

SUPREME COURT OF NIGERIA
14TH JULY, 2006. SC. 165/2003
CORAM:- S. U. ONU, U. A. KALGO, M. MOHAMMED,
I. F. OGBUAGU, F. F. TABAI, JJSC

1. UNIVERSITY OF ILORIN
2. THE VICE CHANCELLOR APPELLANTS
UNIVERSITY OF ILORIN
AND
IDOWU OLUWADARE RESPONDENT

CONSTITUTIONAL LAW - Reliefs - Fundamental Rights Procedure
Rules - Nature of relief thereunder - Except relief claimed - Is in the main
an enforcement of fundamental rights - It should not be brought - Under
the Fundamental Rights Rules (H1)

JURISDICTION - Over actions - Not initiated by due process - Where
an action is brought otherwise than by due process - Court lacks juris-
diction to entertain same - As it is not properly before it (H2)

ACTIONS - Cause of action - Unlawful expulsion - Commencement of
action - Such action is to be commenced - By a writ of summons -
Under applicable Rules of Court (H3)

FACTS

The Applicant/Respondent was at all material time a student of the Respondent/Appellant's University. During the Harmattan Semester Examination conducted by the Appellants, Respondent was caught while collecting a question paper meant for the exams in the examination hall from a fellow student who was also sitting for the same exams. Consequently, Respondent was invited to appear before the Appellants' Student Disciplinary Committee to defend himself on allegation of exam misconduct. That committee found him liable and recommended his expulsion from the Appellant's University. Pursuant to the Law establishing the 1st Appellant, Respondent had a right of appeal from the decision of the

Disciplinary Committee to the University Governing Council. Accordingly he appealed to the council. However, before that appeal could be decided, Respondent filed an application at the Federal High Court purportedly for leave to enforce his fundamental "right to studentship."

At the hearing, Respondent contended that the Disciplinary Committee lacked the power to deal with exam misconduct, which, according to him, was criminal in nature and that he was not given adequate opportunity to defend himself. For the Appellants, it is argued that exam misconduct is within the domestic affair of the University and that Respondent was given fair hearing. Further that the court action instituted by the Respondent was premature as he had not exhausted the domestic remedy available to him within the School system. The learned trial judge found for the Respondent and consequently declared his expulsion unconstitutional, null and void. His Lordship further ordered for Respondent's reinstatement. Appellants appealed to the Court of Appeal. But the court ultimately upheld the decision of the trial judge to the effect that the Disciplinary Committee lacked the powers to deal with exam misconduct and that the Respondent was not bound to first appeal to the Governing Council on the matter. Appellants have brought this further appeal to the Supreme Court against the judgment of the Court of Appeal.

ISSUE FOR DETERMINATION

Whether the action/suit of the respondent before the trial court is competent, and whether the trial court had jurisdiction to entertain same.

HELD (Unanimously allowing the appeal per **ONU JSC**)

Reliefs - Fundamental Rights Procedure Rules

1. The appellants next submitted and I fully agree with them that the reliefs sought by the applicant/respondent at the trial court border upon the expulsion and for restoration of his studentship with the 1st appellant.

His case being a challenge to his expulsion as a student from the 1st appellant's institution, is not one of those claims/reliefs envisaged by the Fundamental Rights Enforcement Procedure Rules. In the case of *Tukur v. Government of Gongola State* (1997) 6 NWLR (Pt. 510) 549 at

574-575, this Honourable Court held as follows:-

“When an application is brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979 a condition precedent to the exercise of the court’s jurisdiction is that the enforcement of fundamental rights or the security of the enforcement thereof should be the main claim and not an accessory claim. Enforcement of fundamental rights or securing the enforcement thereof should, from the applicant’s claim as presented, be the principal or fundamental claim as presented, and not accessory claim.

However, where the main or principal claim is not the enforcement or securing the enforcement of a fundamental right, the jurisdiction of the court cannot as has been pointed out above, be properly exercised as it will be incompetent by reason of the foregoing feature of the case.” (pp. 2959 H & 2960 E)

JURISDICTION - Over actions

2. The 1st appellant then submitted and I agree with it that the reliefs are not competent as it is trite law that for a court of law to have jurisdiction to entertain a matter, such matter must be initiated by due process of law and any condition precedent to the court’s jurisdiction must be fulfilled.

I therefore agree with the appellants submission that having regard to the reliefs sought on the originating motion and the statement in support, they have not been initiated by due process of law. (p. 2960 A)

Cause of action - Unlawful expulsion

3. I also agree with the appellants that the defect in the procedure adopted by the respondent is fatal and that it affected the competence of the action and of course, the jurisdiction of the trial court because, the case cannot be said to have been initiated by due process of law. And what is more, the right to studentship not being among the rights guaranteed by the 1999 Constitution, the only appropriate method by which the respondent could have challenged his expulsion was for him to have commenced the action with a Writ of Summons under the applicable rules of court. (p. 2961 C)

NOTABLE POINTS OF INTEREST

OGBUAGU JSC

1. Respondent jumped the gun by preempting the appeal to the council

B Of course, having rushed to the court, the matter became sub-judice and there is nothing the Council or the appellants could have done, until the matter is determined by the court. As a matter of fact, if the respondent had realized this simple fact, that he remained an undergraduate of the 1st
C respondent, until the Council had determined the matter or his fate, he should have not rushed to the court as he did. But he did not give the said council, the opportunity or chance, to consider his appeal as clearly averred in the said counter-affidavit, hereinabove reproduced.

D Now, Section 17(2) of the University of Ilorin Act, Cap 455 Laws of the Federation, 1990 (which is the enabling Law or Act of the 1st appellant), provides as follows:

*“(2) Where a direction is given under subsection (1) or (d) of this section in respect of any student, the student may, within the pre-
E scribed period and in the prescribed manner, appeal from the direction to the Council; and where such an appeal is brought, the Council shall, after causing such inquiry to be made in the matter as the Council considers just either confirm or set aside the direction or modify it in such
F manner as the Council thinks fit”. (The underlining mine)*

I agree with the submission of the appellants in paragraph 7.03 of the Brief that,

*“.....rather than awaiting the outcome of the appeal to the
G University (sic) Council, the respondent herein “jumped the gun” by reporting (sic) (meaning resort) to court action thus drawing a domestic issue to the arena of court litigation, a practice which is not only embarrassing but frowned at by the Supreme Court in the case of Miss Abimbola Akintemi & Ors. v. Professor C. A. Onwumechili & Ors. (1985) 1 NWLR
H page 68 at page 85”. (p. 2965 D)*

TABAI JSC

2. Exam malpractice matters - Are domestic affairs of a university

It is clear from the above review of the cases decided by this court that matters which involve criminal allegations against the State such as arson, stealing, indecent, assault etc., the suspects should, for obvious reasons, be tried in a court or tribunal properly so called under the Constitution. But where the matters involve the award of degrees, diplomas and certificates and matters incidental thereto like examination malpractices, an aggrieved party, be he a student or a lecturer should first exhaust all the internal machineries for redress before a recourse to court. Where he rushes to court without first exhausting all the remedies for redress available to him within the domestic forum, as was the case of Akintemi v. Onwumechili (supra), he would be held to have “jumped the gun” and the matter would be declared bad for incompetence. (p. 2975A)

REPRESENTATION

Chief Olatunji Arosanyin, for the Appellants.

Waheed Gbadamosi, Esq., for the Respondent.

CASES REFERRED TO

Madukolu & Ors. v. Nkemdilim (1962) NSCC 374 at 379-380.

Patrick D. Magit v. University of Agriculture & Ors. (2005) 12 S.C. (Pt. I); (2005) 19 NWLR (Pt. 959)

Chief Ifezue v. Mbadugha (1984) 5 S.C. 79; (1984) 1 SCNLR 427 at 456-457; (1984) 15 NSCC 314

Dr. Bamgboye v. University of Ilorin & Anor - Registrar (1999) 6 S.C. (Pt. II) 72; (1999) 6 SCNJ 295

Imo State & Anor. v. Chief Nwanwa (1997) 2 NWLR (Pt. 490) 675 at 706

Garba v. The University of Maiduguri (1986) All NLR 149

Magit v. University of Makurdi & 3 Ors. (2005) 12 S.C. (Pt. I); (2005) 19 NWLR (Pt. 959) 211

Tukur v. Government of Gongola State (1997) 6 NWLR (Pt. 510) 549 at 574-575

Akintemi & Ors. v. Prof. C.A. Onwumechili & Ors (1985) All NLR 94

Egbuonu v. BRTC (1997) 12 NWLR (Pt. 531) 29

Thorne v. University of London (1966) 2 QB 237

R. v. Dunsheath Ex Parte Meredith - (1951) 1 KB 127

University of Lagos & 2 Ors. v. Dr. Dada - 1 University of Ife Law Reports Part III (1971) 344

B

STATUTES & RULES REFERRED TO

Fundamental Right (Enforcement Procedure) Rules, 1979; O. 1, rr 1, 2, 3 and 4

University of Ife Edict 1970; S. 6

C

University of Ilorin Act, L.F.N. 1990; S.17

LEAD JUDGMENT BY ONU JSC

D This is an appeal against the judgment of the Court of Appeal (hereinafter in the rest of this judgment referred to as “the court below”) sitting at Ilorin, Kwara State delivered on 24th day of June, 2002, wherein the court below upheld the decision of Tsoho, J., of the Federal High Court, Ilorin delivered on 22nd day of November, 1999.

E

The claim of the respondent before the trial court was an application for enforcement of his Fundamental Rights on the expulsion order placed on him by the appellants contending among other things: -

F *(1) That his expulsion from the appellants’ University (the 2nd appellant being the Vice-Chancellor of the 1st) pursuant to an allegation of criminal offence of examination malpractice is unconstitutional, null and void.*

G *(b) An order of mandatory injunction on the respondent/ appellant or their privies, agents etc. to forthwith allow appellant/respondent to continue with his academic career in the appellants’ institution without let or hindrance especially in the area of registration, receiving lectures and writing examination etc., and*

H *(c) An order of perpetual injunction restraining the appellants, their agents, servants etc. from taking any step(s) prejudicial to the smooth pursuit of the applicant’s/respondent’s Academic career in the appellant’s Institution vide the suspension or other disciplinary measure save and except the guilt of the applicant/respondent has been conclusively estab-*

lished through the appropriate judicial forum.

The applicant/respondent, a student of the appellant's University during the Harmattan Semester Examination conducted by the appellants on 27th day of August, 1998, was caught while collecting a question paper meant for the examination during the examination itself in the examination hall from one Miss Sule Oluwatoyin Sandra, a fellow student of the appellant who was also sitting for the same examination. The officer who was invigilating the examination and who caught the respondent on the spot confronted the respondent and requested him to make statement but the respondent refused (see Exhibit "A" attached to the counter-affidavit especially paragraphs 7, 8,9,10,11,12 and 13 thereto) sworn to by the respondent himself on 9/6/99 at page 36 of the record of proceedings.

On the strength of this examination misconduct, the respondent was invited to appear before the appellants' Student Disciplinary Committee (SDC for short) to defend himself on allegation of examination misconduct (vide Exhibit "B" at page 40 of the Record of Proceedings. The respondent appeared before the said SDC and after a thorough investigation and interrogation of the respondent, the SDC found him (respondent) to have committed examination misconduct and therefore recommended the expulsion of the respondent from the appellant's University and consequent upon which Exhibit "C" at page 41 of the Record of proceedings was issued to the respondent.

Pursuant to the law establishing the 1st appellant, to wit: Cap. 455 Laws of the Federation of Nigeria 1990 the respondent was to appeal to the University Governing Council against the decision of the SDC recommending the expulsion of the respondent from the 1st appellant. However, the respondent did not await the outcome of his appeal to the Governing Council of the 1st appellant before rushing to court to institute this action. See page 11 of the Record of Proceedings for the letter dated 28/4/99.

At the hearing of the respondent's application for the enforcement of his fundamental right, the respondent contended that the SDC lacked the power to deal with examination misconduct which is criminal

in nature and that the respondent was not afforded adequate opportunity to defend himself. On the other hand, the appellants contended at the trial that an act of examination misconduct is a misconduct that can be dealt with by the appellants under the University of Ilorin Act, Cap. 455 Laws of the Federation 1990 and that the respondent was given a fair hearing while the step taken by the respondent in rushing to court, after he had appealed to the Governing Council, was indeed premature and constituted an abuse of judicial process and also runs counter to the relevant provisions of Unilorin Act, Cap. 455 which allows appeal from the decision of the SDC.

On the appeal to the court below, that court refused to consider Grounds 1 and 2 contained on the Notice of Appeal against the judgment of 22nd November, 1999 and Issue Nos. 3 and 4 in the appellants' brief of argument on mere technical ground. The court below also upheld the decision of the trial Judge to the effect that the SDC of the appellants lacked the powers to deal with examination misconduct and that the respondent was not bound to first appeal on the matter to the University Council, hence the appeal to this court. Where the appellants have formulated four issues from three original grounds and one additional ground of appeal:

"1. Whether the action/suit of the respondent before the trial court is competent, and whether the trial court has jurisdiction to entertain same (additional Ground of Appeal).

2. Whether two issues of merit formulated from one ground of appeal should be rejected out rightly as invalid on mere technical ground rather than being carefully considered on its merit (Ground one of the original Ground of Appeal).

3. Whether the appellant possesses the power and authority under its enabling law (i.e. Unilorin Act, Cap. 455 1990, Laws of the Federation) to deal with any act of omission or commission of its students that is tantamount to misconduct. (Ground two of the Original Ground (sic) of Appeal).

4. Whether the statutory provision which provides proceedings for internal resolution of issues are mere formalities and should not be

adhered to before resorting to external adjudication. (Ground Three of the Original Grounds (sic) of Appeal)."

As identified by the respondent, the issues calling for determination in the appeal are simply as follows:

"(i) *Considering the facts and circumstances of this case, whether the respondent ought to institute this action by way of Writ of Summons instead of an application for enforcement of his fundamental rights and whether by so doing the trial Federal High Court acted without jurisdiction (Additional Ground of Appeal).*

(ii) *Whether the allegation of examination malpractice is a criminal offence not amenable to domestic jurisdiction of the appellants in spite of the provisions of Section 17 of the University of Ilorin Act Cap. 455, Laws of the Federation of Nigeria 1990, (Grounds 2 & 3).*

(iii) *Whether the lower court is bound to follow issues formulated by the appellants in arriving at its decision (Ground 1)."*

Upon a careful study of the two sets of issues submitted as arising by the appellants and the respondent alike, I take the view that the appellants' issues and indeed, appellants' issue 1 alone is enough to dispose of the query raised. That issue which falls within a narrow compass, queries whether the action/suit of the respondent before the trial court is competent, and whether the trial court had jurisdiction to entertain same.

The appellants' contended under Issue 1 as follows:

That the trial lower court on 22nd July, 1999 granted leave to the plaintiff/respondent to enforce his fundamental human right to seek the reliefs contained on the motion on notice. The said motion on notice was supported by paragraphs affidavit sworn to by the respondent. The respondent filed a paragraph counter-affidavit deposed by one Akin Sesan, the deputy Registrar and Students Affairs Officer of the 1st appellant. After this court's attention was drawn to this originating motion dated 21st day of July, 1999 but filed on 22nd day of July, 1999 at pages 17-29 of the record, the statement setting out the names and description of the applicant of the reliefs sought are contained on pages 19-20 of the Record. **The appellants next submitted and I fully agree with them that the**

reliefs sought by the applicant/respondent at the trial court border upon the expulsion and for restoration of his studentship with the 1st appellant. **The 1st appellant then submitted and I agree with it that the reliefs are not competent as it is trite law that for a court of law to have jurisdiction to entertain a matter, such matter must be initiated by due process of law and any condition precedent to the court's jurisdiction must be fulfilled** vide *Madukolu & Ors. v. Nkemdili* (1962) NSCC 374 at 379-380.

I therefore agree with the appellants submission that having regard to the reliefs sought on the originating motion and the statement in support, they have not been initiated by due process of law. Thus, when the learned trial Judge in his ruling of 22nd July, 1999 ruled:

"I am quite satisfied that the applicant has ,s, satisfied the requirements of the law, to wit: Order 1 Rule 2 sub-rules 1, 2, 3 and 4 of the Fundamental Rights (enforcement Procedure) Rules, 1979 to enable me exercise my power to grant him leave to apply to enforce his fundamental rights guaranteed under the 1999 Constitution. Leave is accordingly granted in terms of the motion.

The application shall be by a motion on notice to be filed and served on the respondents....."

The respondent was thereby jumping the gun, as **his case being a challenge to his expulsion as a student from the 1st appellant's institution, is not one of those claims/reliefs envisaged by the Fundamental Rights Enforcement Procedure Rules. In the case of *Tukur v. Government of Gongola State* (1997) 6 NWLR (Pt. 510) 549 at 574-575, this Honourable Court held as follows:-**

"When an application is brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979 a condition precedent to the exercise of the court's jurisdiction is that the enforcement of fundamental rights or the security of the enforcement thereof should be the main claim and not an accessory claim. Enforcement of fundamental rights or securing the enforcement thereof should, from the applicant's claim as presented, be the principal or fundamental claim as presented, and

not accessory claim. See *The Federal Minister of Internal Affairs & Ors. v. Shugaba Abdulrahman Darman* (1989) 2 NCLR 915 in which the principal or main claim was a declaration that the order..... was ultra vires and that the same constituted a violation of his fundamental rights to personal liberty, privacy and freedom to move freely throughout Nigeria..... B

However, where the main or principal claim is not the enforcement or securing the enforcement of a fundamental right, the jurisdiction of the court cannot as has been pointed out above, be properly exercised as it will be incompetent by reason of the foregoing feature of the case.” C

I also agree with the appellants that the defect in the procedure adopted by the respondent is fatal and that it affected the competence of the action and of course, the jurisdiction of the trial court because, the case cannot be said to have been initiated by due process of law. And what is more, the right to studentship not being among the rights guaranteed by the 1999 Constitution, the only appropriate method by which the respondent could have challenged his expulsion was for him to have commenced the action with a Writ of Summons under the applicable rules of court see *Akintemi & Ors. v. Prof. C.A. Onwumechili & Ors* (1985) All NLR 94. See also the case of *Egbuonu v. BRTC* (1997) 12 NWLR (Pt. 531) 29 at pages 41-42 where the court held:- D E F

“In this appeal, the claims are partly for wrongful dismissal or termination of appointment and partly for breach of fundamental right. But here, as in Tukur, the principal claim being wrongful termination of appointment which ought to have been commenced by a Writ of Summons, which was not, then all the claims, principal and subsidiary which flow directly from it, are incompetent and therefore ought to be struck out” G

Thus, when the court below held (per Amaizu, JCA.), affirming H the decision of the trial court, as follows:

“I have earlier stated in this judgment that the purported expulsion of the respondent is null and void because he was denied a fair

hearing. In the words of Lord Denning in *Macfoy v. U.A.C. Ltd.* (1961) 3 All ER 1169 at 1172-

“If an act is void, then it is in law a nullity. It is not bad, but incurably bad.”

B In that case, if the respondent was bound to take the matter to the University Council, (which he was not bound to do), there was no valid decision which the respondent could have taken to the University Council.

C It is for the foregoing reasons that I hold that this case is liable to be struck out for being incompetent and prematurely embarked upon. I am therefore of the first view that the trial lower court lacked jurisdiction to entertain the same at the point in time it did.

D In the result, I hold that the action giving rise to this appeal be and is hereby accordingly struck out with N10,000.000 costs to the appellants.

KALGO JSC

E I have had the advantage of reading in advance the judgment of my learned brother, Onu, JSC., just delivered. In my respectful view, he had painstakingly dealt with the issues which were in controversy in the appeal and I agree with his conclusions thereon. I adopt them as mine and find that there is no merit in the appeal. I dismiss it with costs as
F assessed in the said judgment.

MOHAMMED JSC

G I have had the privilege of reading in draft, the judgment of my learned brother, Onu, JSC., which he had just delivered in this appeal. I agree with the judgment. I would however add some observations of my own.

H The respondent, who was expelled from the appellants’ University on the allegation of examination misconduct, went before the Ilorin Federal High Court to enforce his fundamental rights under the Fundamental Rights (Enforcement Procedure) Rules 1979 and Section 46(1)

of the 1999 Constitution seeking the following reliefs.

“1. A declaration that the expulsion of the applicant from the 1st respondent University pursuant to an allegation of criminal offence of examination malpractice without his guilt having been established before a court of law or constitutional tribunal constitutes a flagrant abuse of the plaintiff’s right to fair hearing and by reason thereof the order of expulsion is unconstitutional, null and void.

2. An ORDER of mandatory injunction on the respondents, their agents, servants, privies, or any person(s) whosoever connected with the running of the 1st defendant to forthwith allow the applicant to continue with his academic career in the 1st respondent University without let or hindrance especially in the areas of registration, receiving lectures and writing examinations and so on and so forth.

3. AN ORDER of perpetual injunction restraining the respondents, their agents, servants, privies or any person(s) whosoever connected with the running of the 1st respondent from taking any step(s) prejudicial to the smooth pursuit of the applicant’s academic career in the 1st respondent University through suspension or whatever other disciplinary measure save and except the guilt of the applicant had been conclusively established through the appropriate judicial forum.”

These reliefs sought by the respondent as applicant before the trial Federal High Court centered principally on his expulsion from the University and the urge for his re-admission into the institution. The law in relation to the claim for the Enforcement of Fundamental Right is trite. It is to the effect that Enforcement of Fundamental Right or securing the enforcement thereof, must form the basis of the applicant’s claim as presented to the court and not merely as an accessory claim. In other words, where the main or principal claim is not the enforcement or securing the Enforcement of Fundamental Rights, the jurisdiction of the court cannot be properly exercised because it will then be incompetent. See *Tukur v. Government of Gongola State* (1997) 6 NWLR (Pt. 510) H 549 at 574-575.

In the present case, the respondent’s application not having been brought in accordance with the requirements of Section 46(1) of

the 1999 Constitution and the Fundamental Rights (Enforcement Procedure) Rules, it ought not to have been heard and granted by the trial court not to talk of it being affirmed by the court below.

In the result, I entirely agree with the conclusion reached by my learned brother, Onu, JSC., in the determination of this appeal and the orders made in his judgment including the order on costs.

OGBUAGU JSC

I had the advantage of reading in draft, the lead judgment of my learned brother, Onu, JSC., just delivered by him. I agree with the reasoning and conclusion that the appeal has merit. However, by way of emphasis, I will make my own contribution.

The reliefs sought by the respondent and the grounds on which they are sought, appear at pages 2 and 3 of the Records, (i.e. Declaration Order for Mandatory Injunction and Order of Perpetual Injunction). In my respectful view, I am in no doubt at all, that a careful reading/perusal of pages 33 to 38, 40 to 45 of the Records by me, clearly shows and I am convinced that the case of the respondent, to say the least, is hopeless. As a matter of fact, on his own admission in paragraphs 27 and 28 of his affidavit in support of his application to the High Court at page 34, it is beyond doubt that the said application of the respondent, for the enforcement of his alleged fundamental right, was not only premature, it was made in very bad faith and was meant to overreach.

In paragraph 27, it is averred as follows:

“That subsequent to the foregoing paragraph, I received a letter dated 6th April, 1999 expelling me from the University with immediate effect and equally directed that in case I am dissatisfied with the decision, I am free to appeal to the University Council through the Dean of my Faculty and the Vice Chancellor within 24 days of the letter. The said letter of expulsion is attached herewith and marked as Exhibit 4.” (The underlining mine)

While in paragraph 28 - it is averred as follows

“That sequel to the contents of Exhibit 4 supra. I appealed to

the appropriate quarters through my letter dated 28th April 1999. Copy of the said letter is attached herewith and marked as Exhibits". (The underlining mine)

In paragraph 13 of the counter-affidavit sworn to by one Akin Sesan on behalf of the appellant, it is averred uncontroverted in any further-affidavit, as follows:

"That in answer to paragraph 13 of the applicant (sic) affidavit, (i.e. the affidavit in support of the application) I know as a fact that it is not true that the respondent did nothing to consider the applicant (sic) appeal since it is the Council of the 1st respondent which is vested with powers to consider the applicant (sic) appeal and that the applicant did not give the respondents' Council sufficient time to consider his appeal before he rushed to court".

(The underlining mine)

Of course, having rushed to the court, the matter became sub-judice and there is nothing the Council or the appellants could have done, until the matter is determined by the court. As a matter of fact, if the respondent had realized this simple fact, that he remained an undergraduate of the 1st respondent, until the Council had determined the matter or his fate, he should have not rushed to the court as he did. But he did not give the said council, the opportunity or chance, to consider his appeal as clearly averred in the said counter-affidavit, hereinabove reproduced.

Now, Section 17(2) of the University of Ilorin Act, Cap 455 Laws of the Federation, 1990 (which is the enabling Law or Act of the 1st appellant), provides as follows:

"(2) Where a direction is given under subsection (1) or (d) of this section in respect of any student, the student may, within the prescribed period and in the prescribed manner, appeal from the direction to the Council; and where such an appeal is brought, the Council shall, after causing such inquiry to be made in the matter as the Council considers just either confirm or set aside the direction or modify it in such manner as the Council thinks fit". (the underlining mine)

I agree with the submission of the appellants in paragraph 7.03 of the Brief that,

“.....rather than awaiting the outcome of the appeal to the University (sic) Council, the respondent herein “jumped the gun” by reporting (sic) (meaning resort) to court action thus drawing a domestic issue to the arena of court litigation, a practice which is not only embarrassing but frowned at by the Supreme Court in the case of Miss Abimbola Akintemi & Ors. v. Professor C. A. Onwumechili & Ors. (1985) 1 NWLR page 68 at page 85”.
(The underlining mine.)

They reproduced in their said brief, the observation of Obaseki, JSC., which relevant portions, I will produce hereunder. But firstly, in the above case, in the lead judgment of Irikefe, JSC., at page 81, his Lordship, reproduced Section 16(3) of the University of Ife spelling out, the functions of the said University and thereafter, stated, inter alia, as follows:

“.....It would be seen from the above that success in examinations may not be all that is required for earning a Degree from this institution.....

On the whole, it seems to be incontestable that the issues with which this appeal is concerned belong to the domestic domain of the University as enshrined in the Statute establishing it and such are not justiciable in a court of law. See *Thorne v. University of London* (1966) 2 QB 237; *R. v. Dunsheath Ex Parte Meredith* - (1951) 1 KB 127; *University of Lagos & 2 Ors. v. Dr. Dada* - 1 *University of Ife Law Reports* Part III (1971) 344”. (The Underlining mine)

Obaseki, JSC., on his part, stated at page 85, inter alia, as follows:

“From an examination of the above provisions of the University of Ife Law and Statute (i.e. Section 17) the Senate and the Council of the University have each a say in the academic fortune or misfortune of any student governing authority of the University and the Senate is the Supreme Academic authority of the University and since no decision has been taken by these authorities on the recommendations by the faculty board on the result of each of the applicants in their Part IV Law Examination, the application for an order of mandamus is misconceived and cannot be granted”. (The underlining mine)

At page 86, the learned jurist continued inter alia, thus,

“.....*The courts cannot and will not usurp the functions of the Senate Council and the visitor of the University the selection of their fit and proper candidates for passing and for the award of certificates, degrees and diplomas. If however, in the process of performing their functions under the law, the civil rights and obligations of any of the students or candidates is breached, denied or abridged, it will grant remedies and reliefs for the protection of those rights and obligations. In the instant appeal, it has not been established that there was such a breach or denial or abridgement. The appeal therefore fails*”. (The underlining mine) B C

His Lordship, also had this say.

“.....*it can only mean that until the remedies available in the domestic forum are exhausted, any resort to court action would be premature*.....”. D

(The underlining mine)

So was the remedy or remedies available at the domestic forum of the appellant, not exhausted, before the respondent, initiated/com-menced his said application/action in court. E

Kazeem, JSC., at page 86, stated inter alia, as follows:

“.....*I have nothing more to add than to observe that it is the prerogative of institutions of higher learning such as the University of Ife to grant and award their degrees to all their students if and when they deserve them. It is therefore inconceivable to think that any aggrieved student can invoke the machinery of court of justice to compel such an institution to grant and award him its degree by obtaining an order of mandamus*”. (The underlining mine) F

Coker, JSC., in his contribution/concurring judgment, referred G to the Visitorial Powers of a Visitor under Section 6(2) of the University of Ife Edict 1970 No. 17 of 1970 reproduced at pages 86-87 and referred to the case of Dunsheat Ex Parte Meredith (supra) and also reported in (1950) 2 All ER 741 - per Lord Goddard; CJ., and the case of St. John’s H College. Cambridge v. Toddington (97) ER - 245) - per Lord Mansfield (1 Burr 200) which His Lordship reproduced. His Lordship also referred to the case of Thorne v. University of London (supra) which is also

reported in (1966) 2 All ER 388 and stated that the Court of Appeal in England -per Diplock, LJ., had observed, that the High Court, “does not act as a Court of Appeal from University examiners”.

He also referred to the functions and powers of the Senate and
B that of the Vice Chancellor in Sections 16(2) and 31(1) respectively of the said Act.

“It is clear that the Laws of the University fully empower the Senate to take the decision to suspend the publication of the result of each of the three appellants, in the interest of promoting the objectives of the University as provided by Section 4 of the 1970 Edict.”
C

His Lordship, also referred to Section 29 relating to the powers of maintaining of discipline and order in the University and stated that the provisions of the Edict, are adequate and reasonable, for any aggrieved
D student to appeal against the decision of the Senate or the Vice Chancellor in any disciplinary action taken against her. That none of the appellants had availed herself of these provisions. Indeed, that none of them, had given time to any of the repository of these powers to exercise its power
E before having recourse to the High Court for relief.

His Lordship, concluded that even if the court, has jurisdiction which it has, to entertain their grievances, it will, in the exercise of the discretion, refuse their application for mandamus. My Lord cited/ referred to the case of R. v. Smith (1873) LR 8 QB 118: Stepney S.C. v.
F Walker (John) & Sons Ltd. (1934) A.C. 365, 395 - 397.

Remarkably, the above case, was cited and relied on by the appellants at the court below. At page 146 of the Records, the following appear, inter alia:

G “.....The learned counsel cited the case of Miss Olajobi Abimbola & Ors. v. Professor C. A. Onwumechili (1985) NWLR (Pt. 1) 68. He referred in particular to the following observation of Irikefe, JSC., (as he then was) -

H “I am reinforced in my belief that Akanbi, JCA., of the Court of Appeal was on firm ground when he stated thus:-

"From all I have said above, I regret to say that applicants in this case have jumped the gun, and cannot therefore be heard to talk of the

rule of natural justice in this case until the Senate has had a chance to deliberate on their case”.

“The learned counsel submitted that on the above authority, until the respondent has exhausted the remedies provided in Section 17(2) (supra), any resort to a court action is premature.”

From the said decision of this court, I repeat, that since the respondent’s said appeal, have/had not been heard and determined by the Council, it seems to me as in *Akintemi v. Prof. Onwumechili*’s case (supra), that the respondent, who should have remained an undergraduate of the 1st appellant, until his said appeal is heard and determined, he woefully but regrettably, failed/neglected/refused, to take advantage of the opportunity or provision in the 1st appellant’s Law or Act including the Students’ Handbook of Information and Regulations (which was made available to the court, by the appellants). Rather, he “foolishly” or in “panic”, rushed to the court where his action is certainly not justiciable and in the result, got himself, completely worsted by losing in this appeal.

Now, for completeness, I note that the respondent, in his letter of 30th April, 1999 to the University’s Council, which appears at page 44 of the Records, the respondent said it all, so to say. Therein, he pleaded and pleaded for forgiveness. The letter is a bit lengthy and I will spare myself, the tedium of reproducing the same. So, from the contents of the said letter, I or one may ask, where is the denial of fair hearing as the court below held at page 148 of the Records, at least, having regard to the contents of the said letter of the respondent at the said page 44 of the Records.

I wish to pause here to state with respect, that the court below, completely missed the point that is really the crucial issue in this matter. The issue of the committal of crime, does not arise and is of no moment. It is a non-issue in my respectful view. This is because, a reading of the Act or Law, unequivocally, shows that the matter in controversy, is purely, the domestic affair or the internal affairs of the 1st appellant. Period! So, the reference to the cases of *Military Governor. Imo State & Anor. v. Chief Nwanwa* (1997) 2 NWLR (Pt. 490) 675 at 706 (it is also reported in (1997) 2 SCNJ 60 and *Garba v. The University of Maiduguri* (1986)

All NLR 149 (it is also reported in (1986) 1 NWLR (Pt. 180) 530) (not (1980) as appears in (2006) Vol. 133 at page 60 in the LRCN) ratio 13 and at page 66 case No. 19 of the said LRCN, are with respect not apposite. See my judgment in *Magit v. University of Makurdi & 3 Ors.* B (2005) 12 S.C. (Pt. I); (2005) 19 NWLR (Pt. 959) 211 and (2005) 12 SCNJ 203 at 222).

The court below, incidentally at page 147 of the Records, reproduced Section 17(2) of the Act and then, dealt with the word “may” and relied on the case of *Chief Edewor & Uwegba & Ors. v. The Attorney-General of Bendel* C Stated 2 Ors. reported in (1987) 1 NWLR (Pt. 50) 313 (it is also reported in (1987) 2 SCNJ 18). The word “may”, or “which way to 30”, was interpreted in the cases of *Chief Ifezue v. Mbadugha* (1984) 5 S.C. 79; (1984) 1 SCNLR 427 at 456-457; (1984) 15 NSCC D 314; *Dr. Bamgboye v. University of Ilorin & Anor - Registrar* (1999) 6 S.C. (Pt. II) 72; (1999) 6 SCNJ 295. (Where the word “shall”, was held to be in essence, directory, notwithstanding the word “shall”) and *Mr. Adesola v. Alhaji Abidoye & Anor* (1999) 10-12 S.C. 109; (1999) 12 E SCNJ 61 at 85.

In the English case of *Re Baker, Nicholas v. Baker* f referred to by the court below - per Amaizu, JCA., (the reference was not stated), the observation of Cotton, U., was reproduced at page 148 of the Records, F thus:

“I think great misconception is caused by saying that in some cases “may” means “must”. It never can be “must” so long as the English Language retains its meaning”.

With respect, I do not agree with the above. It all depends, on G the use of the words in any particular statutory provision which one or the court, has to look at.

Thus, in the instant case and as rightly submitted by the appellants in paragraph 7.04 of their Brief, if a student decides to take the first H option in appealing to the Council of the 1st appellant, then he should explore as such, the possibility of having the matter settled or determined at the domestic level he had voluntarily opted for or chosen before rushing to the court.

Therefore, in all the circumstances of this case, pursuant to Section 9(1) and (b); No. 15(i) and (iii) of the said Students' Handbook and Section 17 of the said Act, this appeal is meritorious and it succeeds. Although there are concurrent judgments of the two lower courts, but having regard to my finding or holding with respect, that the stance or decision of the court below, is in error or erroneous, the attitude of this court in such circumstance or situation, is that this court, is bound to interfere and I so interfere. See the cases of Akinloye v. Eyiola (1968) NMLR 92; Fabunmi v. Agbe (1985) 1 NWLR (Pt. 2) 295 at 314 and recently; Moses Bunge & Anor. v. The Governor of Rivers State & Ors. in - Suit No. SC. 261/2001 delivered on 9th June, 2006, reported in (2006) 6 S.C. 81."

It is from the foregoing and the reasons and conclusion in the said lead judgment of my learned brother, Onu, JSC., that I too, allow the appeal, set aside the said decision of the court below. The said suit of the respondent, which should have been liable for dismissal based on its merits, is hereby and accordingly struck out.

I abide by the consequential orders in respect of costs.

TABAI JSC

I have had the privilege to read, before now, the judgment of my learned brother, Onu, JSC., and I agree that there is substance in the appeal which ought to be allowed. The facts are clearly set out in the said judgment and I therefore need not restate them here. I shall however, for the purpose of emphasis, express my opinion on the issue of competence or incompetence of the action initiated at the Federal High Court sitting at Ilorin.

At the High Court, the applicant/respondent, Idowu Oluwadare, a student of the 1st respondent University/appellant claimed the following reliefs:-

1. A DECLARATION that the expulsion of the applicant from the 1st respondent University pursuant to an allegation of criminal offence of examination malpractice without his guilt having been estab-

lished 5 before a court of law or constitutional tribunal constitutes a flagrant abuse of the plaintiff's right to fair hearing and by reason thereof the order of expulsion is unconstitutional, null and void.

2. AN ORDER of mandatory injunction on the respondent, their agents, servants, privies or any person(s) whosoever connected with the running of the 1st defendant to forthwith allow the applicant to continue with his academic career in the 1st respondent University without let or hindrance especially in the area of registration, receiving lectures and writing examinations and so on and so forth.

3. AN ORDER of perpetual injunction restraining the respondents, their agents, servants, privies or any person(s) whosoever connected with the running of the 1st respondent from taking any step(s) prejudicial to the smooth pursuit of the applicant's academic career in the 1st respondent University through suspension or whatever other disciplinary measure save and except the guilt of the applicant has been conclusively established through the appropriate judicial forum.

The case was tried on the affidavit evidence. And in a considered ruling on the 22/11/1999, all the reliefs were granted. The appeal to the court below was dismissed and the ruling of the trial court affirmed. The court relied 5 heavily on the decision in Yusuf Amudu Garba & Ors. v. The University of Maiduguri (1986) 1 NSCC 245 and its construction of the meaning of the word "May" in Section 17(2) of the University of Ilorin Act.

In both the appellants' brief and appellants' reply brief, Chief Olatunji Arosanyin argued that the applicant/respondent ought to have exhausted the remedies available to him at the domestic forum before embarking on the court action. He relied heavily on Miss Abimbola Akintemi & Ors. v. Prof. Onwumechili & Ors. (1985) 1 NWLR (Pt. 1) 68 at 85; and Esiaga v. University of Calabar (2004) 4 S.C. (Pt. I) 1; (2004) 7 NWLR (Pt. 872) 366. It was his submission that Garba v. University of Maiduguri (supra) does not apply.

In the respondent's brief, Waheed Gbadamosi submitted that Garba v. University of Maiduguri (supra) applies to the facts of this case. He also adopted the lower court's construction of the word "may" in Sec-

tion 17(2) of the University of Ilorin Act and submitted that Akintemi v. Onwumechili (supra) does not apply.

I think we should be guided by the previous decisions of this court in which the parties have so heavily relied. In Akintemi v. Onwumechili (supra) arising from allegations of examination malpractices in the Faculty of Law, University of Ife, eight students including the appellants were suspended and their results withheld. The appellants filed an action at the Oyo State High Court claiming their results, a declaration that the refusal to publish their results was illegal and an injunction to stop the award of degrees to any student of the University pending the final determination of the action. The action was dismissed. Their appeal to the Court of Appeal was also dismissed.

Their further appeal to this court was equally dismissed. In dismissing the appeal and affirming the decision of the two lower courts, this court, per Irikefe, at page 81 stated-

“On the whole, it seems to be incontestable that the issues with which this appeal is concerned belong to the domestic domain of the University as enshrined in the Statute establishing it and as such not justiciable in a court of law. See Thorne v. University of London (1966) 2 OB 237. R. v. Dunsheath Ex Parte Meredith (1951) 1 KB 127; University of Lagos & 2 Ors. v. Dr. Dada 1 University of Ife Law Reports Part III (1971) 344.

On the totality of the facts presented in this appeal, I am in no doubt that the respondents were justified in law to have, as it were, staged a pre-emptive environmental strike against those students suspected of examination malpractices in order to preserve from being polluted, the University’s channel of academic excellence.”

The other Justices in the case spoke in the same voice:

In Garba & Ors. v. University of Maiduguri (supra), there was a riotous behaviour in the University involving about 500 students. In its wake there was arson, properties destroyed and looted and assaults on persons. There was an administrative inquiry headed by the Deputy Vice-Chancellor whose house was destroyed and properties destroyed or looted. The report showed that although the allegations against the students in-

cluded arson, stealing and indecent assault, there was nothing to show that the appellants who were among those against whom the allegations were made were given the opportunity to examine witnesses or that they were even present. The appellants were expelled.

B They initiated an action at the Borno State High Court for the enforcement of their fundamental rights. The court granted their reliefs. The University's appeal to the Court of Appeal was successful.

C The applicants appeal to this court was allowed. The main principle in the decision is that the allegations of arson, destruction of properties, looting and indecent assault for which the students were expelled are serious crimes under the Penal Code beyond matters within the domestic forum of the University. The court gave some examples of matters which fall within the domestic forum of a University. At page 280, D the court per Kayode Eso, stated: -

E *"I am not in the least limiting the powers of the visitor in regard to domestic forum. Issues of awarding degrees, grades of degrees, admissions to the University, calling meetings of the Senate and Deans are all within the visitorial powers....."*

And at page 289, the court per Nnamani, speaking on the nature of matters within the domestic forum said:-

F *"The nature of matters which fall into the visitorial jurisdiction has been decided by a long line of cases. See Akintemi v. Onwumechili (1985) 1 NWLR 68; Patel v. University of Bradford Senate (1978) 1 WLR 1488; Thompson v. University of London (1864) 33 LJ Ch 625 Thorne v. University of London (1966) 2 OB 237."*

G In Chiekwe Ikwunze Eziega & 2 Ors. v. University of Calabar (supra) this court tried to point out the real principle on Garba v. University of Maiduguri.

H And in Patrick D. Magit v. University of Agriculture & Ors. (2005) 12 S.C. (Pt. I); (2005) 19 NWLR (Pt. 959), this court again held that an application to court to quash the University Senate's decision about the award of a degree without first appealing to the University's Governing Council was premature and affirmed the decision of the two lower courts dismissing the application.

It is clear from the above review of the cases decided by this court that matters which involve serious criminal allegations against the State such as arson, stealing, indecent assault, etc., the suspects should, for obvious reasons, be tried in a court or tribunal properly so called under the Constitution. But where the matters involve the award of degrees, diplomas and certificates and matters incidental thereto like examination malpractices, an aggrieved party, be he a student or a lecturer should first exhaust all the internal machineries for redress before a recourse to court. Where he rushes to court without first exhausting all the remedies for redress available to him within the domestic forum, as was the case of Akintemi v. Onwumechili (supra), he would be held to have “jumped the gun” and the matter would be declared bad for incompetence.

I have no doubt in my mind that the present case falls within the principle in Akintemi’s case. The plaintiff/ respondent appealed to the Governing Council of the University of Ilorin and ought to have waited for its decision before rushing to court. The action was premature. For the foregoing reasons and the fuller reasons in the judgment of Onu, JSC., I also strike out the suit for incompetence. I also assess the costs of this appeal at N10,000.00 against the respondent.

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