

**SUPREME COURT OF NIGERIA**

15th December, 2006 SC. 63/2002

**CORAM:- I. L. KUTIGI, U. A. KALGO, S. A. AKINTAN,  
W. S. N. ONNOGHEN, F. F. TABAI, JJSC**

BILL CONSTRUCTION CO. LTD. .... APPELLANT/  
AND CROSS RESPONDENT  
IMANI & SONS LTD/SHELL  
TRUSTEES LTD (A JOINT VENTURE) ..... RESPONDENT/  
CROSS APPELLANT

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CONSTITUTIONAL LAW - Fair hearing - Access to the courts - Is granted to every citizen vide s. 33(1) 1979 Constitution - And under the twin pillars - Of the common law concept of natural justice (H1)

FAIR HEARING - Breach of - Burden of proof - Is on the party who alleges breach - Facts and circumstances of each case - Should be considered (H2)

PRACTICE & PROCEDURE - Motions - Fair hearing - Adjournment - Where applicant has finished moving his motion - Grant of application for adjournment to respondent - At that stage on a flimsy reason - Will not be proper (H3)

CONSTITUTIONAL LAW - Fair hearing - Breach of - Where a party is given ample opportunity - And conducive atmosphere to present his case - But he fails to utilize them - His right to fair hearing is not breached (H4)

**FACTS**

The parties entered into a construction contract for the building of the United States of America Embassy Staff Housing and recreational facilities at Abuja. The contract provided that any dispute between them must be referred to an arbitrator whose award shall be final and binding

on the parties. During the course of execution of the contract, disputes arose between the parties. The matter was referred to a Chartered Quantity Surveyor who made an award of N352,910,156.00 on 31-12-1996 in favour of the appellant. Respondent refused to pay. Appellant applied to the Lagos State High Court on 26-3-1997 for leave to enforce the award as judgment of that court by an originating motion/summons on notice.

Respondent filed a notice of preliminary objection which was more than 3 months allowed by the Arbitration Act for challenging an award. Respondent's fresh suit commenced on 1-4-1997 before the Federal High Court Lagos was successfully challenged by appellant on ground of jurisdiction. On 27-10-1997, the Lagos High Court dismissed respondent's preliminary objection and granted appellant's application to enforce the arbitration award. Before granting the application, respondent refused to reply to the motion but rather applied for adjournment to file a counter affidavit which was refused by the trial judge. Respondent's appeal to the Court of Appeal was upheld on ground of denial of fair hearing. Being dissatisfied, appellant has now appealed to the Supreme Court.

**ISSUES FOR DETERMINATION**

1. *"Were the learned justices of the Court of Appeal right in treating the third issue for determination formulated by the Respondents as similar to the Appellants? Should the judgment still be sustained if the said respondents' third issue for determination is shown not to have been distilled from a ground of appeal arising from a ground of appeal arising from the judgment of the trial court? (Ground 1 of the appeal).*

2. *Were the learned justices of the Court of Appeal right in holding that the registration of the Arbitral award pursuant to section 31 of the arbitration and conciliation Act, the Respondents were not given a fair hearing in the circumstances of this case for not being granted adjournment at the time and for the reason the request was made? (Grounds 2 & 3 of the Appeal)"*

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

***Fair hearing - Access to the courts***

1. By virtue of the provisions of section 33(1) of the 1979 Constitution being the applicable Constitution to the facts of this case, in the determination of a person's civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality. It is settled law that the above provision entrenches the common law concept of natural justice with its twin pillars, namely:

(i) that a man shall not be condemned unheard or what is commonly known as *audi alteram partem*, and

(ii) that a man shall not be a judge in his own cause or *nemo judex in causa sua*.

The section confers on every citizen of this great nation who has any grievance, the right of access to the courts and leaves the doors of the courts open to any person with the desire to ventilate his grievances and compels the court that will determine the rights of such person to accord the person a fair hearing. (p. 3528 C)

### ***FAIR HEARING - Breach of - Burden of proof***

2. It is the person who alleges any breach of the rules of fair hearing that has the burden of proof of same. In the instant case, it is the respondents who alleged before the lower court that their right to fair hearing was breached that owed therefore the duty to prove same; they have to establish how their civil rights and obligations have been adversely affected by the alleged breach. It is settled law that whether a trial or proceeding had been fair or not depends on the facts and circumstances of each case. The question is whether given the facts and circumstances of the instant case the Court of Appeal is right in its conclusion that the respondents were denied their right to fair hearing. (p. 3528 H)

### ***Motions - Fair hearing - Adjournment***

3. Just before learned counsel for the appellants started moving the courts on the application or midway into his so moving the court, learned coun-

sel for the respondents, if he desired to put up any facts before the court to be considered in the application on behalf of his client, was under a duty to have so informed the court and applied for an adjournment in the circumstances so as to bring the facts properly before the court but he  
 B did not do so. He waited until learned counsel for the appellant concluded his argument on the application. It was when counsel for the respondent was called upon to reply to the arguments of his learned friend that he told the court that he needed an adjournment to file a counter affidavit in  
 C opposition to an affidavit in support of the application already argued or moved by counsel. This obviously is not acceptable because the request for adjournment and the reason for same if granted would have amounted to a breach of the right to fair hearing of the appellant, see N.N.B PLC vs Sanni (2001) 7 NWLR (pt. 713) 544. (p. 3530 A)  
 D

***Fair hearing - Breach of - Where a party is given ample opportunity***

4. On the above facts and circumstances of this case, I hold the considered view that the right to fair hearing of the respondents was never  
 E breached by the trial court and that the Court of Appeal was in error when it held the contrary. It is settled law that where a party is given ample opportunity to present his case within the confines of the law but he chooses not to utilize same, he cannot later be heard to complain that  
 F his right to fair hearing has thereby been breached. What the court is enjoined by the provisions of section 33 of the 1999 Constitution to do is to create a conducive atmosphere for the parties to exercise their right to fair hearing by holding the scales of justice fairly but firmly without fear  
 G or favour affection or ill will. Having provided the required atmosphere the duty on the court stops there. It becomes the duty or choice of the party seeking to enforce his civil rights and obligations to utilize the opportunity so created. He cannot be compelled to do so. Where he decides to present his case in an acceptable mode and as required by the rules and  
 H substantive law, he would be heard. On the other hand, where he chooses not to present his case he cannot later be heard to complain that he was not heard, as in the instant case.

In conclusion the appeal has merit and should be allowed and I

order accordingly. (p. 3530 G)

## **NOTABLE POINT OF INTEREST**

### **AKINTAN JSC**

#### ***1. Arbitration award - When adjournment file counter affidavit will not be granted*** B

The learned trial Judge, rightly in my view, refused that request for an adjournment in that such a counter-affidavit could not be taken as an application to set aside the arbitral award as provided for in section 29 (1) (a) of the Arbitration and Conciliation Act which has to be made within three months of the delivery of the award. The lower court, however, allowed the appeal and set aside the order made by the trial High Court. C

I believe that the lower court was in error in its decision in the matter because the counter affidavit sought to be filed by the respondent could not serve any useful purpose. This is because, any request made in such application to set aside the arbitral award could not be entertained by the court as it would not have been made within the three months stipulated by law for making such application. (p. 3533 F) D E

## **REPRESENTATION**

G. N. Okonkwo Esq., for the Appellant.

Olu Daramola Esq., for Respondent/Cross-Appellant with him are Akin Akintan Esq. and M. B Badmus Aladesane (Mrs). F

## **CASES REFERRED TO**

Kenon vs Tekam (2001) 14 NWLR (pt. 732) 12 G

Deduwa vs Okorodudu (1976) 9-10 S.C 329

Mohammed vs Kano N.A (1908) 1 All NLR 424

N.N.B PLC vs Sanni (2001) 7 NWLR (pt. 713) 544

Araka vs Ejeugwu (1999) 2 NWLR (pt. 589) 107 at 121 H

## **STATUTES & RULES REFERRED TO**

Constitution of Nigeria 1979 s. 33(1)

Arbitration and Conciliation Act cap. 19 LFN 1990 ss. 31, 29(1)(a)  
High Court of Lagos Civil Procedure Rules O. 49 r. 4

**LEAD JUDGMENT BY ONNOGHEN JSC**

B This is an appeal against the judgment of the Court of Appeal  
holden at Lagos in appeal NO. CA/L/192/98 delivered on 7<sup>th</sup> July, 1999 in  
which it allowed the appeal and set aside the decision of the Lagos State  
High Court granting leave to the appellant to enforce an arbitral award  
between the parties.

C The parties entered into a construction contract for the building  
of the United States of America Embassy Staff Housing and recreational  
facilities at Abuja with a provision that any dispute between them must be  
referred to arbitration and the award of such arbitration shall be final and  
D binding on the parties. Later on and during the course of the execution of  
the contract, disputes arose between the parties and the matter was duly  
referred to Kofo Popoola Jp, Chartered Quantity Surveyor, for arbitra-  
tion and an award was made on 31/12/96. The award was for  
E N352,910,156.00 in favour of the appellant who demanded payment but  
the respondent refused to pay. There was in addition, an award of 21%  
interest per annum on the principal sum calculated monthly on any out-  
standing sum remaining unpaid.

F Appellant later applied to the Lagos State High Court on 26/3/97  
for leave to enforce the award as a judgment of that court by an originat-  
ing motion ex parte but the Chief Judge directed the appellant to put the  
respondent on notice of the motion. The appellant consequently took out  
an originating summons on notice to the respondent on 23/4/97 under  
G the same suit NO. M/172/97 which was served on the parties.

On the 7/7/97 the respondents filed a notice of preliminary objec-  
tion to the application of the appellant which objection was more than  
three months as allowed by the Arbitration and Conciliation Act, cap 19  
H Laws of the Federation 1990 for challenging an award. The challenge to  
the award was thus more than 6 months after it was made.

On the 1<sup>st</sup> day of April 1997 the respondents commenced suit NO.  
FHC/L/CP/365/97 at the Federal High Court Lagos in respect of the award

and the appellant filed a notice of preliminary objection against the suit on 8/4/97 challenging the jurisdiction of the court to entertain and determine the suit which objection was upheld by that court on 9/3/98.

On the 27<sup>th</sup> day of October 1997 the Lagos High Court dismissed the preliminary objection of the respondents and proceeded to grant the appellant's application to enforce the award there being nothing to oppose its grant. Before granting the application learned counsel for the respondents, when called upon to reply to the motion as moved by learned counsel for the appellant applied for an adjournment to file a counter affidavit, which application was refused by the learned trial judge resulting in the appeal to the Court of Appeal. The Court of Appeal allowed same on the ground that the respondent's right to fair hearing was impeached by the learned trial judge's refusal to grant the adjournment sought and without allowing counsel opportunity to reply on points of law to the application to enforce the arbitral award. It is against that decision that the appellant has appealed to this court.

The issues relevant for the determination of the appeal are as follows:-

1. *"Were the learned justices of the Court of Appeal right in treating the third issue for determination formulated by the Respondents as similar to the Appellants? Should the judgment still be sustained if the said respondents' third issue for determination is shown not to have been distilled from a ground of appeal arising from a ground of appeal arising from the judgment of the trial court? (Ground 1 of the appeal).*

2. *Were the learned justices of the Court of Appeal right in holding that the registration of the Arbitral award pursuant to section 31 of the arbitration and conciliation Act, the Respondents were not given a fair hearing in the circumstances of this case for not being granted adjournment at the time and for the reason the request was made? (Grounds 2 & 3 of the Appeal)"*

It must be noted that there was a cross appeal by the respondents which was withdrawn by learned counsel for the respondents/cross appellant at the hearing of the appeal on the 18<sup>th</sup> day of October 2006 and was consequently dismissed by this court. Also to be noted is

the fact that there was a third issue identified by the learned counsel for the appellant which relates to the withdrawn cross appeal and was consequently struck out by the court following the dismissal of the cross appeal.

B Going through the surviving two issues as identified by learned  
counsel for the appellant for determination, I hold the view that the main  
issue in this appeal is the second issue dealing with fair hearing. I will  
therefore limit this judgment to a consideration of the issue as to whether  
C the respondents were denied their right to fair hearing as held by the  
Court of Appeal. I hold the considered view that the 1<sup>st</sup> issue is really of  
no moment even though elegantly couched and thought out.

**By virtue of the provisions of section 33(1) of the 1979 Con-**  
**stitution being the applicable Constitution to the facts of this case,**  
D **in the determination of a person's civil rights and obligations in-**  
**cluding any question or determination by or against any govern-**  
**ment or authority, a person shall be entitled to a fair hearing within**  
E **a reasonable time by a court or other tribunal established by law**  
**and constituted in such a manner as to secure its independence and**  
**impartiality. It is settled law that the above provision entrenches**  
**the common law concept of natural justice with its twin pillars,**  
**namely:**

F (i) that a man shall not be condemned unheard or what is  
commonly known as *audi alteram partem*, and

(ii) that a man shall not be a judge in his own cause or *nemo*  
*judex in causa sua*.

G The section confers on every citizen of this great nation  
who has any grievance, the right of access to the courts and leaves  
the doors of the courts open to any person with the desire to venti-  
late his grievances and compels the court that will determine the  
rights of such person to accord the person a fair hearing, see *Kenon*  
H *vs Tekam* (2001) 14 NWLR (pt. 732) 12; *Deduwa vs Okorodudu* (1976)  
9-10 S.C 329; *Mohammed vs Kano N.A* (1908) 1 All NLR 424.

**It is the person who alleges any breach of the rules of fair**  
**hearing that has the burden of proof of same. In the instant case, it**



**is the respondents who alleged before the lower court that their right to fair hearing was breached that owed therefore the duty to prove same; they have to establish how their civil rights and obligations have been adversely affected by the alleged breach. It is settled law that whether a trial or proceeding had been fair or not depends on the facts and circumstances of each case. The question is whether given the facts and circumstances of the instant case the Court of Appeal is right in its conclusion that the respondents were denied their right to fair hearing.**

From the evidence as contained in the record, the following facts are clear and undisputed:

(a) the proceeding emanated from an application by the appellant to enforce an arbitral award of the sum of N352,910,156.00 with interest at 21% per annum calculated monthly on any outstanding sum remaining unpaid in accordance with an agreement entered into by the parties to the proceedings who also agreed that the award shall be final and binding on them

(b) the application to enforce, the award was on notice to the respondents who reacted to it by the filing of a notice of preliminary objection with no counter affidavit opposing the application on the merit.

(c) as at the time of filing the application to enforce the award more than six months had passed after the making of the award.

(d) that section 31 of the Arbitration and Conciliation Act grants three months to the respondents within which to challenge the award which the respondents failed or neglected to utilize.

(e) from the facts even the notice of preliminary objection to the application to register and enforce the award was made more than six months after the award.

(f) the respondents filed no action to set aside the award for whatever reason.

(g) the preliminary objection of the respondent was eventually struck out with cost to the appellant leaving the coast clear for the consideration of the application to register and enforce the award, which was then heard.

**Just before learned counsel for the appellants started moving the courts on the application or midway into his so moving the court, learned counsel for the respondents, if he desired to put up any facts before the court to be considered in the application on behalf of his client, was under a duty to have so informed the court and applied for an adjournment in the circumstances so as to bring the facts properly before the court but he did not do so. He waited until learned counsel for the appellant concluded his argument on the application. It was when counsel for the respondent was called upon to reply to the arguments of his learned friend that he told the court that he needed an adjournment to file a counter affidavit in opposition to an affidavit in support of the application already argued or moved by counsel. This obviously is not acceptable because the request for adjournment and the reason for same if granted would have amounted to a breach of the right to fair hearing of the appellant, see N.N.B PLC vs Sanni (2001) 7 NWLR (pt. 713) 544 apart from the fact that a counter affidavit has been held by this court in the case of Araka vs Ejeugwu (2000) 2 NWLR (pt. 589) 107 at 121 not to be relevant and that “*what he cannot do is to seek to do so by way of pleading or counter affidavit as an action for enforcement of the award*” but by an independent action to set aside the award before the court seized of the application for registration of the award and by order 49 Rule 4 of the High Court of Lagos Civil Procedure Rules he had six weeks to do so but failed. Their failure further strengthened the finality of the award as agreed by the parties to the arbitral clause in the agreement they signed.**

**On the above facts and circumstances of this case, I hold the considered view that the right to fair hearing of the respondents was never breached by the trial court and that the Court of Appeal was in error when it held the contrary. It is settled law that where a party is given ample opportunity to present his case within the confines of the law but he chooses not to utilize same, he cannot later be heard to complain that his right to fair hearing has thereby been breached. What the court is enjoined by the provi-**

sions of section 33 of the 1999 Constitution to do is to create a conducive atmosphere for the parties to exercise their right to fair hearing by holding the scales of justice fairly but firmly without fear or favour affection or ill will. Having provided the required atmosphere the duty on the court stops there. It becomes the duty or choice of the party seeking to enforce his civil rights and obligations to utilize the opportunity so created. He cannot be compelled to do so. Where he decides to present his case in an acceptable mode and as required by the rules and substantive law, he would be heard. On the other hand, where he chooses not to present his case he cannot later be heard to complain that he was not heard, as in the instant case. B C

**In conclusion the appeal has merit and should be allowed and I order accordingly.** I set aside the judgment of the Court of Appeal and restore the Ruling of the High Court. Appellant is awarded costs of N10,000.00 only. D

Appeal allowed.

E

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### KUTIGIJSC

I have had the privilege of reading in advance the judgment just delivered by my learned brother Onnoghen, JSC. I agree with his reasoning and conclusions. The learned trial Judge was perfectly right when she concluded her Ruling thus - F

*“I am satisfied that the Agreement to arbitrate subsisted and that the Award published was made by Popoola JP. Order is granted to the Applicants as prayed to enable the Applicant enforce the Award ...”* G

The Court of Appeal I believe was in error when despite the facts of the case which are very clear, it proceeded to overturn the decision of the trial Court. The question of fair hearing raised by the Respondents in the Court of Appeal was undoubtedly irrelevant as an after thought. H The appeal is in my view meritorious and ought to succeed. It is accordingly allowed. The judgment of the Court of Appeal is hereby set aside while the Ruling of the learned trial judge of the High Court is restored.

The Respondents' cross-appeal was withdrawn and dismissed at the hearing of the appeal.

The Appellant/Cross-Respondent is awarded costs of N10,000.00 only.

B

### **KALGO JSC**

I entirely agree with the judgment just delivered by my learned brother Onnoghen JSC, which I have read before now. He has, in my view, fully and adequately dealt with all the issues raised by the appellant and I accordingly adopt his reasoning and conclusions reached thereon. I therefore also allow the appeal and abide by the consequential orders made in the said judgment including the order as to costs.

D

### **AKINTANJSC**

The dispute that led to this appeal arose over the steps taken by the appellant to enforce an arbitration award made in its favour. Reference by the parties to an arbitrator was made in accordance with one of the terms of a construction agreement between the said parties that any dispute between the parties must be referred to arbitration and that the award made by such an arbitration shall be final and binding on the parties. A dispute actually arose and the parties agreed that the dispute be referred to one Kofo Popoola, a Chartered Quantity Surveyor, for resolution.

The parties presented their respective case before the said arbitrator. At the conclusion of his deliberation, the arbitrator delivered his award on 31<sup>st</sup> December, 1996. An award of N352,910,156 with interest at 21% per annum to be calculated monthly on any outstanding sum unpaid, was made in favour of the appellant.

In Section 29(1) (a) of Arbitration and Conciliation Act (Cap 19, Laws of the Federation of Nigeria 1990), "*A party who is aggrieved by an arbitral award may within three months - (a) from the date of the award.... by way of an application for setting aside, request the court to set aside the award*".

The appellant applied to the Lagos High Court on 26<sup>th</sup> March, 1997 under section 31 of the Arbitration and Conciliation Act for leave to enforce the said award as a judgment or order to the same effect as that of the said High Court. The appellant's application to the High Court was by an originating motion ex-parte. But on the order from the Chief Judge, a B directive that the respondent be put on notice was made and the respondent was accordingly put on notice and served with the processes.

The respondent's reaction after service on him was to file a notice of preliminary objection to the appellant's application to register the arbitral award as a judgment of the High Court. The notice of preliminary C objection was filed on 7<sup>th</sup> July, 1997, which was a period not within the three months prescribed for filing an application for setting aside an arbitral award in section 29(1) (a) of the afore-mentioned Arbitration and Conciliation Act. D

The learned trial Judge over-ruled the preliminary objection and thereafter went ahead to make the order registering the award as a judgment or order of the High Court of Lagos State. The respondent appealed against the decision of the High Court to the Court of Appeal. The main E complaint made at the Court of Appeal was that it was denied fair hearing. The allegation of denial of fair hearing was premised on the fact that at the hearing on 27<sup>th</sup> October, 1997 before the learned trial Judge, learned counsel for the respondent had unsuccessfully applied for an adjournment F to enable him "take necessary step" by filing a counter-affidavit in opposition to the appellant's application before the court. This was after the court had over-ruled the preliminary objection.

The learned trial Judge, rightly in my view, refused that request G for an adjournment in that such a counter-affidavit could not be taken as an application to set aside the arbitral award as provided for in section 29 (1) (a) of the Arbitration and Conciliation Act which has to be made within three months of the delivery of the award. The lower court, however, allowed the appeal and set aside the order made by the trial High H Court.

I believe that the lower court was in error in its decision in the matter because the counter affidavit sought to be filed by the respondent

could not serve any useful purpose. This is because, any request made in such application to set aside the arbitral award could not be entertained by the court as it would not have been made within the three months stipulated by law for making such application.

B In the result, I hold that there is merit in the appeal and I accordingly allow it. I therefore set aside the judgment, of the lower court and in its place, I hereby affirm the order made by the trial High Court. I had the privilege of reading the draft of the leading judgment written by my learned brother, Onnoghen, JSC. I agree with his reasoning and conclusion that  
C the appeal should be allowed. I also abide by the order made therein on costs.

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D **TABAI JSC**

The parties entered into a construction agreement for the building of the U.S. Embassy Staff Housing and recreational facilities in Abuja. The agreement made provision for reference to Arbitration in the event of  
E any dispute. A dispute actually arose and the matter was accordingly referred to Kofo Popoola as the Arbitrator. The Arbitral proceedings lasted 9 months. In the end an award of N352,910.156 was made with interest at 21% per annum calculated monthly was made. It was made in favour  
F of the Appellant herein. This was on the 31/12/96.

When the award was not paid the Appellant applied to the Lagos State High Court by way of originating summons to enforce the judgment. The originating summons was ex-parte. On the directive of the learned trial Chief Judge the Respondent herein was put on notice. Its  
G reaction was to file a Notice of Preliminary objection. It was filed on the 8/4/97. It was argued on the 27/10/97 and on that same day the learned trial judge dismissed it with N500.

Mr. Nwaogu learned counsel for the Appellant argued the originating  
H nating summons and urged the court to make the award a judgment of the court.

Mr. Agbamu learned counsel for the Respondent herein who was present in court urged the court to grant him a short adjournment to

make him to take necessary step. The learned trial judge ruled and refused the application for adjournment. In part of the ruling the learned trial judge said: -

*“Counsel for the Respondent asked for time to take necessary step. I have given thought to the said application and I think it is not necessary because the role of a Respondent in these proceedings is for him to be aware that the Arbitral Award made upon the agreement of the parties is being enforced by the court. To allow him to file counter affidavit in challenge as a Respondent would do will defeat the Arbitration and Cancellation Act Cap 19 Laws of the Federation of Nigeria 1990 for a speedy resolution of dispute between the parties who have reached agreement to arbitrate in the event of any dispute. The parties herein have reached such agreement and the only instance where the Respondent can complain is for him to institute another proceedings for the discharge of an arbitrator in the event of misconduct. The Respondent is at liberty to raise a challenge within 3 months - The Respondent herein has not done so that the award can be set aside - but they raised flimsy excuse which tend to lead to a delay of these proceedings.”*

The learned trial judge then granted the application to enable the Appellant enforce the Arbitral award.

Dissatisfied the Respondent therein appealed to the Court of Appeal against the ruling of the learned trial judge. The Court of Appeal allowed the appeal on the 7/7/99 and reversed the registration of the arbitral award on the sole ground that the Respondent who was appellant therein was not given a fair hearing. This appeal is against that judgment.

The parties through their counsel filed the respective briefs of argument of the parties. The Appellant's Brief which is headed Appellant Cross-Respondent's Brief of Argument was filed on the 24/10/03. It was settled by Ben O. Nwaogu. There is also a Reply Brief which was prepared by B. M. Wifa SAN. The Respondent's Brief was settled by Dr. Olumide Ayeni of Chief Afe Babalola's chambers.

The main and dominant issue in this appeal is whether the Respondent was denied fair hearing when on the 27/10/97 the learned trial judge refused the application for adjournment. I have earlier summarized

the facts and circumstances at which the application for adjournment was made and refused. Granting an adjournment is a matter for discretion at the court which discretion must however be exercised judicially and judiciously. The learned trial judge reasoned that the Respondent was at liberty to challenge the award within 3 months of the award but that was not done. And he considered the application as a ploy to cause further delays. Section 29(1) of the Arbitration and conciliation Act Cap 19 Laws of the Federation of Nigeria 1990 provides: -

(1) *And party who is aggrieved by an arbitral award may within three months;*  
 (a) *from the date of the award; or*  
 (b) *in a case falling within section 28 of the Act from the date of the request for additional award is disposed of by the arbitral tribunal by way of an application for setting aside request the court to set aside the award in accordance with subsection 2 of this section."*

In this case, the arbitral award was made on the 31/12/96. No application was filed in accordance with section 29(1) of the Arbitral and Conciliation Act within 3 months. The originating summon was filed on the 25/3/97 and served on the Respondent. No application either under section 29(1) or section 32 of the Act was filed.

The Notice of Preliminary Objection was filed on or about the 26/5/97. And when on the 27/10/97 learned counsel for the Respondent applied for adjournment his reason was simply "*to take necessary step*".

In such circumstances were there such strong reasons as to warrant granting the adjournment. I do not think so. Before the learned trial judge there were no sufficient materials to enable him exercise his discretion in favour of the Respondent. This in my view, is not a case of denial of the Respondent's right to fair hearing.

For the foregoing and the better reasons contained in the judgment of Onnoghen JSC I also allow the appeal. The judgment of the Court of Appeal be and is hereby set aside. While the ruling of the trial court of the 27/10/97 is hereby restored. I abide by the order on costs in the leading judgment.