

COURT OF APPEAL
CALABAR DIVISION
27TH JUNE, 2005. CA/C/93M/2001
CORAM:- D. ADAMU, C. M CHUKWUMA-ENEH,
J. OMOKRI, JJCA

REV. EYO ETIM IKPANA APPELLANT

V

1. THE REGISTERED TRUSTEES OF THE
PRESBYTERIAN CHURCH OF NIGERIA
2. REV. UMA ONWUNTA (PRINCIPAL
CLERK AND CHAIRMAN OF B.C.M. RESPONDENTS
3. REV. OBO DIEN (DEPUTY PRINCIPAL
CLERK AND SECRETARY OF B.C.M.
4. REV. ITANG EDEM (MODERATOR
NORTH CALABAR PRESBYTER
5. REV. ITA OKON
6. REV. I. EKE

CONSTITUTIONAL LAW - Right to counsel of one's choice - Avails only in criminal proceedings - As court can interfere with choice of counsel - In civil cases where appropriate (H1)

STATUTES - Plain words - Of the Statute or Constitution - Should be given their natural meaning - So that s. 36(3)(c) 1999 Constitution - On right to counsel of one's choice - Applies only to criminal cases (H2)

LEGAL PRACTITIONERS - Parties - Employing services of a counsel - Will be stopped by court - Where that counsel has acted for the opposing party - In that same transaction (H3)

EVIDENCE - Affidavits - Oral evidence - Where there is conflict in the parties' affidavits - Trial court should call for oral evidence (H4)

EVIDENCE - Proof - Affidavits - Further affidavit - Where necessary but was not filed - Burden of proof is not discharged - And the fact in issue is deemed admitted (H5)

EQUITY - Delay - In filing motion to oppose appearance of counsel - Amounts to waiver - As equity helps only the vigilant (H6)

LEGAL PRACTITIONERS - Duty of counsel - To disclose interest in a matter - Under s. 10(a) Rules of Professional Conduct - Is towards his own client - The section was wrongfully relied upon - By the trial court (H7)

APPEALS - Issues - Leave - Fresh issue - Where raised without leave of court - And it is not supported by the evidence - It will be struck out as incompetent (H8)

FACTS

Before the Calabar High Court, the plaintiff/appellant filed an action against the defendants/respondents. Appellant had been a religious Minister in the Presbyterian Church of the respondents. As a result of a certain dispute affecting the leadership of the Church, appellant was removed or deposed from his ministerial post by the respondents. He immediately instituted this action challenging his deposition. Before the hearing of the suit, respondents filed a motion in which they raised objection against the competence of the appellant's counsel Mr. F. A. Esu to handle the case for the appellant.

The objection was raised on the ground that the said counsel had acted as a legal adviser to the respondents' church prior to the action. The trial court considered the affidavit evidence before it and gave a ruling in which it upheld the objection and debarred the appellant's counsel from further conducting the case. Being dissatisfied with the ruling, appellant has now appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the learned trial Judge was right in holding that F. A.

Esu, Esq. of counsel to the appellant could not conduct the case because he had earlier been legal adviser to the respondents in the light of the fact that he had long before then resigned his appointment with the said 1st respondent and that the matter had nothing to do with the counsel.

2. Whether in the light of the decision of Onyeke and Harriclem (Nig.) Ltd. (1998) 7 NWLR (Pt.556) page 64 holding 2, the learned trial Judge was right in debarring F. A. Esu, Esq. from doing the matter when the matter was not anything F. A. Esu, Esq. had done in his capacity as a legal adviser for the respondents, this being the dependent (sic) of the plaintiff/appellant.

3. Whether the ruling so delivered does not infringe as it were on the fundamental rights of the appellant in this suit viz the right to a counsel of his choice as enshrined in section 36(6)(c) of the 1999 Constitution.

HELD (Unanimously allowing the appeal per **ADAMU JCA**)

Right to counsel of one's choice

1. From the clear and unambiguous wordings of the above provision, the true intention of the framers of the Constitution is to make the choice of counsel as a right only in criminal cases. Thus the right of choice of counsel by a party or litigant is only regarded as a constitutional or fundamental right in cases where the party or person is charged with criminal offence. Since the Constitution is silent on other cases (i.e. civil cases) the intention of the legislature (i.e. the framers of the 1999 Constitution) is therefore to make the parties or litigants thereto not entitled to counsel of their choice as a right. Consequently, in such cases where it is appropriate under the law, the court can or in some cases, should interfere with the choice of a counsel by the litigant under the circumstances of a particular case and in the interest of justice. The duty of the court in some cases to interfere with the choice of counsel by the litigant or his appearance before it stems from the rules of practice and procedure and it is exercised or applied in civil cases in the interest of justice. This court (Lagos Division) had an occasion to pronounce on the exercise of such a duty in the case of Williams v. Nwosu (2001) 3 NWLR (Pt. 700) 376 that

the right of a co-plaintiff in a joint action in the right to change his counsel does not contravene his constitutional right to engage the services of a counsel of his own choice. The court succinctly stated the rule (per Galadima, JCA at pages 386-387 of the report) as follows:-

B *"I do not see how the operation of the rule of practice just explained above, in any way, contravene(s) the legal or constitutional right of the 2nd respondent to engage the services of a lawyer of his choice (including his right to choose himself as his own counsel). ... It is therefore not correct to say that the operation of the aspect of the rule of practice now being considered contravenes any legal or constitutional right of a plaintiff."*

C In my humble view, the above dictum aptly applies to the present case where the appellant is asserting that his fundamental right to fair hearing has been infringed by the order of the lower court restraining him from appearance or further appearance in the case for the appellant after finding that he had earlier served the respondents in the same subject matter or cause of action. (p. 3460 A)

E ***Plain words - Of the Statute or Constitution***

2. As stated earlier, where the clear plain and unambiguous words of the statute or Constitution are being interpreted by the court, they should be given their natural, ordinary, grammatical and literal meaning. This is the recommended approach in ascertaining the intention of the legislature, statute or the Constitution (as in the present case). It has been described as an act of violence to read into a statute (or Constitution) words that are absent from its express provision. It is therefore wrong for the learned counsel for the appellant to cite and rely on the provision of section 36(3)(c) of the 1999 Constitution under his issue 3 in support of his submissions bordered on the breach of the appellant's right to have a counsel of his choice which is an issue not covered under the provision dealing with or applying only to criminal cases and which does not apply to the present case being a civil case. The 3rd issue of the appellant's brief is consequently shallow and must be resolved against the said appellant. It is hereby so resolved. (p. 3461 A)

Parties - Employing services of a counsel

3. It is also mutually accepted in the briefs of both parties under the issues that under the principle of law enunciated in the celebrated case of Onyeke v. Harriclem etc (supra) which they both cited and relied upon, B to the effect that a party should not be allowed by the court to employ the services of a counsel and the counsel should not accept the brief of such a party where it is clear that the services to be rendered flow out of or are closely connected with the previous services he had rendered to the opposing side or party - see also Anatogu v. Iweka II (1995) 8 NWLR (Pt. C 415) 547. Thus under the principle as stated in the case, the court frowns at the practice whereby a counsel appearing for one party at an early stage of the transaction and then turning round at a later stage of the same transaction to appear for his opponent. However, where the trans- D actions are different, the court will not restrain a counsel from changing sides. With the above concession of the parties in the present case, the crucial question to ask in the resolution of the two issues and the submission thereto as canvassed in the briefs of the parties is whether or not the E transaction or the subject-matter in which the appellant's counsel served the respondents was the same or different from the one in the present action. (p. 3461 G)

Where there is conflict in the parties' affidavits

4. From the above averments in the affidavits evidence filed respectively F by the parties before the trial courts, it is clear that there was an apparent conflict arising from the said affidavits on the issue of whether or not the G counsel involved had actually resigned his appointment as the legal adviser of the respondent before the inception of the present suit against them by the respondent. There is also a conflict on the question of whether H or not the services rendered to the respondents by the said counsel was on one and the same transaction or was a continuous transaction with or resulted in the present suit. In a case like the present one which is decided by affidavit evidence, where there is conflicting affidavit evidence, it is the duty of the court to resolve such a conflict by calling for oral

evidence. Thus the learned trial Judge in the present case faced with the denial of the appellant's counsel and the conflicting affidavit evidence filed respectively by the parties was duty bound to call upon the said parties to adduce oral evidence in order to resolve the conflict so raised in their affidavit evidence. This is moreso when the documents annexed to the respondents' affidavit (i.e. exhibits A-C) were not very helpful in resolving the conflict. Without such an oral evidence called, the learned trial Judge was not competent to have resolved by himself such conflict and a fortiori the dispute between the parties. It is the parties themselves who would resolve the conflict in their oral evidence. (p. 3465 B)

Further affidavit - Where necessary but was not filed

5. Under the rule of practice on the filing and exchange of affidavit evidence, the respondents upon being served with the counter-affidavit filed by the appellant (where there was a denial of their allegation) should have filed a further affidavit to counter the denial of their allegation made by the said appellant. On their failure to counter the appellant's averments in the counter-affidavit, the effect is that the facts averred or deposed therein prevailed and are to be relied upon by the court. This rule on affidavit evidence is in accord with the principle that in civil cases which are decided on the preponderance of evidence, the burden of proof lies on the party or person who would have failed if no evidence is adduced as provided under section 137 of the Evidence Act (Cap. 112) LFN, 1990. Under the above rule, the burden of proof of their allegation still lied on the respondents who failed to file a further-affidavit to counter the appellant's denial of their said allegation. On the respondent's failure to file such a further affidavit, the implication is that they agreed with and accepted the facts stated in the appellant's counter-affidavit. (p. 3465 H)

Delay - In filing motion to oppose appearance of counsel

6. It is still questionable as to why the respondents waited for two (2) years after the filing of the suit before they brought their motion to challenge the competence of the appellant's learned counsel in his appearance, and in instituting the present suit for the appellant. It is to be noted

that from the suit number of the present case C/512/98, it was instituted sometime in 1998. The delay in bringing their present application (or motion) for over 2 years in my view apart from causing further suspicion to the respondents' case is also fatal to their application, which was not brought timeously as required under the rule or principle of equity. It is trite that the rules or principles of equity help only the vigilant and they do not assist an indolent party who fails to pursue his rights diligently and within a reasonable time. Where this happens, the courts regard such a delay or indolence of the party either as fatal to his case or as amounting to a waiver of his right under the maxim that equity helps only the vigilant. Thus, it is said that delay defeats equity. From the foregoing, it is very clear that the respondents' case in their application at the lower court was weaker than that of the appellant. On that weakness, the lower court should have regarded them as failing to prove their allegation of impropriety and professional misconduct particularly in view of the serious nature of the respondents' allegation against the appellant's counsel. (p. 3467 C)

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Duty of counsel - To disclose interest in a matter

7. It was also an error on the part of the learned trial Judge to have held that section 10(a) of the Rules of Professional Conduct was applicable to the case to debar or estop the learned counsel for the appellant in the case. This is because from the express wordings of the said provision as reproduced in the judgment (at the same page), it is very clear that the duty of a counsel as imposed under the provision is only applicable in his relationship towards his client to whom he is required to disclose his interest if any which he may have in the case with a view to influencing his said client in selecting him as his counsel. The rule is not applicable in the relationship of a counsel to other persons who are not his clients as the respondents in the instant case. Consequently, since the appellant's counsel has resigned from being the respondents' counsel for some years (2 years) before instituting the present action on behalf of the appellant, the said respondents who are not his clients are not competent or qualified to bring their present application against the appearance of their former

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counsel challenging his appearance for the appellant purportedly under the provision of section 10(b). If any action is to be brought under the said provision against the counsel, it should have been by or on behalf of the appellant who is his client. (p. 3468 D)

B

Fresh issue - Where raised without leave of court

8. On the fresh issue said to be raised by the respondents (in their brief), namely that the appellant's counsel F. A. Esu, Esq. was not only the legal adviser of the said respondents but also served as a Chairman of the Committee that decided the issue of the appellant's marriage the result of which resulted in the later's deposition from the religious ministry, I agree with the appellant's submission that the issue of the nexus between the dissolution of his marriage and his deposition by the respondents (the subject-matter of the present suit) is a fresh issue raised for the first time in the respondents' brief before this court. Being a fresh issue or point raised and which is not supported by or based on the evidence (i.e. the affidavit evidence) at the trial court, it is a well settled principle of law that the respondent as a party to the present appeal cannot raise or should not be allowed to raise such a fresh issue or point as done in his brief without first seeking for and obtaining the leave of this court to do so. Consequently, by raising the fresh issue in this court without the required leave, such an issue is or has been rendered incompetent as rightly submitted in the reply brief. In the result of my consideration of the appellant's submissions in the reply brief, I find the said submissions and the authorities cited in support thereof in the said brief as unassailable and in line with the above principle and authorities and I hereby uphold them. I hold that the fresh issues raised in the respondents' brief is incompetent and hereby strike it out. (pp. 3469 E/ 3470 A)

NOTABLE POINTS OF INTEREST

H ADAMU JCA

1. Appeals - Need to relate issues for determination to grounds of appeal

From the above issues formulated in the two briefs, the first comment that comes to mind is that neither of the learned counsel for the parties

has attempted to relate the issues formulated in his brief to the grounds of appeal filed in the case as required by the rules of practice in this court. Rather, they left it open for the court to ascertain the grounds from which their issues flow. This type of practice is frowned at by the appellate courts, which always insist that issues for determination must be formulated from or tied to the grounds of appeal. They must arise from or relate to the grounds of appeal and where they do not so relate or arise from the grounds of appeal then they become at large and therefore go to no issue. Such issues that are unrelated to the grounds of appeal are ultimately struck out and the arguments canvassed in support thereof are discountenanced - see *Sanusi v. Ayoola* (1992) 9 NWLR (Pt.265). (p. 3452 E)

2. Respondent's failure to reply to appellant's issue - Is deemed acceptance

Going by the rules of brief writing and under the circumstances where a respondent fails to answer or reply to an issue formulated and argued by the appellant (in the brief of argument), he will be deemed to have accepted the truth of that issue so canvassed by the appellant and to which he (i.e. the respondent) has not replied in so far as such is borne out by the record. Consequently, despite the non-reaction to issue 3 of the appellant by the respondents, I will still review the arguments thereto to see if they are supported by the record of proceedings in the present case before I uphold or reject them. (p. 3453 G)

REPRESENTATION

F. A. Esu, Esq. for the Appellant
Chief E.E. Ukaegbu for the Respondents

CASES REFERRED TO

Tote Industries Plc. v. Devcom M. B. Ltd. (2004) 17 NWLR (Pt. 901) H 182 at 216; 220-22
Williams v. Nwosu (2001) 3 NWLR (Pt. 700) 376
Ikeanyi v. A.C.B. (1997) 2 NWLR (Pt. 489) 509

3450 Ikpana v. Reg. Trustees Presbyterian Chur. (2006) 9 KLR Adamu JCA

Adelaja v. Alade (1999) 6 NWLR (Pt. 608) 544

Kaigama v. Namnai (1996) 4 NWLR (Pt. 441) 162

Ejuetami v. Olaiya (2001) 18 NWLR (Pt. 746) 572

Dabo v. Abdullahi (2005) 7 NWLR (Pt. 923) 181 at 200

B Ola v. Williams (2002) 4 WRN 77 at 86; (2003) 5 NWLR (Pt.812) 48

Habib Bank (Nig.) Ltd. v. Ochete (2001) 3 NWLR (Pt. 699) 114

Onobruhere v. Esegine (1986) 1 NWLR (Pt.19) 799

Bakare v. A.C.B. Ltd (1986) 3 NWLR (Pt. 26) 47 at 57

Okpo v. Umet (1998) 7 NWLR (Pt. 558) 451 at 461

C Mbadugha v. Nwosu (1993) 9 NWLR (Pt. 315) 110

Onagoruwa v. Adeniji (1993) 5 NWLR (Pt. 293) 317

Ndigwe v. Ibekendu (1998) 7 NWLR (Pt. 558) 486 at 499

Odumeru v. Adenuga (2000) 4 NWLR (Pt. 652) 224

D

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1999, S. 36(1)(b)(c), 3(c) and (6)(c)

E Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, S. 137

Rules of Professional Conduct in the Legal Profession, 1997, r. 10(a) & (b)

Legal Practitioners Act, No. 33, 1962, S.7

F

LEAD JUDGMENT BY ADAMU JCA

This appeal is against the ruling of Hon. Justice Philomena Ekpe, J., sitting at the High Court of Justice of Cross River State, Calabar Judicial Division delivered on 30/3/2000. The facts leading to the said

G ruling are as follows:

The plaintiff/appellant (hereinafter called “the appellant”) had been a religious Minister in the Presbyterian Church of the defendants/respondents (also hereinafter called “the respondents”). As a result of a certain
H dispute affecting the leadership of the respondents’ church, the appellant was removed or deposed from or of his ministerial post by the respondents and he immediately instituted an action at the lower court challenging his removal or position. Before the hearing of the action, the respon-

dents through, their counsel raised an objection against the competence of the appellant's counsel Mr. F. A. Esu to handle the case for the said appellant on the grounds that the said counsel had acted as a legal adviser to the respondents' church prior to the action. As a result of the objection, the lower court duly considered the affidavit evidence and save its ruling on the matter in which it upheld the objection and debarred the appellant's learned counsel (Mr. F. A. Esu) from further conducting the case for the said appellant. Being dissatisfied by [he ruling of the lower court, the appellant appealed against it in [his court. B

In his notice of appeal dated the 19th of April, 2000, the appellant filed five (5) grounds of appeal from which he formulated three (3) issues for determination in his brief of argument dated and filed on 10/4/2002 and adopted at the hearing of the appeal. The three issues so formulated in the appellant's brief are as follows: C

Issues for determination D

3 issues arise (sic) for determination from the grounds of appeal filed herein, these are

1. Whether the learned trial Judge was right in holding that F. A. Esu, Esq. of counsel to the appellant could not conduct the case because he had earlier been legal adviser to the respondents in the light of the fact that he had long before then resigned his appointment with the said 1st respondent and that the matter had nothing to do with the counsel. E

2. Whether in the light of the decision of Onyeke and Harriclem (Nig.) Ltd. (1998) 7 NWLR (Pt.556) page 64 holding 2, the learned trial Judge was right in debarring F. A. Esu, Esq. from doing the matter when the matter was not anything F. A. Esu, Esq. had done in his capacity as a legal adviser for the respondents, this being the dependent (sic) of the plaintiff/appellant. F G

3. Whether the ruling so delivered does not infringe as it were on the fundamental rights of the appellant in this suit viz the right to a counsel of his choice as enshrined in section 36(6)(c) of the 1999 Constitution. H

On their own part, the respondents in their joint brief of ' argument dated 16/8/2002 and filed on 19/8/2002 also adopted at the hearing

of this appeal, formulated only two (2) issues for determination which are as follows:

“Issue 1

Whether having regard to the fact that F. A. Esu, Esquire of counsel was the legal adviser to the defendants/ respondents and was appointed by the defendants/ respondents as the Chairman of the Committee that looked into the case of the plaintiff/appellant as to determine the question of his marriage, the result of which would decide whether or not to depose the plaintiff/appellant as a Minister of religion, that F. A. Esu Esquire of counsel was legally and ethically right to turn round and act as the counsel for the plaintiff/appellant against the defendants/ respondents in relation to the issue on which he had acted for the defendants/ respondents.

Issue 2

Whether the trial court, having regard to the fact that F. A. Esu, Esquire of counsel had earlier on acted as the legal adviser for the defendants/respondents in the same matter between them and the plaintiff/appellant, was not right in stopping F. A. Esu, Esquire from appearing for the plaintiff/appellant in the same matter.”

From the above issues formulated in the two briefs, the first comment that comes to mind is that neither of the learned counsel for the parties has attempted to relate the issues formulated in his brief to the grounds of appeal filed in the case as required by the rules of practice in this court. Rather, they left it open for the court to ascertain the grounds from which their issues flow. This type of practice is frowned at by the appellate courts, which always insist that issues for determination must be formulated from or tied to the grounds of appeal. They must arise from or relate to the grounds of appeal and where they do not so relate or arise from the grounds of appeal then they become at large and therefore go to no issue. Such issues that are unrelated to the grounds of appeal are ultimately struck out and the arguments canvassed in support thereof are discountenanced - see *Sanusi v. Ayoola* (1992) 9 NWLR (Pt.265) 275; *Ceekay Traders Ltd. v. General Motors Co. Ltd.* (1992) 2 NWLR (Pt.222) 132; *Mogaji v. Military Administrator, Ekiti State* (1998) 2 NWLR (Pt.538)

425; UBN Ltd. v. Tropic Foods Ltd. (1992) 3 NWLR (Pt. 228) 231 and Pan African Bank Ltd. v. Ede (1998) 7 NWLR (Pt. 558) 422 at 432.

I will apply the above principle to the appellant's three issues to see whether they are covered by or related to the five grounds of appeal and their particulars filed in his notice of appeal (at pages 11-13 of the record). Accordingly, I found that issues 1 and 2 of the appellant's brief are covered by or are related to grounds 1,2,3 and 4, viz-Issue 1 arises from grounds 1 and 3 while issue 2 arises from „ ground 4. Issue 3 of the appellant's brief, which is on the denial of the appellant's right to fair hearing arises from ground 2. As for ground 5 of the appeal, it is couched in the form of an omnibus ground applicable to criminal cases because of the use of the following phrase at its end:-

“... are unwarranted, unjustified and against the weight of argument (sic).”

The use of a criminal form of ground in a civil case or matter is not appropriate or permitted by the court. Consequently, the said ground should be and is hereby disregarded or discountenanced *Egesie v. Elele* (2001) 8 NWLR (Pt 716) 582; *Ofuani v. Nigerian Navy* (2001) 16 NWLR (Pt. 739) 365 and *Maune v. Abdul* (2001) 4 NWLR (Pt. 702) 95. In any case, since no issue has been formulated from the appellant's 5th ground (which has also been wrongly couched) it is deemed as abandoned under the rules of brief writing and it is accordingly hereby struck out.

From the two issues formulated in the respondents' brief and the arguments canvassed under them, it appears that the said respondents have accepted or adopted the appellant's issues 1 and 2. This [eaves us with the appellant's 3rd issue (on breach of fair hearing), which has not been answered or addressed to by the respondents in their brief. Going by the rules of brief writing and under the circumstances where a respondent fails to answer or reply to an issue formulated and argued by the appellant (in the brief of argument), he will be deemed to have accepted the truth of that issue so canvassed by the appellant and to which he (i.e. the respondent) has not replied in so far as such is borne out by the record - see *Lagricom Co. Ltd. v. U.B.N. Ltd. & Ors.* (1996) 4 NWLR (Pt. 441) 185 at 196; *Aliyu v. Adewuyi* (1996) 4 NWLR (Pt. 442)

284 at 292 and *Akanbi v. Alatede (Nig.) Ltd. (2000) 1 NWLR (Pt. 639) 125*. Consequently, despite the non-reaction to issue 3 of the appellant by the respondents, I will still review the arguments thereto to see if they are supported by the record of proceedings in the present case before I uphold or reject them. I will do that later at an appropriate stage of this judgment.

In arguing his issues 1 and 2 together, it is conceded in the appellant's brief that the appellant's counsel Mr. E A. Esu was actually appointed as a legal adviser to the 1st respondent in Hope Waddel Parish. Later, in appreciation of his good service, the said counsel was promoted as the Synod's legal adviser by the said 1st respondent. However, in the course of this relationship, the said counsel who started noticing some anomalies alerted the leadership of the Church which instead of correcting them, made them worse leading to the division of the Church into camps. Consequently, the said counsel resigned his appointment as the legal adviser of the 1st respondent. The notice of resignation was not responded to until after two (2) months when a pressure was placed on him to withdraw the resignation notice. This led the counsel to avoid the Church and start worshipping elsewhere. Reference is made in the brief to the supporting affidavit filed by the respondents in support of their motion to debar him from the proceedings at the lower court and in - particular to the letter exhibited therein which shows that he had made a report on a divorce proceedings based on the task or assignment given to him by the 1st respondent to reconcile the appellant with his estranged wife (see page 4 of the record). It is pointed out in the brief that the said counsel (legal adviser) had resigned after that letter he wrote which was the last of the exercise he had rendered to the 1st respondent as their legal adviser. Since then, the later neither invited him to any meeting nor gave him any other assignment. It is also stated in the brief that the said counsel (as the legal adviser) was never aware nor seized of any of the events leading to the deposition of the appellant, which was the issue before the lower court. He was also not aware of any decision by the 1st respondent to depose the appellant when he was acting as the former legal adviser. He was only informed for the first time by the appellant about the

deposition when he was approached to institute an action in the court, challenging the deposition. After considering the fact that he had since resigned his position as a legal adviser to the 1st respondent, the appellant's counsel decided to take up the case since it had nothing to do with the earlier case of divorce, which he has earlier handled on the instruction of the 1st respondent. The brief cited and relied upon the case decided by this court in *Onyeke v. Harriclem Nigeria Ltd.* (1998) 7 NWLR (Pt. 556) 64 in which it was held that the courts would not generally prevent a litigant from employing the services of a counsel of his choice though they frown upon (the idea of a counsel appearing for a party at an earlier stage of the transaction and then turning round at a later stage of the same transaction to appear or act for his opponent. Thus where the transactions are different, the court will not restrain a counsel from changing his sides. It is submitted in the appellant's brief that the transactions in the present case were different in that the earlier case conducted by the counsel on behalf of the 1st respondent was on the divorce between the appellant and his wife while the later case or transaction for which the said counsel is representing the appellant involves the latter's deposition or removal from the Church as a , religious minister. It is slated in the brief that although this fact was emphasized to the trial court by the appellant's counsel who also died the authority and principles of the above case which was binding on the said trial court, the later did not advert its mind to it but ignored it in its ruling. The appellant's brief also refers to page 4 of the record which shows that the letter (or report) on *Ikpanah v. Ikpanah* written by the appellant's counsel to the 1st respondent had nothing to do with the subject matter or cause of action in the present case which is on the removal of the appellant from his religious office. This is also said to be reflected in the affidavit in support of the respondents' motion (at pages 2 and 3 of the record). It is pointed out in the said brief that the appellant's counsel F. A. Esu, Esq. was never a party or a privy to the discussions or meetings where the myriad of offences allegedly committed by the appellant were discussed or deliberated upon before his removal or deposition. The brief urges this court to apply the decision in *Onyeke v. Harriclem* (supra) and hold that the transactions

both earlier and subsequent in the present case were different and to hold that the lower court's ruling debarring the appellant's counsel in appearing in the case was erroneous. Finally, and on a further authority of this court in *Lacricom Co. Ltd. v. UBN Ltd.* (1996) 4 NWLR (Pt. 441) 185, the appellant urges this court to reverse the said decision of the lower court and to allow F. A. Esu of counsel for the appellant to carry on with the matter.

In the respondents' brief which argues the 1st and 2nd issues separately, the gravamen of the arguments is that the appellant's counsel F. A. Esu, Esq. was the legal adviser to the 1st respondent and in that capacity he served or acted as the Chairman of the Committee that decided the issues of the marriage of the said appellant as a result of which decision the respondents deposed or removed him (i.e. the appellant) from his post as a religious minister. It is pointed out that F. A. Esu, Esq. has himself admitted acting as the legal adviser of the 1st respondent though he stated that he later resigned his post as such. It is also contended in the respondents' brief that it was as a result of his deposition that the appellant filed the present suit No. C/512/98 and turned round to retain the former legal adviser of the respondents. It is also stated in the brief that F. A. Esu was appearing for the respondents in considering the question of whether or not to depose the appellant. It is submitted that the subsequent appearance by the said counsel in the present suit for the appellant was contrary to rule 10(a) and (b) of the Rules of Professional Conduct in the Legal Profession (1997). This court is consequently urged in the respondents' brief to hold F. A. Esu, Esq.'s act as a professional misconduct or an infamous act as held in *Re Idowu: A Legal Practitioner* (1971) 1 All NLR (Pt. 1) p. 126.

In another arm of the respondents' submission under their 2nd issue, this court is urged to hold that the cases of *John Onyeke v. Harriclem Nigeria Limited* (supra); *Lacricom C. Ltd. v. UBN Ltd.* (supra) and *H Ntukidem v. Oko* (1986) 5 NWLR (Pi. 45) 909 at 911 cited in the appellant's brief are not relevant and they do not support the latter's case. It is emphasized that the 2nd ratio in *John Onyeke's* case (supra) to the main effect that the court frowns upon the idea of a counsel appearing for one

party, say the plaintiff, at the early stage of a transaction and then turning round at a later stage of the same transaction to appear or act for the opponent does not help the appellant's case at all because the transaction in the instant case was one and the same. Thus, the above ratio in the case cited by the appellant rather supports the respondents' case. Finally, the respondents urge this court, in their brief, to hold that the trial court or the learned trial Judge was right in restraining F. A. Esu, Esq. from appearing for the appellant in the case in which the transaction was the same with the earlier one in which he also worked for the respondents.

It is relevant at this stage to refer to the appellant's reply brief dated 8/4/03 and filed on 9/4/03 in response to some of the issues raised in the submissions from the respondents' brief as discussed above. The said reply brief was also duly adopted and relied upon at the hearing of the present appeal. In the said reply brief, [the two issues formulated by the respondents are referred to and reproduced they are also reproduced at the earlier stage of this judgment). It is pointed out in the reply brief that by their issue one, the respondents asserted that F. A. Esu, Esq. acted as a legal adviser to, and was also appointed by the respondent as the Chairman of the Committee that looked into the case of the appellant as to determine the question of his marriage, the result of which would decide whether or not to , depose him as a minister of religion. It is submitted that by their above assertion, the respondents have raised a new or fresh issue that was never raised at the lower court. It is argued that the simple issue before the said lower court was on the deposition of the appellant as a Minister of God and there was no nexus whatsoever between that issue and the marriage between the said appellant and his wife who is not even a party to the present appeal. It is pointed out in the reply brief that there is no iota of evidence before the lower court (either documentary or otherwise) to show that there was any nexus or connection between the divorce petition between the appellant and his wife and his present action to challenge his removal from the religious office or ministry. Furthermore, it is argued by the appellant that there was no Committee ever formed or constituted by the respondents to decide the

issue of the appellant's marriage with his wife and F. A. Esu, Esq. was never appointed as a chairman to any such committee which is described in the brief as mere creation of the respondents imagination and therefore fictitious. Issue 1 of the respondents as discussed above is therefore said
 B in (he reply brief to have raised fresh facts or issues, which have not been or were never raised at the lower court. It is submitted that such fresh issues or fact can only be raised by the said respondents with the leave of this court - see *Uzo v. Nnalimo* (2000) FWLR (Pt. 3) p. 414 at 415; (2000) 11 NWLR (Pt.678) 237 *Alhaji Juddun v. Abba Abuna and Goni Adam* (2000) FWLR (Pt. 24) p. 1405 at 1409; (2000) 14 NWLR (Pt.286) 209 *Fadare & Ors. v. A.-G., Oyo State* (1982) Vol. 13 NSCC p. 52 at 53; and *Bank of the North v. Alhaji Adamu Maidamisa & 2 Ors.* (1997) 10 NWLR (Pt. 525) 408 at 413 cited and relied upon in support of
 D the above submission in the reply brief.

In another facet of the submission in the reply brief, the authority of *In Re Mown* (A legal practitioner) (*supra*) cited in the respondents' brief is said to be irrelevant and not supportive to the case of that said
 E respondents. This is because the appellant's counsel F. A. Esu is not in the stretchiest of imagination, guilty of any act or omission amounting to an infamous conduct. It is therefore difficult if reconcile the issue of counsel's appearance in matters that are basically hinged on different
 F subject matters and parties with an act or omission that can be properly termed as an infamous conduct. It is emphasized in the brief that F A. Esu, Esq. (the appellant's counsel) had appeared for the appellant in a purely matrimonial case between the said appellant and his wife and the present case is for the deposition of the said appellant by the respondents
 G and therefore on a different subject-matter. Finally, the reply brief urges this court to discountenance the arguments or issues raised by the respondents (in their brief) and to decide the present appeal in favour of the appellant.

H As stated earlier, I will consider the appellant's 3rd issue which has not been replied to by the respondent in order to see whether or not the submissions therein are borne by the record and they represent the legal position before I resolve the issue. I have confirmed that the issue is

covered by ground 2 where the complaint of breach of fair hearing is made. In the submissions under the issue in the appellant's brief, reference is made to section 36(1)(b) and (c) of the 1999 Constitution of the Federal Republic of Nigeria where the right of fair hearing is enshrined. The fundamental nature of the right is emphasized in the brief and it is pointed out that the courts frown at its breach. It is submitted that it is a fundamental right of a party or litigant to any proceeding to have the services of a counsel of his choice. This cardinal rule or principle of fair hearing should not be treated with levity by any court - see section 36(1)(b) and of the 1999 Constitution (supra). The appellant's brief relies on and cites the authorities of *Bum v. Garabi* (2000) FWLR (Pt. 23) p. 1191 at 1192; (2000) 13 NWLR (Pt.684) 228 and *Ntukidem v. Oko* (1986) 5 NWLR (Pt. 45) 909 at 911 in support of the above submissions, Finally, this court is urged to hold that by preventing the appellant from choosing F. A. Esu, Esq. as his counsel to prosecute his case, the trial court has denied him (i.e. the said appellant) of his fundamental right to have the services of a counsel of his choice. Because of the fundamental nature of the right of fair hearing, I will deal with the above issue first and in priority over issues 1 and 2.

From the above submissions under issue 3 in the appellant's brief, the only question of fact raised which requires to be ascertained from the record is the order made by the learned trial Judge in the judgment restraining the learned counsel for the appellant from appearance in the case. This is contained at page 10 of the record of proceedings. The next point to consider is the provision of the 1999 Constitution giving right to fair hearing to a party or litigant in any proceedings to have the services of a counsel of his own choice. That provision of section 36(6)(c) only applies to a person charged with criminal offence and does not therefore apply to civil cases.

The provision in its totality (rather than in isolation) reads thus:-

“36(6) Every person who *is charged with a criminal offence* shall H be entitled to

(c) defend himself in person or by legal practitioners of his own choice;

(Italics supplied for emphasis).

From the clear and unambiguous wordings of the above provision, the true intention of the framers of the Constitution is to make the choice of counsel as a right only in criminal cases. Thus
B **the right of choice of counsel by a party or litigant is only regarded as a constitutional or fundamental right in cases where the party or person is charged with criminal offence. Since the Constitution is silent on other cases (i.e. civil cases) the intention of the legisla-**
C **ture (i.e. the framers of the 1999 Constitution) is therefore to make the parties or litigants thereto not entitled to counsel of their choice as a right. Consequently, in such cases where it is appropriate under the law, the court can or in some cases, should interfere with the choice of a counsel by the litigant under the circumstances of a**
D **particular case and in the interest of justice. The duty of the court in some cases to interfere with the choice of counsel by the litigant or his appearance before it stems from the rules of practice and procedure and it is exercised or applied in civil cases in the interest**
E **of justice. This court (Lagos Division) had an occasion to pronounce on the exercise of such a duty in the case of Williams v. Nwosu (2001) 3 NWLR (Pt. 700) 376 that the right of a co-plaintiff in a joint action in the right to change his counsel does not contravene**
F **his constitutional right to engage the services of a counsel of his own choice. The court succinctly stated the rule (per Galadima, JCA at pages 386-387 of the report) as follows:-**

“I do not see how the operation of the rule of practice just explained above, in any way, contravene(s) the legal or constitutional
G *right of the 2nd respondent to engage the services of a lawyer of his choice (including his right to choose himself as his own counsel). ... It is therefore not correct to say that the operation of the aspect of the rule of practice now being considered contravenes any legal or constitu-*
H *tional right of a plaintiff.”*

In my humble view, the above dictum aptly applies to the present case where the appellant is asserting that his fundamental right to fair hearing has been infringed by the order of the lower

court restraining him from appearance or further appearance in the case for the appellant after finding that he had earlier served the respondents in the same subject matter or cause of action.

As stated earlier, where the clear plain and unambiguous words of the statute or Constitution are being interpreted by the court, they should be given their natural, ordinary, grammatical and literal meaning. This is the recommended approach in ascertaining the intention of the legislature, statute or the Constitution (as in the present case). It has been described as an act of violence to read into a statute (or Constitution) words that are absent from its express provision - see *Tote Industries Plc. v. Devcom M. B. Ltd.* (2004) 17 NWLR (Pt. 901) 182 at 216; 220-221; *Salami v. Chairman LEDB* (1989) 5 NWLR (Pt. 123) 539; *Ayeni v. University of Ilorin* (2000) 2 NWLR (Pt. 644) 290; and *Osondu v. FRN* (2000) 12 NWLR (Pt. 682) 483; and *Adisa v. Oyinwola* (2000) 10 NWLR (Pt. 674) 116. It is therefore wrong for the learned counsel for the appellant to cite and rely on the provision of section 36(3)(c) of the 1999 Constitution under his issue 3 in support of his submissions bordered on the breach of the appellant's right to have a counsel of his choice which is an issue not covered under the provision dealing with or applying only to criminal cases and which does not apply to the present case being a civil case. The 3rd issue of the appellant's brief is consequently shallow and must be resolved against the said appellant. It is hereby so resolved.

In resolving the submissions under the 1st and 2nd issues as presented above, it is pertinent to observe the concession of the parties in their respective brief that the appellant's learned counsel F.A. Esu, Esq. had been serving or acting as the legal adviser of the 1st respondent at whose instance he defended the appellant in the matrimonial dispute between the later and his estranged wife. It is also mutually accepted in the briefs of both parties under the issues that under the principle of law enunciated in the celebrated case of *Onyeke v. Harriclem* etc (*supra*) which they both cited and relied upon, to the effect that a party should not be allowed by the court to employ the services of a

counsel and the counsel should not accept the brief of such a party where it is clear that the services to be rendered flow out of or are closely connected with the previous services he had rendered to the opposing side or party - see also *Anatogu v. Iweka II* (1995) 8 NWLR (Pt. 415) 547. Thus under the principle as stated in the case, the court frowns at the practice whereby a counsel appearing for one party at an early stage of the transaction and then turning round at a later stage of the same transaction to appear for his opponent. However, where the transactions are different, the court will not restrain a counsel from changing sides. With the above concession of the parties in the present case, the crucial question to ask in the resolution of the two issues and the submission thereto as canvassed in the briefs of the parties is whether or not the transaction or the subject-matter in which the appellant's counsel served the respondents was the same or different from the one in the present action. Since the present case before the lower court was an interlocutory application which was decided on affidavit evidence rather than oral evidence, the above crucial question posed can only be resolved by reference to the supporting affidavit and the counter-affidavit filed for and against the respondents' motion on notice before the trial court (at pages 1- 8 of the record of proceedings). It is to be noted that although it is indicated in the judgment that the learned counsel who represented the parties at the lower court addressed it on the matter or on the application, the respective addresses of the said counsel are not contained in the record of proceedings. This, in my humble view, is an important omission from the record. Although the addresses of counsel do not constitute or are not regarded as evidence and can be dispensed with in certain cases, they are regarded as important in assisting or guiding the court in its final determination of the case. They are therefore of very useful assistance or guidance to the court. Although the addresses are not mandatory in this case as in other cases, they would have been of assistance to this court if they were included in the record of proceedings which was compiled by the appellant's counsel under or by way of a departure from the rules granted by this court on 22/11/2001 - see *Niger Construc-*

tion Ltd. v. - Okugbeni (1987) 4 NWLR (Pt.67) 787; Michika L.G. v. NPC (1998) 11 NWLR (Pt. 573) 201; Daramola v. A.-G., Ondo State (2000)7 NWLR (Pt. 665) 440; and Mirchandoni v. Pinheiro (2001) 3 NWLR (Pt. 701) 557 at 572. From the above authorities, the addresses of counsel are only important in assisting or guiding the court but they do not constitute evidence. I will therefore, in their absence and without their assistance in the present case, still proceed to consider the affidavit evidence and the (one page) ruling of the learned trial . Judge (at pages 9-10 of the record) in resolving the above question raised under the two issues. C

The appellant's counsel F. A. Esu, Esquire's position which he maintains throughout his submission under the twin issues is that he had resigned his position as a legal adviser or counsel for the respondents long before the removal of the appellant who engaged his services to prosecute or institute the present suit challenging his removal as a religious Minister by the said respondents. He also maintains that there is no nexus between his representation of the appellant (at the instance of the 1st respondent) in the divorce petition against the later by his wife and the present suit, which is challenging his removal or deposition by the respondents. On the other hand, the learned counsel for the respondent who applied to the lower court (in his motion on notice) to restrain F. A. Esu, Esq. from his appearance for the appellant on grounds of impropriety and double standard maintains in his brief that F. A. Esu, Esq. had not only served as a legal adviser to the respondents but he was in fact the Chairman of the Committee constituted by the 1st respondent to determine the case for the removal or deposition of the appellant who had been sued by his wife for taking another wife and that the issue of the appellant's divorce from his wife was therefore tied to and in fact led to his deposition or removal which is the subject matter of the present suit. Thus, both the two cases or proceedings are one and the same transaction. The common factors or grounds amongst the parties as per their submission is that F. A. Esu, Esq. had resigned from his position as the respondents' legal adviser before taking up the case against them for or on behalf of the appellant and that the subject matter in the previous D E F G H

action (which was a divorce petition) and the present action (which is against the appellant's removal or deposition) are ordinarily different. From the above position maintained by the parties, (in their submissions) it is easy to find an answer to our above stated poser by reference to the
B record of proceedings. In the supporting affidavit filed by the respondents with motion on notice on 16/10/2001 (at pages 2-3 of the record) and the exhibits annexed thereto, the relevant paragraphs averred as follows:-

C "3. At all material times to the inception of this case F. A. Esu, Esq. of this counsel (sic) now for the plaintiff was the legal adviser to the defendant church on the auspices of Northern Calabar Presbytery ...

6. That on 10th March, 1988 at the inception of this case at the Presbytery level, F. A. Esu, Esq. acting as the legal adviser of the Church
D (now the defendants) wrote a letter to say that he was the legal adviser to the Church and was "briefed extensively by the erstwhile legal adviser " on the matter. A copy of the said letter is herein annexed as exhibit A.

7. That our counsel Chief E. E. Ukaegbu informs (sic) me and I
E very believe him that F. A. Esu, Esq. of counsel now for the plaintiff (sic) cannot properly act for the plaintiff after having acted for us in this matter on the past (sic).

8. That when on 16th day of November, 1998, the defendant wrote
F to F. A. Esu, Esq. to explain why he resigned his position as the Northern Calabar Presbytery legal adviser on the 1st September, 1998, F. A. Esu, Esq. made no reply. A copy of the defendant's and his resignation letter are herein annexed respectively as G exhibits "B" and "C".

G 9. That after being seised with all the facts of the case of the defendants in this matter, F. A. Esu, Esq. turned round acting for the plaintiff to sue the defendants in respect of the same case. ...

In the counter-affidavit, deposed to by F. A. Esu. Esq. himself, the averments in paragraphs 2-4 are relevant to the above depositions of
H the supporting affidavit. They read thus:

"2. That it is true that I was the legal adviser of the Northern Calabar Presbytery but I had resigned same as the applicant (i.e. the respondent herein) rightly stated.

3. *That the present case is not the same as any that I have handled for the defendants nor is it one continuous transaction and there is no impropriety on my part.*

4. *That the case here is different as it relates to unlawful and unjustifiable deponement (sic) of the plaintiff."*

From the above averments in the affidavits evidence filed respectively by the parties before the trial courts, it is clear that there was an apparent conflict arising from the said affidavits on the issue of whether or not the counsel involved had actually resigned his appointment as the legal adviser of the respondent before the inception of the present suit against them by the respondent. There is also a conflict on the question of whether or not the services rendered to the respondents by the said counsel was on one and the same transaction or was a continuous transaction with or resulted in the present suit. In a case like the present one which is decided by affidavit evidence, where there is conflicting affidavit evidence, it is the duty of the court to resolve such a conflict by calling for oral evidence. Thus the learned trial Judge in the present case faced with the denial of the appellant's counsel and the conflicting affidavit evidence filed respectively by the parties was duty bound to call upon the said parties to adduce oral evidence in order to resolve the conflict so raised in their affidavit evidence. This is moreso when the documents annexed to the respondents' affidavit (i.e. exhibits A-C) were not very helpful in resolving the conflict. Without such an oral evidence called, the learned trial Judge was not competent to have resolved by himself such conflict and a fortiori the dispute between the parties. It is the parties themselves who would resolve the conflict in their oral evidence - see Mbadugha v. Nwosu (1993) 9 NWLR (Ft. 315) 110; Onagoruwa v. Adeniji (1993) 5 NWLR (Pt. 293) 317; Ndigwe v. Ibekendu (1998) 7 NWLR (Pt. 558) 486 at 499 and Odumeru v. Adenuga (2000) 4 NWLR (P. 652) 224 and Momah H v. Vab Petroleum Inc. (2000) 4 NWLR (Pt. 654) 534.

Furthermore, **under the rule of practice on the filing and exchange of affidavit evidence, the respondents upon being served**

with the counter-affidavit filed by the appellant (where there was a denial of their allegation) should have filed a further affidavit to counter the denial of their allegation made by the said appellant. On their failure to counter the appellant's averments in the counter-affidavit, the effect is that the facts averred or deposed therein prevailed and are to be relied upon by the court. This rule on affidavit evidence is in accord with the principle that in civil cases which are decided on the preponderance of evidence, the burden of proof lies on the party or person who would have failed if no evidence is adduced as provided under section 137 of the Evidence Act (Cap. 112) LFN, 1990 -see Onobruhere v. Esegine (1986) 1 NWLR (Pt.19) 799; Ojomo v. Ijeh (1987) 4 NWLR (Pt. 64) 216; Bakare v. A.C.B. Ltd (1986) 3 NWLR (Pt. 26) 47 at 57; and Okpo v. Umet (1998) 7 NWLR (Pt. 558) 451 at 461. Under the above rule, the burden of proof of their allegation still lied on the respondents who failed to file a further-affidavit to counter the appellant's denial of their said allegation. On the respondent's failure to file such a further affidavit, the implication is that they agreed with and accepted the facts stated in the appellant's counter-affidavit. Exhibit A (the report of reconciliatory role of the counsel in the divorce case or petition dated 10/3/98) shows clearly that it was a different case or transaction from the subject of the present suit which is on the deposition of appellant from his ministerial post in the respondents' church also found that there is nothing in that report to show that the role of the counsel in the divorce proceedings has anything to do with the present case. Moreover, by reference to exhibits 'B' and 'C' which are respectively the counsel's letter of notice of his resignation and the reply thereto by the 1st respondent .showing its refusal to accept [he resignation, it is clear from the dates on the said documents which are respectively shown on their faces lobe 1/9/98 and 16/11/ 98, that a period of about 6 months had expired between the final report on the divorce case and the counsel's resignation. Although there is nothing on the record to show the date of the filing of the present case at the lower court which is relevant and useful in ascertaining the respondents' allegation that the appellant's counsel instituted the case while he

was still the legal adviser of the 1st respondent, it can be reasonably implied from the date of filing the respondents' motion at the lower court which is the subject of the present appeal. Although the motion (at page I of the record is undated, it is however shown that it was filed at the lower court's Registry on the 22/6/2001. The supporting affidavit further compounded the problem by the date it was sworn to or deposed which is given as 17/1/2000. By this date in the affidavit, which shows that the motion was filed after more than one year of the filing of its supporting affidavit, the respondents' case should have been looked at with suspicion and scepticism. In any case, even if that is regarded as a slip from or fay the Registry, and the date in the affidavit is treated as the date of the motion (i.e. 17/1/2000) **it is still questionable as to why the respondents waited for two (2) years after the filing of the suit before they brought their motion to challenge the competence of the appellant's learned counsel in his appearance, and in instituting the present suit for the appellant. It is to be noted that from the suit number of the present case C/512/98, it was instituted sometime in 1998. The delay in bringing their present application (or motion) for over 2 years in my view apart from causing further suspicion to the respondents' case is also fatal to their application, which was not brought timeously as required under the rule or principle of equity. It is trite that the rules or principles of equity help only the vigilant and they do not assist an indolent party who fails to pursue his rights diligently and within a reasonable time. Where this happens, the courts regard such a delay or indolence of the party either as fatal to his case or as amounting to a waiver of his right under the maxim that equity helps only the vigilant. Thus, it is said that delay defeats equity** - see *Ola v. Williams* (2002) 4 WRN 77 at 86; (2003) 5 NWLR (Pt.812) 48 M & B Electrical Co. Ltd. v. Government of Cross River State (2005) 6 F NWLR (Pt. 922) 471 at 479-480; *Igbinkpogie v. Ogedegbe* (2001) 18 NWLR (Pt. 745) 412 and *Habib Bank (Nig.) Ltd. v. Ochete* (2001) 3 NWLR (Pt. 699) 114. **From the foregoing, it is very clear that the respondents' case in their application at the lower court was weaker than that of the appel-**

lant. On that weakness, the lower court should have regarded them as failing to prove their allegation of impropriety and professional misconduct particularly in view of the serious nature of the respondents' allegation against the appellant's counsel. It is also relevant here to point out that the learned trial Judge had made a finding at the end of the ruling that the said counsel had earlier resigned from acting for the respondents before taking up the *appellant's brief in the following words (at page 11 of the record):-*

“... it is therefore the opinion of this court and with reference to section 10(b) of the Rules of Professional Conduct that counsel would be representing conflicting interest without the consent of all the parties involved in this matter notwithstanding the fact that counsel had earlier resigned from acting for the defendants.”

It was also an error on the part of the learned trial Judge to have held that section 10(a) of the Rules of Professional Conduct was applicable to the case to debar or estop the learned counsel for the appellant in the case. This is because from the express wordings of the said provision as reproduced in the judgment (at the same page), it is very clear that the duty of a counsel as imposed under the provision is only applicable in his relationship towards his client to whom he is required to disclose his interest if any which he may have in the case with a view to influencing his said client in selecting him as his counsel. The rule is not applicable in the relationship of a counsel to other persons who are not his clients as the respondents in the instant case. Consequently, since the appellant's counsel has resigned from being the respondents' counsel for some years (2 years) before instituting the present action on behalf of the appellant, the said respondents who are not his clients are not competent or qualified to bring their present application against the appearance of their former counsel challenging his appearance for the appellant purportedly under the provision of section 10(b). If any action is to be brought under the said provision against the counsel, it should have been by or on behalf of the appellant who is his client. The authority relied upon by the

learned trial Judge for the ruling, namely Onugboigbo Community v. Minister of Lagos Affairs in *Re Chief Williams* (1971) IV CLR (Pt. 2) 186 as well as the one cited in the respondents' brief (*In Re G. Idowu: A Legal Practitioner* (supra) are therefore both misconceived as they were predicated on the breach of the rule 10(a) and (b) of the Rules of Professional Conduct for the Legal Profession. Even the citation of the law is wrongly given in both the ruling and in the respondents' brief as section 10(a) and (b) of the Rules of Professional Conduct for the legal profession. This is wrong way of giving a citation of the law or a statute, which should have full particulars with the Chapter (or No.) and the year. The correct provision on which the case of *Idowu* (supra) was based or decided is section 7 of the Legal Practitioners Act No. 33 of 1962 dealing with infamous conduct by a legal practitioner which as we have seen above are not applicable in the present case.

My last comment under the twin issues being considered is on the submission in the appellant's reply brief. I have already set out the submission earlier on and I therefore need not repeat them here will therefore without much ado deal with the appellant's submission in the reply brief as briefly as possible and resolve them accordingly. **On the fresh issue said to be raised by the respondents (in their brief), namely that the appellant's counsel F. A. Esu, Esq. was not only the legal adviser of the said respondents but also served as a Chairman of the Committee that decided the issue of the appellant's marriage the result of which resulted in the later's deposition from the religious ministry, I agree with the appellant's submission that the issue of the nexus between the dissolution of his marriage and his deposition by the respondents (the subject-matter of the present suit) is a fresh issue raised for the first time in the respondents' brief before this court.** Thus, it was not raised or even mentioned in the appellant's brief where it is maintained that the present action is an entirely different transaction from the services he had rendered to the respondents before his resignation. Neither was the issue raised nor can be traceable from the affidavit evidence filed by the parties at the lower court. Even in the ruling of the lower court, the issue of the transaction being similar in the

two cases is only shown to have arisen from the submission or address of the learned counsel for the respondents and it was not the basis of the said ruling as evidenced from the above quoted statement of the learned trial Judge. **Being a fresh issue or point raised and which is not supported by or based on the evidence (i.e. the affidavit evidence) at the trial court, it is a well settled principle of law that the respondent as a party to the present appeal cannot raise or should not be allowed to raise such a fresh issue or point as done in his brief without first seeking for and obtaining the leave of this court to do so. Consequently, by raising the fresh issue in this court without the required leave, such an issue is or has been rendered incompetent as rightly submitted in the reply brief - see Ikeanyi v. A.C.B. (1997) 2 NWLR (Pt. 489) 509; Adelaja v. Alade (1999) 6 NWLR (Pt. 608) 544; Kaigama v. Namnai (1996) 4 NWLR (Pt. 441) 162; Ejuetami v. Olaiya (2001) 18 NWLR (Pt. 746) 572; and Dabo v. Abdullahi (2005) 7 NWLR (Pt. 923) 181 at 200. In the result of my consideration of the appellant's submissions in the reply brief, I find the said submissions and the authorities cited in support thereof in the said brief as unassailable and in line with the above principle and authorities and I hereby uphold them. I hold that the fresh issues raised in the respondents' brief is incompetent and hereby strike it out. Issues 1 and 2 are hereby resolved in favour of the appellant.**

In the final result of my consideration of all the issues in the present appeal whereby I resolve issues 1 and 2 in favour of the appellant and issue 3 against him, I find his appeal as meritorious and hereby allow it. The ruling of the trial court delivered on 30/3/2000 is hereby set aside and the appellant's learned counsel F. A. Esu, Esq. is hereby allowed to continue with his appearance in the case for the appellant (plaintiff) whose brief he has been found to be properly holding in this judgment. From the nature of the case, and the relationship between the parties, I will not make any order as to costs, Rather each of the parties should bear his or its own costs.

CHUKWUMA-ENEHJCA

I have had a preview of the judgment of my learned brother Adamu, JCA just delivered. I agree with the reasoning and conclusions and that the appeal be allowed. I abide by the orders in the lead judgment. B

OMOKRIJCA

I have read in advance the judgment of my learned brother, Adamu, JCA, just delivered. He has dealt satisfactorily with all the issues presented in this appeal. C

I agree with the reasons and conclusion that the appeal is meritorious and deserves to be allowed.

I allow this appeal and abide by the orders in the lead judgment. D
Appeal allowed.

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