot grant the defendants the benefit of the limitation G law contrary to the rules of pleading and the principle of avoidance of surprise.”

It is settled law that the rules of court are meant to be obeyed H particularly as they regulate matters in court and help parties to present their case within the procedure made to achieve a fair and quick trial of actions,, In the instant case, I hold the view that Order 23 supra is meant to be obeyed by the parties and the court.

On the sub-issue as to whether a defence of statute of limitation raises an issue of the jurisdiction of the trial court, I hold the view that it does not. Jurisdiction can be said to be the authority which a court has to determine or decide matters which are litigated before it or take cogni-
B sance of matters presented in a formal way for determination. The limits of such authority are imposed by the Constitution, Statute, Charter or Commission under which the court is constituted and can be extended or restricted by similar means. Where no restriction is imposed, we say that the jurisdiction so created is unlimited.

C Jurisdiction is therefore a matter of hard core law which is donated by the Constitution and the enabling statute and is very crucial and sensitive in judicial proceedings though it may occasionally involve ques- tions of facts also. This is because courts are creation of statutes.

D It has been held times without number that a court is competent when:-

(a) it is properly constituted as regards members and qualifica- tion of the members of the bench and no member is disqualified for one
E reason or another.

(b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction/ and

F (c) the case comes before the court instituted by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. All these requirements must co-exist conjunctively before the jurisdiction can be exercised by the court - see *Madukolu v. Nkemdilim* (1962) a SCNLR 341; *Skenconsult v. Ukey* (1981) 1 S.C (Reprint) 4;
G (1981) 1 S.C 6.

I agree with the statement of the law that objection to jurisdic- tion of a court can be taken at anytime depending on what materials are available. It could be taken in any of the following situations:

H (a) on the basis of the Statement of Claim; or

(b) on the basis of evidence received; or

(c) by a motion supported by affidavit giving the full facts upon which reliance is placed; or

(d) on the face of the Writ of Summons, where appropriate, as to the capacity in which action was brought, or against whose action was brought - see *Arjay Ltd v. A.M.S. Ltd.* (2003) 2-3 S.C 1; (2003) 7 NWLR (Pt. 820) 577 at 625-626.

The above however is limited to a situation where the substance of the objection is jurisdiction, not where a legal defence such as limitation law is being raised in answer to the case of the plaintiff. I hold the view that to say that an action that is alleged to be statute barred is a matter affecting the competence of the court before which it is instituted instead of competence of the cause or right of action so instituted is to stretch that word too far. B
C

Generally speaking therefore, it is the claim before the court that determines the jurisdiction of the court when examined together with the statute creating and conferring jurisdiction on the court concerned. From the claim earlier reproduced in this judgment it is not in doubt that the trial court had jurisdiction to entertain same; the action being for possession injunction and damages for trespass. D

The crucial question to be determined in this appeal, which in fact is the pivot of the appeal, remains whether an action commenced outside the period of limitation is strictly speaking a matter of jurisdiction of the court before which it is instituted. In the instant case, the respondent's motion before the trial court and which had earlier been reproduced in this judgment stated that the trial court lacked the jurisdiction to entertain the action because that action was statute barred. It is necessary to bear in mind that the concept of cause of action or competence of same ought not to be confused with the jurisdiction of the court. E
F

Generally speaking, where the law provides for the bringing of action within a prescribed period in respect of a cause of action accruing to a plaintiff, proceeding shall not be brought after the time so prescribed by the statute had expired. It follows therefore that an action brought outside the prescribed period offends against the provision of the statute and does not give rise to a cause of action. See *Eboigbe v. NNPC* (1994) 5 NWLR (Pt. 347) 649 at 659 where this court, per Adio, JSC., stated the law thus: G
H

“Where an action is statute-barred, a plaintiff who might have had a cause of action loses the right to enforce the cause of action by judicial process because the period of limitation laid down by the limitation law for instituting such an action has elapsed. See *Odubeko v. Fowler* B (1993) 7 NWLR (Pt. 308) 637. An action commenced after the expiration of the period within which an action must be brought as stipulated in the statute of limitation is not maintainable. See *Ekeogu v. Aliri* (1991) 3 S.C. 58; (1991) 3 NWLR (Pt. 179) 258. In short, when the statute of limitation in question prescribes a period within which an action must be C brought, legal proceedings cannot be properly or validly instituted after the expiration of the prescribed period. See *Sanda v. Kukawa L G.* (1991) 3 S.C. 45; (1991) 2 NWLR (Pt. 174) 379.

It is very clear that the period of limitation or limitation law affects the cause of action or validity of cause of action instituted outside D the limitation period. It deals with the competence of the action so instituted, and has nothing to do with the greatest respect, with the jurisdiction or competence of the court to decide or determine the matter. That is E why the statute of limitation is regarded as a defence to an action and by the provisions of the relevant Rules of Court, it must be specifically pleaded. This court has held that:

“Matters that can be raised on the pleading which can be taken F up in proceedings in lieu of demurrer are matters which go to the merits and include matters relating to cause of action ground of defence, statutory provisions or defences, illegality, and damages. They do not include matters of those pleas, such as pleas to the jurisdiction, stay or suspension of the action or in abatement which are classified as dilatory pleas.”

G Per Nnaemeka-Agu, JSC, in *Okoye v. Nigeria Const. & Furniture Co. Ltd* (1991) 7 S.C. (Pt. Ill) 33; (1991) 6 NWLR (Pt. 199) 501 at 540.

A cause of action is the fact or combination of facts which gives H rise to a right to sue. It includes all things which are necessary to give a right of action and every material fact which has to be proved to entitle the plaintiff ‘to succeed. See *Egbe v. Adefarasin* (No. 2) (1987) 1 NWLR (Pt. 47) 1; *Savannah Bank (Nig.) Ltd, v. Pan Atlantic ???? Shipping &*

Transport Agencies Ltd. (1987) 1 NWLR (Pt. 49) 212; Thadant v. National Bank of Nigeria (1972) 1 S.C (Reprint) 75; (1972) 1 S.C 105; P. N. Udoh Trading Co. Ltd. v. Abere (2001) 5 S.C (Pt. II) 64; (2001) 11 NWLR (Pt. 723) 114. A cause of action usually arises as soon as the combination of facts giving the right to complain accrued or happened. B
On the other hand, DEFENCE as defined at page 451 of BLACK'S LAW DICTIONARY, 8TH EDITION, is:

"Defence. A defendant's stated reason why the plaintiff or prosecutor has no valid case; esp. a defendant's answer, denial, or plea. C

"Defence is defined to be that which is alleged by a party proceeded against in an action or suit, as a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition." EDWIN E. BRYANT, *THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE* 240 (2nd ed. 1899)." D

In the instant case, the Rules of Court applicable to the facts specifically provide that the defence of limitation law or statute of limitation must be specifically pleaded while Order 23 Rule (2) supra provides also that such a point of law must be first and foremost raised in the Statement of Defence before a motion by way of preliminary objection is brought for the determination of the said point of law. In the instant case, the respondent is in effect saying that though the court has the jurisdiction to deal with the claim of the plaintiff as presented, it should not listen F
to him or grant him the reliefs because the time within which he would have been entitled to 35 the reliefs if he had been vigilant has passed, thereby rendering his cause of action unenforceable.

The question involved in the issue under consideration is not whether an issue of jurisdiction (if validly existing) cannot be raised at any stage in the proceedings and by motion without first filing a Statement of Defence, as learned counsel for the respondent would want us believe but whether the procedure under which a defendant may raise a point of law by way of defence to the claim of the plaintiff under the provisions of Order 23 supra to wit limitation law is by filing a preliminary objection in which the point(s) of law is/are raised without first filing a Statement of Defence in which the point(s) of law is/are pleaded G
H

prior to the raising of same in the Notice of Preliminary Objection, particularly where the point(s) of law do(es) not affect the jurisdiction of the court to entertain the matter.

Learned counsel for the respondent submitted by way of alternative that the non-compliance by the respondent with the rules of court be termed a mere irregularity which does not render the proceeding null and void. I do not agree with learned counsel for the respondent on the matter. The non-compliance in the instant case, in my considered opinion is not a mere irregularity but affects substantially the rules of pleadings designed to ensure fair hearing to both parties and must be complied with so as not to defeat the aim it was designed to achieve.

Finally on this issue, I have to say that learned counsel for the respondent is not correct when he submitted that the cases of *Fadare v. A-G. Oyo State* (supra); *Mobil Oil (Nig.) Plc, v. IAL 36 INC* supra; and *Brawal Shipping Ltd, v. Onwadike & Co. Ltd, supra* were decided per incuriam. In *Fadare v. A-G. Oyo State* supra, this court stated the law as follows:-

“Order 22 Rule 1 (now Order 23 Rule 1) of the High Court (Civil Procedure) Rules of Western Nigeria abolished ‘demurrer’ and substituted Order 22 Rule 2 under which a preliminary point of law (as done by the appellant in this case) could be raised after both the Statement of Claim and defence have been filed.”

In *Mobil Oil (Nig.) Plc, v. IAL 36 INC* (2000) 4 S.C. (Pt. I) 85; (2000) 6 NWLR (Pt. 659) 146 at 175-176; this court again stated thus:

“I think I should point out that an application by way of demurrer under the Federal High Court (Civil Procedure) Rules, 1976 must not be confused with or mistaken for an application in lieu of demurrer applicable presently in Lagos and the Western States. In the latter case of application, the points of law desired to be raised by the defendant as a preliminary issue are required to be set out in the Statement of Defence before such application in lieu of demurrer is raised.”

Learned counsel for the respondent has not told this court either the decided authority or statutory provision which this court ought to have taken into consideration but failed to do so in the decisions of this

court which learned counsel has labelled per incuriam. On the contrary, the decisions are on all fours with the relevant provisions of the applicable rules of court.

The principle of per incuriam has been defined in BLACK'S LAW DICTIONARY 8TH ED. Page 175 Thus:

"PER INCURIAM (of judicial decision) wrongly decided, usu, because the judge or judges were ill-informed about the applicable law."

"There is at least one exception to the rule of stare decisis. I refer to judgments rendered per incuriam. A judgment per incuriam is one which has been rendered inadvertently. Two examples come to mind: first, where the judge has forgotten to take account of a previous decision to which the doctrine of stare decisis applies. For all the care with which attorneys and judges may comb the case law, errare humanum est, and sometimes judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding and in ignorance of that judgment, with no mention of it, must be deemed rendered per incuriam; thus it has no authority..... the same applies to judgment rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed per incuriam, that judgment must show that legislation was not invoked." LOUIS - Phillipe Pigeon, DRAFTING AND INTERPRETING LEGISLATION, 60 (1988).

"As a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare decisis rule which is an essential part of our law, be of the rarest occurrence." Rupert Cross & J. W. Harris, PRECEDENT IN ENGLISH LAW 149 (4th Edition 1991)"

I therefore hold the view that having regard to the facts of the case and the applicable law thereto, I am unable to agree with the lead judgment of my learned brother, Mohammed, JSC., as regards Issue 1 under consideration. Legally speaking, the procedure of demurrer having been abolished by the applicable rules of court should rest in its grave. I therefore do not consider it appropriate for its ghost to be allowed to continue to govern proceedings in lieu of demurrer from the grave. I accordingly resolve Issue 1 in favour of the appellants.

On Issue 2 which is whether the lower court was right in holding that the action of the appellants was statute barred, I hold the view that having resolved Issue 1 in favour of the appellants which in effect confirmed the ruling of the learned trial Judge earlier reproduced in this judgment, it means in effect that the preliminary objection before that court was incompetent and therefore its merits or otherwise cannot be determined without a competent application being brought to that effect. However, the submission that time does not run during the pendency of litigation is crucial and makes interesting reading. In conclusion, I hold the view that Issue 2 be and is hereby discountenanced.

In conclusion, I find merit in the appeal which is accordingly allowed with N 10,000.00 costs which I hereby award in favour of the appellants.

Appeal allowed.

G

H