

SUPREME COURT OF NIGERIA

12TH JANUARY, 2007 SC.272/2006

**CORAM:- I. L. KUTIGI, A. I. KATSINA-ALU, N. TOBI,
D. MUSDAPHER, G. A. OGUNTADE, S. A. AKINTAN,
I. F. OGBUAGU, JJSC**

1. HON. MUYIWA INAKOJU
(IBADAN SOUTH EAST)
2. HON. FAJIMI SAKIRULAH
ADEKUNLE (IBADAN SOUTH EAST)
3. HON. FASHOLA EMMANUEL
OLUBOWALE (IBADAN NORTH EAST)
4. HON. SALAWU KEHINDE
(IBADAN NORTH EAST)
5. HON. AYILARA KAZEEM
(IBADAN SOUTH WEST)
6. HON. ABIOLA AAYORINDE
(IBADAN SOUTH EAST)
7. HON. AKINRINADE OYEWALE,
AKINYELE II
8. HON. JELILIADELEKE,
AKINYELE I DEFENDANTS/ APPELLANTS
9. HON. ISIAKA ADEOLA, IDO
10. HON. LEKAN GANIYU,
OLUYOLE
11. HON. OGUNREMI MUFUTAU,
ONAARA
12. HON. LAWAL DAUDA ADEMOLA,
LAGELU
13. HON. TAIWO OLUYEMI,
IBARAPA
14. HON. OLU OYELEYE, OGBOMOSO NORTH
15. HON. AJADI OLATEJU, OGBOMOSO SOUTH
16. HON. ESUOLA HAMED BABATUNDE,
ATIBA

17. HON. ATILOLA MORUFU OLAWALE,
OYO EAST/WEST

18. HON. AKANBI IDOWU, ORIRE
AND

1. HON. ABRAHAM ADEOLU
ADELEKE (SPEAKER) PLAINTIFFS/RESPONDENTS

2. HON. BARRISTER TITILAYO
ADEMOLA DAUDA (DEPUTY SPEAKER)

3. SENATOR RASHIDI
ADEWOLU LADOJA PARTY INTERESTED/RESPONDENT

4. OYO STATE HOUSE
OF ASSEMBLY PLAINTIFF/RESPONDENT

ACTIONS - Commencement - Originating summons - Is used in commencing proceedings - Where facts are not in dispute - The cynosure is applicable law and its construction (H1)

ACTIONS - Jurisdiction - Striking out - Where a court holds that it has no jurisdiction - It should strike out the action - And not dismiss it - Since dismissal should flow from adjudication on the merits (H2)

CONSTITUTIONAL LAW - Impeachment - S. 188(1) & (2) 1999 Constitution - Meaning - As the word is not used and has very wide meaning - The proper word is removal from office (H3)

CONSTITUTIONAL LAW - Removal of Governor - S. 188 1999 Constitution - Basis - Should be for gross misconduct - Not political or vendetta purpose (H4)

ACTIONS - Jurisdiction - Relevance of - Tool for its determination - Is the plaintiff's case - Which where commenced by originating summons -

Supporting affidavit should be considered (H5)

JURISDICTION - Determination of - Evidence may or may not be taken
- Where it is in relation to a constitutional provision - Totality of the section not mere subsections - Must be considered (H6)

CONSTITUTIONAL LAW - Jurisdiction - Judicial precedents - Removal of Governor - Some conditions must be fulfilled - Before court will decline jurisdiction under s. 188(10) 1999 Constitution - And the case of Abaribe - Is not applicable in this matter (H7)

CONSTITUTIONAL LAW - Stare decisis - Foreign cases - Are only persuasive - Cases based on USA Constitution on impeachment - Are not applicable to our removal of Governor provisions - As the facts are not the same (H8)

CONSTITUTIONAL LAW - Ouster clause - Removal of Governor - Procedure & proceedings - Difference in the two words - S. 188(10) 1999 Constitution - Is an ouster clause on proceedings - And does not affect the procedure spelt out in s. 188(1) - (6) (H9)

CONSTITUTIONAL LAW - Courts - Jurisdiction - Ouster clauses - How regarded by the judicial system - Wrong procedure adopted - In removal of Governor - Is outside s. 188(10) 1999 Constitution - An ouster clause (H10)

CONSTITUTIONAL LAW - Removal of Governor - S. 188 1999 Constitution - Outline of acts of breach of the section by appellants - Breach of one condition is enough - To make a court hold that the procedure is unconstitutional (H11)

CONSTITUTIONAL LAW - Legislation - Removal of Governor - House of Assembly - Place of sitting - Should be the building provided for that purpose - Not a hotel - As it is not a secret cult (H12)

ACTIONS - Locus standi - Meaning - Party who seeks declaratory relief under the Constitution - Must show vide his statement of claim - That he has a substantial Constitutional interest - That is violated or breached to his detriment (H13)

ACTIONS - Competence of plaintiff - Removal of Governor - Speaker of the House of Assembly - In view of his constitutional responsibilities - Has sufficient interest - To complain vide an action - On the breach of s.188 1999 Constitution (H14)

CONSTITUTIONAL LAW - Removal of Governor - Locus standi - Rule in Foss v. Harbottle - Cannot apply in a case on breach of the Constitution - Speaker, deputy speaker and members of the House of Assembly - Have locus to commence action - Upon breach of s.188 1999 Constitution (H15)

EVIDENCE - Admissibility - House of Assembly proceedings - Oral evidence - Where cogent and relevant - No need for documentary evidence - Draft rules need not be exhibited in an affidavit - Before court can take judicial notice of them (H16)

EVIDENCE - Affidavits - Nature - Objection against some depositions - As not complying with the Evidence Act - Is not tenable - And the objection being new - Leave of court ought to be obtained (H17)

APPEALS - Court of Appeal Act s.16 - Jurisdiction - Of the High Court - Is a precondition - For invocation of the section - The real question in controversy - Must be a ground of appeal - Before Court of Appeal can invoke s.16 (H18)

APPEALS - Court of Appeal's power - Under s.16 of the Act - Purpose of the section - Speedy administration of justice - Sufficient materials abound - To enable Court of Appeal invoke s.16 - In deciding the real

question in controversy (H19)

APPEALS - Jurisdiction - Limits - Every Statute that vests power on a court - Has a limit - S.16 Court of Appeal Act - Was rightly invoked in this case - As there was no fact that limited its application (H20) B

STATUTES - Constitution - Specific provision - Removal of Governors - Specific provision of s.188(9) - Will prevail over general provision - Of s.102 1999 Constitution (H21) C

LEGISLATION - Parliamentary action - Power to suspend its rules - Where exercised mala fide - It will be deemed illegal and unconstitutional (H22) D

JUDGMENTS - Dissatisfaction - Appeals - Findings of trial court - Where a party is dissatisfied therewith - His only remedy is to appeal or cross appeal (H23) E

EVIDENCE - Affidavits - Counter affidavit - Normally follows an affidavit as a matter of course - Save where a party has no evidence - That can silence that affidavit (H24) F

COURTS - Justice - Meaning - Role of a judge - Is to do justice between the parties - That is substantial justice - That is not sacrificed at the altar of technicality (H25) G

CONSTITUTIONAL LAW - Appeals - Technicalities - Removal of Governor - The manner some State Assemblies have made it like a child's play - Calls for an arrest - Vide court's pursuit of doing substantial justice (H26) H

CONSTITUTIONAL LAW - Arms of government - Checks and balances - The Legislature should not desecrate the Constitution - As the judiciary is alive to check acts of violation (H27)

FACTS

Defendants/appellants were members of the Oyo State House of Assembly. Sometime in December, 2005, they left the usual House of Assembly Complex. Appellants sat at D'Rovans Hotel, Ring Road, Ibadan where they suspended the Draft Rules of the Oyo State House of Assembly. Appellants purportedly issued a notice of allegation of misconduct against Senator Ladoja, the Oyo State Governor, with the purpose of commencing impeachment proceedings against him. On 22nd December, 2005, without following the laid down rules, regulations and the Constitution of Nigeria, appellants passed a motion calling for the investigation of the allegations of misconduct against the Governor. This was without the concurring consent and approval of two-thirds majority of the House. The purported notice of allegations of misconduct against the Governor was not served on each member of the House of Assembly.

Aggrieved by the procedure of removing the Governor, plaintiffs/respondents filed an action before the Oyo State High Court by way of Originating Summons. They asked for six declaratory reliefs and three orders setting aside the steps taken by the defendants/appellants in the impeachment proceedings against the Governor. The action was supported by a 17-paragraph affidavit. Appellants as applicants raised a preliminary objection contending that the court lacked jurisdiction, and the respondents lacked locus standi to institute the suit. They also alleged that the claims did not disclose a reasonable cause of action. The trial judge, Ige J. upheld the preliminary objection that he had no jurisdiction to deal with the matter. On appeal to the Court of Appeal, Ogebe JCA, held that the High Court had jurisdiction to hear the matter. He invoked the powers conferred on the Court by s.16 of the Court of Appeal Act, took the merits of the matter before the High Court and gave judgment to the respondents. Aggrieved appellants have now appealed to the Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was right in its determination that the High Court has jurisdiction to entertain the question of im-

peachment of the Party Interested/Respondent as the Governor of Oyo State without:

(a) a decision of the Lower Court as to whether or not there has been any non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria, 1999 and or B

(b) proof of non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria? This issue is covered by ground 1 of the Grounds of Appeal contained in the Amended Notice of Appeal dated 20th November, 2006 but filed on 21st day of November, 2006. C

2. Whether the Court of Appeal was right in its determination that the High Court of Justice Oyo State has jurisdiction to entertain a question as to the impeachment of the Party Interested/Respondent as the Governor of Oyo State having regard to: D

(i) the provision of Section 188(10) of the Constitution of the Federal Republic of Nigeria; and

(ii) the question of locus of the Plaintiffs? This issue is covered by grounds 9, 10 and 11 of the Grounds of Appeal contained in the Amended Notice of Appeal aforesaid. E

3. Whether the Court of Appeal was right in considering the merits of the Originating Summons and granting all the reliefs sought by the Plaintiffs/Respondents pursuant to Section 16 of the Court of Appeal Act and in the absence of the power in the High Court of Oyo State in granting those reliefs as at the stage of proceedings before it and also in not affording the Defendants/Appellants the opportunity to present their own defence (by way of Counter-Affidavit) to the action. This issue is covered by grounds 2, 3, 4, 5, 6, 7 and 8 of the grounds of appeal contained in the Amended Notice of Appeal aforesaid.” G

HELD (Dismissing the appeal per **TOBI JSC, Oguntade JSC** dissenting) H

ACTIONS - Commencement - Originating summons

1. The action was commenced in the High Court by originating summons. Commencement of action by originating summons is a procedure

which is used in cases where the facts are not in dispute or there is no likelihood of their being in dispute. Originating summons is also reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case could demand the setting of pleadings.

Where facts are in dispute or riotously so, an originating summons procedure will not avail a plaintiff who must come by way of writ of summons. In other words, an originating summons will not lie in favour of a plaintiff where the proceedings are hostile in the sense of violent dispute.

In originating summons, facts do not have a pride of place in the proceedings. That cynosure is the applicable law and its construction by the court. The situation is different in a trial commenced by writ of summons where the facts are regarded as holding a pride of place and the fountain head of the law, in the sense that the facts lead to a legal decision on the matter. That is not the position in proceedings commenced by originating summons where facts do not play a central role but an infinitesimal role, if at all. (p. 348 H/ 349 E)

Jurisdiction - Striking out

2. The law is that when a court comes to the conclusion that it has no jurisdiction to entertain a suit, it will be struck out and not dismissed.

In *Din v. Attorney-General of the Federation* (1986) 1 NWLR (Pt. 17) 471, this court held that where a court holds that it has no jurisdiction to entertain an action, it does not dismiss the action but merely strikes it out. A dismissal of action is adjudication on the merits and there can be no adjudication on the merits where there is no jurisdiction or competence to adjudicate. There is a plethora of case law on the issue, so much so that the issue is very well settled in law and should no longer give rise to any other position.

Where an action is filed in a court which has no jurisdiction, it should be struck out and not dismissed in order to give the plaintiff another opportunity to file the action, if possible, in a court of competent jurisdiction or by way of amending the action to fall in line with the

jurisdiction of the court it was initially filed. By this, the plaintiff is given an opportunity to have a second bite at the cherry and that is not bad.

Dismissal of an action *in limine* is the most punitive relief that a court can grant a defendant against the plaintiff. Because of its punitive nature, courts of law are reluctant or loath in granting it. In other words, B courts of law cannot grant the relief for the mere asking on the part of the defendant. There must be legal basis for the request and a corresponding legal basis for granting it. (p. 351 H)

Impeachment - S. 188(1) & (2) 1999 Constitution - Meaning C

3. *The point I have been struggling to make is clear from the above relief. Section 188(1) and (2) does not provide for the word “impeachment”. The appropriate word is removal, although section 188(1) contains the verb “removed”. In the circumstances, the first relief should D have used the word “removal” in the place of “impeachment”.*

What is the meaning of impeachment? Black’s Law Dictionary defines the word as follows:

“A criminal proceeding against a public officer, before a quasi- E political court, instituted by a written accusation called articles of impeachment; for example a written accusation of the House of Representatives of the United States to the Senate of the United States against the President, Vice President, or an officer of the United States, including F Federal judges.”

This definition, with a slant for the United States Constitution, does not totally reflect the content of section 188 of the Constitution, as it conveys so much element of criminality. Section 188 is not so worded. The section covers both civil and criminal conduct. I am not saying that G the definition vindicates the totality of the impeachment provision of the United States Constitution. It is my view that the word should not be used as a substitute to the removal provisions of section 183. We should call spade its correct name of spade and not a machete because it is not H one. The analogy here is that we should call the section 188 procedure one for the removal of Governor or Deputy Governor, not of impeachment. (p. 356 C)

Removal of Governor - S. 188 1999 Constitution - Basis

4. It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organized vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct. Accordingly, where a misconduct is not gross, the section 188 weapon of removal is not available to the House of Assembly. (p. 365 D)

Jurisdiction - Relevance of - Tool for its determination

5. Jurisdiction is a radical and crucial question of competence for if the court has no jurisdiction to hear the case, the proceedings, are and remain a nullity ab initio, however well conducted and brilliantly decided they might be, as a defect in competence is not intrinsic, but rather extrinsic, to the entire adjudication. Jurisdiction is the nerve centre of adjudication; it is the blood that gives life to the survival of an action in a court of law; in the same way blood gives life to the human being and the animal race.

There is a common agreement that in the determination of jurisdiction, the court process to be used is the pleadings of the plaintiff,

which is the statement of claim. As this action is commenced by originating summons, the court process to be used is the affidavit in support of the summons. In other words, the court will not examine a counter-affidavit even if filed. Fortunately or unfortunately, no counter affidavit was filed in this case. And so the learned trial Judge had no choice than to examine the affidavit in support, which stands for all intents and purposes, as vindicating the plaintiff claims. Put differently, it is the case put forward by the plaintiff that determines the jurisdiction of the court. (p. 366 A)

JURISDICTION - Determination of

6. In some cases, the court may need to take some evidence before determining the issue of jurisdiction. But this will not be necessary where all the materials necessary to determine whether or not the court has jurisdiction are already before the court, as in this case. In the determination of the issue of jurisdiction, the court should not be influenced by sympathy for the case of one of the parties but must base its decision on the law, particularly in the light of the enabling law. After all, jurisdiction is a matter of hard law.

In determining the jurisdiction of a court in relation to a constitutional provision, the court must take into consideration the totality of the enabling section or sections and not subsections in isolation. This is because the journey to the jurisdiction of the courts in the Constitution, at times, could be cumbersome and not straight or simple. In this appeal, this court must determine the totality of section 188 in unison and not the subsections in isolation. (p. 366 H)

Jurisdiction - Judicial precedents

7. It is good law that where the Constitution or a statute provides for a precondition to the attainment of a particular situation, the pre-condition must be fulfilled or satisfied before the particular situation will be said to have been attained or reached. Our common and popular pet expression is “condition precedent” which must be fulfilled before the completion of the journey, which is the terminus and in our context, that terminus is

section 188(10).

Learned Senior Advocate for the appellants cited the case of Abaribe v Speaker Abia State House of Assembly (supra) and submitted that the Court of Appeal was wrong in not giving effect to that case, on the ground that the issue of non-compliance with the provisions of the Constitution did not arise in that case.

In Abaribe, the Court of Appeal held that section 188(10) of the 1999 Constitution forbids all courts from allowing any proceedings or determination of a House of Assembly or its Panel with respect to proceedings under section 188 to be challenged before it. It also forbids all courts from allowing any matter relating to such proceedings and determination to be entertained before it. I entirely agree with the decision as it relates to full compliance with the preconditions in section 188(2) to (9). That is a straightforward construction of section 188(10) of the Constitution. Like Ogebe, JCA, I am inclined to the view that the “*question of non-compliance with subsections 1-9 did not arise in that case.*” And that is the crux of the issue here. And so the case of Abaribe is not applicable in this case. (p. 368 D)

Stare decisis - Foreign cases

8. What is relevant however is whether this court should make use of the cases cited by learned Senior Advocate of Nigeria? It is the law that decisions of foreign courts, however learned they are or may be, are of persuasive authority and not binding on this court. The courts have held that decisions of English courts are of persuasive authority as they lack binding effect in our principles of stare decisis.

A case is decided on the facts before the court and the facts of the case erect the ratio decidendi of the case. And so the cases cited by learned Senior Advocate were decided on the provisions of the United States Constitution which are clearly different from our section 188. One clear difference is that our section 188 does not contain the word “impeachment”. That apart, Article 1 section 3 of the Constitution of the United States does not provide for the details of our section that apart, our section 188 does not provide for the situation in Article 1, Section

3(7).

Another difference between the Constitution of the United States and that of Nigeria is in respect of the quorum for the removal of the office holder. In the United States Constitution, the quorum is two-thirds of the members present. In our Constitution, it is two-thirds of all the members of the House. There is a world of difference between the two. Is learned Senior Advocate really justified in asking this court to follow decisions of the United States courts on the provision of the United States Constitution on impeachment? I shudder. I will not and that is legal and constitutional. (p. 370 G/ 371 D)

CONSTITUTIONAL LAW - Ouster clause

9. With the greatest respect, the Court of Appeal in the above dictum would seem to have mixed up the expressions: procedure and proceedings. Procedure is the set of actions necessary for doing something. It is also the method and order of directing business in an official meeting. On the contrary, proceedings are the records of activities. In this definition, procedure generally comes before proceedings. Putting it in another language, proceedings are built on the procedure established for the particular activity or business.

The arrangement of section 188 vindicates the above position I have taken and the difference between the two expressions. While section 188(7)(a) provides for the first word “procedure”, section 188(8) provides for the second word “proceedings”. The Court of Appeal mixed up the two expressions when the court taking section 170 of the 1979 Constitution held that the proceedings for the removal of the Governor or his Deputy commences with a notice of any allegation in writing is presented to the Speaker; including the appointment of 7 persons by the Speaker to conduct the investigation, in my humble view, section 188(1) to (6) sets out the procedure to be adopted in the removal process. The proceedings commence from section 188(7) and ends in section 188(9). In my view, proceedings will commence from section 188(7) when the Panel of 7 members call the first witness to testify in the investigation of the allegation. And that continues until the conclusion of the deliberations

of the report by the House.

The section 188(10) ouster clause is clearly on proceedings or determination of the Panel or the House. It does not relate to or affect the procedure spelt out in section 188(1) to (6). Parliamentary proceedings which result in the Hansard cannot be the same as the procedure which Parliament invokes or adopts during the proceedings.

This court cannot in the interpretation of specific provisions of the Constitution, gallivant about or around what the makers of the Constitution do not say or intend. On the contrary, this court must interpret any section of the Constitution to convey the meaning assigned to it by the makers of the Constitution. (p. 374 D)

Ouster clauses - How regarded by the judicial system

10. Ouster clauses are generally regarded as antitheses to democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism. The courts become helpless when the Constitution itself provides for ouster clause, such as section 188. In such a situation, the courts hold their heads and arms in despair and desperation. They can only bark but cannot bite. Their jurisdiction is to give effect to the ouster clause because that is what is in the Constitution or what the Constitution says. It is in the light of this very helpless situation of the courts, the upholders of the rule of law, that parties should not urge them to interpret section of the Constitution as ousting their jurisdiction when it is not. Ouster clause is a very hard matter of strict law which must be clearly donated by the provision. It is not a subject of speculation or conjecture, in sum, I am of the view that in the circumstances of this case, the wrong procedure adopted is clearly outside the section 188(10) ouster clause, and I so hold. (p. 375 D)

Removal of Governor - S. 188 1999 Constitution

11. Now that I have taken section 188, this is a convenient place to slot in the acts of violation, contravention or breach of the section by the appellants. They are as follows:

1. The holding of the meeting by the appellants at D’Rovans Hotel, Ring Road, instead of on the floor of the House of Assembly.

2. The absence of a constitutional notice of allegation against the 3rd respondent.

3. The non-service of a constitutional notice of allegation against the 3rd respondent. B

4. The failure to obtain the constitutionally required two-thirds majority of all the members of the House for the removal of the 3rd respondent.

5. The non-involvement of the Speaker in the so-called proceedings leading to the removal of the 3rd respondent. C

6. The unconstitutional procedure adopted in the suspension of Order of the House of Assembly. In other words, the unconstitutional application of Rule 23 of the Draft Rules of the Oyo State House of Assembly. D

I should briefly take the above, not before I make an important point that all the above conditions need not be breached before a court of law can hold that the procedure is unconstitutional. Breach of one condition is enough. (p. 377 C) E

Removal of Governor - House of Assembly - Place of sitting

12. It appears to me from the intention of the Constitution that the House of Assembly will sit in the building provided for it and for that purpose. F By the provision of section 104 of the Constitution, the House shall sit for a period of not less than one hundred and eighty-one days in a year. By section 108(1), the Governor of a State may attend a meeting of the House of Assembly either to deliver an address on State affairs or to G make such statement on the policy of government as he may consider to be of importance to the State.

In my humble view, a community reading of the two sections show that the intention of the Constitution is to make the House of Assembly sit physically in the building provided for that purpose. If I am H wrong and the appellants are right, it will then mean that the Governor has to move to a Hotel to address the members anytime the House sits

there and he wants to take advantage of section 108. Can that be the intention of the makers of the Constitution? Will that not be ridiculous?

In *Akintola v. Aderemi* (1962) All MLR 440 at 443, it was held that anything done outside the House of Assembly to remove the Governor of the old Western Region was/is a nullity. The Governor is elected by the people - the electorate. The procedure and the proceedings leading to his removal should be available to any willing eyes. And this the public will see watching from the gallery. It should not be a hidden affair in a hotel room.

A Legislature is not a secret organization or a secret cult or fraternity where things are done in utmost secrecy in the recess of a hotel. On the contrary, a Legislature is a public institution, built mostly on public property to the glare and visibility of the public. As a democratic institution, operating in a democracy, the actions and inactions of a House of Assembly are subject to public judgment and public opinion. (p. 377 H)

Locus standi - Meaning

13. Locus standi or standing is the legal right of a party to an action to be heard in litigation before a court of law or tribunal. The term entails the legal capacity of instituting or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.

It is the law that to have locus standi to sue, the plaintiff must show sufficient interest in the suit. One criterion of sufficient interest is whether the party could have been joined as a party to the suit. Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship from the litigation. If the Judge is satisfied that he will so suffer, then he must be heard as he is entitled to be heard.

A party who seeks a declaratory relief in the Constitution must show that he has a constitutional interest to protect and that the interest is violated or breached to his detriment. The interest must be substantial, tangible and not vague, intangible or caricature. In ascertaining whether the plaintiff in an action has locus standi, the pleadings, that is, the statement of claim, must disclose a cause of action vested in the plaintiff and

the rights and obligations or interests of the plaintiff which have been violated. (p. 380 B)

ACTIONS - Competence of plaintiff

14. Where the competence of a plaintiff to institute an action is challenged or is in issue, the onus would be on him to establish that he is competent to sue as plaintiff.

In this case, the respondents sought four declarations based on section 188 of the Constitution of the Federal Republic of Nigeria. This apart, the affidavit in support deposed to a number of violations of section 188 by the appellants. A community reading of the reliefs sought by the respondents and the affidavit in support clearly, in my view, vest locus standi on the respondents.

Section 188 mentions the Speaker in very substantial parts, so much so that he has sufficient interest in the protection of the section, a'fortiori the violation, or breach of it. By section 95 of the Constitution, at any sitting of the House, the Speaker will preside, and in his absence the Deputy Speaker will. How can a person who presides over a house under section 95 and who is given specific constitutional function to perform in the procedure and proceedings of removal of a Governor or his Deputy, not have a sufficient interest to commence an action complaining on the violation or breach of section 188? (p. 381 A)

Locus standi - Rule in Foss v. Harbottle

15. What is notoriously referred to as the Rule in Foss v. Harbottle is in the following terms:

“The company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be ratified by a simple majority of its members.”

Certainly, the above Rule cannot apply in this case which deals with the breach of a section of the Constitution. The House of Assembly cannot, in any sense or imagination, be equated to a company. One is a constitutional body; the other is a corporation in business or commerce.

The minority element learned Senior Advocate introduced in the issue is, with the greatest respect, neither here nor there. Counsel cannot talk about majority to win over minority in the context of section 188 in order to make the action of the minority unconstitutional. That is company or commercial law practice and it is wrong to import that to the determination of locus standi under the Constitution. In the search for locus standi in the Constitution, the searcher will have good company in section 6(6)(b) and any specific section in the Constitution, such as section 188 as it relates to this appeal. The searcher will not go outside the Constitution for case law on minority shareholding because that is inapposite.

Section 188 does not only mention the Speaker and the members of the House of Assembly, but also gives them functions to perform in the removal process. Can such persons be branded with any seriousness as busy bodies in a case where the relevant section is violated, contravened or breached? This is quite new learning to me and I do not think I am prepared to learn it, not because I hate to learn or I am not willing to learn, but because there is nothing to learn. In sum, I come to the conclusion that the Speaker, Deputy Speaker and members of the House of Assembly Oyo State have locus standing to commence action in this matter, and I so hold. (p. 382 A/ H)

EVIDENCE - Admissibility - House of Assembly proceedings

16. It is good law that unchallenged or uncontradicted oral evidence is admissible to establish the existence of a fact on which it is based. Where oral evidence is cogent and relevant, there is no need for documentary evidence as the oral evidence has properly covered the entire evidential scene. Hansard, though a useful documentary evidence of the proceedings of the House of Assembly, is not always necessary for proof of any aspect of the proceedings. A cogent oral evidence is enough. In this case, the affidavit in support deposed to the facts mentioned by counsel in paragraph 4.8 of the appellants' brief, depositions which were enough for appellants to react one way or the other.

Draft Rules, like laws, need not be exhibited in an affidavit. Counsel can make use of them when necessary Counsel can also call for them

when necessary. They need not be exhibited for the court to take judicial notice of them. The Evidence Act does not say that Rules should be exhibited to enable the court take judicial notice of them. (p. 386 B)

Affidavits - Nature

17. Section 86 provides that every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. By section 88, when a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he must set forth explicitly the facts and circumstances forming the ground of his belief. And section 89, which relates to section 88, provides that when such belief is derived from information received from another person, the name of the informant should be stated and reasonable particulars should be given respecting the informant, and the time, place and circumstances of the information. B
C
D

I have carefully read paragraphs 8, 9, and 10 of the affidavit in support and I am unable to agree with learned Senior Advocate that the paragraphs offend sections 86, 88 and 89 of the Evidence Act. I do not see any extraneous matter by way of objection, prayer, legal argument or conclusion. I see on the contrary, factual statements. In paragraph 8, Sunday Aborisade, the deponent, deposed to the source of his belief as the 1st and 2nd plaintiffs and said that he believed them, thus complying with section 88 of the Act. Paragraph 9 cannot be said to be an extraneous matter by way of objection, prayers or legal argument. On the contrary, the paragraph contains factual statements. So too, paragraph 10 thereof. In sum the objection on the paragraphs of the affidavit in support fails. The issue was not raised in the Court of Appeal and so cannot be raised here without leave of the court. No such leave was sought. From whatever way one looks at the objection, it fails. (p. 386 F) E
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Court of Appeal Act s.16 - Jurisdiction

18. The Court of Appeal can exercise its section 16 power if only the High Court has jurisdiction in the matter. Accordingly, jurisdiction of the H

High Court is a precondition for the invocation of the provision of section 16 by the Court of Appeal. In the more recent case of Professor Olutola v. University of Ilorin (2004) 18 NWLR (Pt. 905) 416, this court held that the Court of Appeal can exercise its power under section 16 if only
B the trial court has jurisdiction in the matter.

The word “real” in the context means actual. It also means true. The word “question” contextually means the issue involved in the appeal. The word “controversy” means dispute. Accordingly, the real question in
C controversy means the actual issue in dispute in the appeal. The real issue in the appeal must be clearly donated by the ground or grounds of appeal, since that is the legal basis of the complaint by an appellant. Therefore, before a section 15 power could be invoked the determination of the real question in controversy in the appeal, that question must be a ground of
D appeal.

In Nneji v. Chief Chukwu (1988) 3 NWLR (Pt. 81) 184, this court held that the general powers conferred on the Court of Appeal by section 16 includes the power to make any order necessary for determining the
E real question in controversy in the appeal. (p. 392 E/ H)

Court of Appeal's power - Under s.16 of the Act

19. The real question in controversy in this appeal is whether the removal
F of the 3rd respondent complied with section 188 of the 1999 Constitution or whether it was in violation or in breach of that section. The grounds of appeal and their particulars before the Court of Appeal clearly donated the real question in controversy. And so the coast was clear for the Court of
G Appeal to decide on the real question in controversy by invoking its section 16 power.

Learned Senior Advocate for the appellants, Mr. Ayanlaja, argued that as there was no material before the trial court upon which the High Court could have determined the case on the merits, there was no basis
H for the assumption of full jurisdiction by the Court of Appeal under section 16 to take over the proceedings and give judgment which the lower court could have, but refused to give.

With respect, I do not agree with learned Senior Advocate. I have

itemized in this judgment evidence available in the trial court, which in my view, was enough for the Court of Appeal to invoke its section 16 power. For ease of reference, I can name them here, though at the expense of prolixity. I should take the liberty of this second exercise to add to the list: affidavit of urgency, affidavit in support of the originating summons, the originating summons itself, motion ex-parte for order of interim injunction and affidavit in support, notice of preliminary objection with particular reference to the eight grounds of objection, motion on notice for an order of interlocutory injunction and affidavit in support; further affidavit in which the respondents deposed to the letter written by the 1st respondent to the Acting Chief Judge in respect of a press release and the totality of the submissions of learned counsel in the High Court, particularly those Mr. Lana, learned Attorney-General of Oyo State, when counsel freely made reference to the reliefs sought by the respondents and the affidavit in support, without objecting to their veracity or authenticity.

There is still one more aspect when section 16 is invoked and it is to facilitate the speedy administration of justice. It is designed to avoid multiplicity of proceedings and hearings. Instead of sending the case back to the trial Judge for a trial, section 16 empowers the Court of Appeal to assume the jurisdiction of the trial court and determine the real question in controversy. This is to save the much needed time in the administration of justice. (p. 393 D/ 394 E)

Jurisdiction - Limits

20. There can hardly be a statute which vests power or jurisdiction on a court limitlessly, or without limit. Section 16 is not an exception, or better, should not be an exception. It has limits as it must have limits. But as rightly pointed out by Ayoola, JSC, the limits will be determined case by case, that is, in the light of the peculiar facts of each case, in my humble view, this is a good and clear case for the invocation of section 16. I seem to be losing sight of the point made by learned Senior Advocate for the appellants that I was trying to pursue. I now remember it. It is the fact that the Court of Appeal invoked section 16 when the learned trial

Judge did not embark on a determination of the merits of the case. I think I should call in aid what Karibi-Whyte, JSC, said in *Jadesimi v. Okotie-Eboh* (supra) at page 276:

“In the appeal before us the trial Judge ought, although in the circumstances he need not, to have heard the application for stay of proceedings before dismissing the application. The Court of Appeal was quite competent to determine the application even though without hearing in the court below. There is the jurisdiction and competence to do so.”

Learned Senior Advocate submitted that the Court of Appeal wrongly misapplied the principles enunciated in *Okeke* to this case because Ayoola, JSC, held that the power of the Court of Appeal under section 16 is limited. With respect, I do not agree with learned counsel. Ayoola, JSC, as seen from the above held that the limits of section 16 will be determined case by case, it is in that circumstance that the Court of Appeal held and rightly, in my view, that the section was applicable in the appeal before the court. In other words, the Court of Appeal did not see any limits in section 16 to stop the application of the section in the appeal before the court. I do not see anything wrong with that conclusion deserving the hammer of counsel. (p. 396 F)

Constitution - Specific provision

21. The law is elementary that where the Constitution or a statute contains a general provision as well as a specific provision, the specific provision will prevail over the general provision. In this wise, it is my view that the specific provision of section 188(9) will prevail over the general provision of section 102. Accordingly, the removal of the 3rd respondent is governed by section 188(9) and not section 102 of the Constitution. (p. 409 A)

Parliamentary action - Power to suspend its rules

22. While a Legislature is competent to suspend particular rule or rules to enable it deal with a situation in the overall interest of the common good of the body, and the persons it represents, this must be done bona fide

and not male fide. A bona fide action will vindicate the totality of good parliamentary action, practice and conduct. A male fide action will violate parliamentary action, practice and conduct. Whether an action is bona fide or male fide is a question of fact to be deduced from the factual milieu giving rise to the decision. I have no difficulty in coming to the B conclusion that the suspension of the rules of the House of Assembly and the Speaker of the House in a hotel apartment were clearly male fide as the act was designed to carry out illegal and unconstitutional acts which were ultra vires section 188 of the Constitution. (p. 409 B) C

JUDGMENTS - Dissatisfaction

23. Where a party is not satisfied with the finding of a court of law other than the Supreme Court, he can only do so by way of appeal. If the judgment is in favour of the party, but he is not comfortable with a particular finding, his remedy is to cross appeal. If he does not cross appeal, D the presumption is that he has no complaint about the entire judgment. This is because the only way for a party to express his rejection of a judgment of a lower court to an appellate court is by way of appeal. E

In view of the fact that the appellants did not cross appeal on the finding of the learned trial Judge that the case involved basically points of law in which no affidavit evidence is required, the appellants cannot now be heard to urge this court to remit the case to the trial court to enable F them file counter affidavit. The trial court which held that the case does not need affidavit evidence will be functus officio to entertain the action by receiving counter affidavit from the appellants, evidence he has clearly ruled is not required. A Judge is a man of consistency and the learned trial G Judge, being a man of consistency, will never like to contradict himself in this way. Even if he is willing to do so, our adjectival law will stop him from doing so. (p. 411 F)

Counter affidavit - Normally follows an affidavit as a matter of course H

24. It is the nature of the human being with the instinctive human automation to react quickly or spontaneously to a lie told against him. He will not or never wait for a moment to do so. That is the habit of most human

beings, including me. And what is more, if my little experience on the bench is anything to write home about, I should say that the filing of counter affidavit normally follows an affidavit in support as a matter of course or routine in the judicial process as the night follows the day and vice versa. Parties do not keep their counter evidence to themselves, nursing them for the rainy day; which may not come as in this case now. The long and short of the counter affidavit episode is that the appellants had no evidence to silence the affidavit in support and so decided to play the trick of the tortoise and the hare, developing, or should I say melting to the moral kindergarten story of “slow and steady wins the race”. Unfortunately for the appellants, the slowness on their part made them lose the race. I have held the view above that the issue of remitting the case to the High court is not available to the appellants in the light of the clear circumstances of this case. (p. 412 E)

Justice - Meaning - Role of a judge

25. Justice is not only one loud and large term, it is a most important expression in the judicial system and the administration of justice, and here I emphasize justice in the context. Justice in its simplistic content means quality of being just, fairplay and fairness. It has an element of quality of egalitarianism in its functional context.

Lord Denning, a very fine Judge, in his very well written book, Family Story, said at page 174:

“My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help in the instant case. I would emphasize however, the word ‘legitimately’; the judge himself is subject to the law and must abide by it.”

For quite some time now, this court has moved from the regime or domain of doing technical justice to the regime or domain of doing substantial justice. This is in keeping with the jurisprudence of the wider

world and its legal system. The need for courts of law to do substantial justice becomes more imperative when considering the provisions of the Constitution, the fons et origo of any democracy. (p. 413 B)

Appeals - Technicalities

26. In Attorney-General of Bendel State v. Attorney-General of the Federation (1982) 3 NCLR 1, Idigbe, JSC, said at page 64:

“I incline to the view that in suits calling for decisions on issues relating to the Constitution this court ought not unduly to allow technicalities to deter it from making vital pronouncements.”

Nnamani, JSC, added at page 109:

“If the plaintiff is entitled to be heard by this court how he comes to be heard may be immaterial. I do not agree that in a complex suit such as this touching on matters which lie at the very foundation of the stability of this country this court should be unduly bogged down by technicalities. This court has in many recent decision, while affirming the importance of observance of Rules of Court, stated that it is more concerned with doing substantial justice between the parties.”

The statement by Nnamani, JSC, is germane to this case when the learned Justice mentioned the stability of the country. The plethora of removal proceedings in respect of Governors is not only frightening but is capable of affecting the stability of Nigeria. It is almost like a child's play as same State Legislatures indulge in it with all the ease and comfort like the way the English man sips his coffee on his breakfast table. Unless the situation is arrested, Nigerians will wake up one morning and look for where their country is. That should worry every good Nigerian. It does not only worry me; the idea frightens me so much. (p. 413 H)

Arms of government - Checks and balances

27. The Legislature is the custodian of a country's Constitution in the same way that the Executive is the custodian of the policy of Government and its execution, and also in the same way that the Judiciary is the custodian of the construction or interpretation of the Constitution. One major role of a custodian is to keep under lock and key the property

under him so that it is not desecrated or abused. The Legislature is expected to pet the provisions of the Constitution like the way the mother pets her day-old baby. The Legislature is expected to abide by the provisions of the Constitution like the way the clergyman abides by the Bible and the Imam abides by the Koran. And so, when the Legislature, the custodian, is responsible for the desecration and abuse of the provisions of the Constitution in terms of patent violation and breach, society and its people are the victims and the sufferers; and in this particular context, the Oyo State society and the respondents, particularly the 3rd respondent. Fortunately, society and its people are not totally helpless as the Judiciary, in the performance of its judicial functions under section 6 of the Constitution, is alive to check acts of violation, breach and indiscretions on the part of the Legislature. That is what I have done in this judgment. I do hope that this judgment will remove the apparent wolf in the appellants as members of the House of Assembly of Oyo State. I am done. (p. 418 A)

NOTABLE POINTS OF INTEREST

TOBIJSC

1. Overreaching - When court & counsel may bend backwards

Although the motion was clearly designed to overreach the very well taken preliminary objections of the respondents, this court had to bend backwards in the overall interest of justice to accommodate it. The court went the extra kilometre to persuade Chief Olanipekun and Yusuf Alli, Esq. to concede to the motion, again in the interest of justice. Counsel, in their wisdom, and a good one in the circumstances, reluctantly acceded to the request of the court and a motion which was otherwise most unmeritorious was granted by consent of the respondents. I will return to this magnanimity later in the judgment. (p. 351 B)

H 2. Need for the judge to remain the unbiased umpire

There are times when counsel ask for a relief with the full knowledge that the law is not on the side of his client. In such a situation, counsel merely tests the legal strength of the Judge, who in his capacity as the

unbiased umpire and master and expert of the law, should give judgment according to the law. While the parties are the clients of the Lawyers, the law is the Judge's clientele and constituency and he must apply it properly without fear or favour. That is the oath he took on the day he was sworn in as a Judge *qua judex*. B

The learned trial Judge, with the greatest respect, was in serious error when he dismissed the action for lack of jurisdiction, instead of striking it out. He had no jurisdiction to dismiss the action for lack of jurisdiction to entertain it but he had jurisdiction to strike it out. Accordingly, in the event that I come to the same conclusion that the High Court has no jurisdiction to entertain the action, I will do the lawful thing of striking it out. (p. 353 A) C

3. *How the CJ may go about appointment of a 7 man panel towards Governor's removal* D

As it is, the Constitution vests in the Chief Judge the power to appoint the 7 persons. Although the Chief Judge is under no constitutional duty to share the power with his brother Judges, it will not be a bad exercise of power to consult his brothers, particularly the most senior ones. It will not be wrong if he asks them for names. He is not bound by the names they send to him out at the end of the day, there will be mutuality of confidence in the matter and that is good both for the Chief Judge and his brother Judges. E

The subsection only talks about the integrity of the persons. The subsection does not talk about the professional callings, age, gender and all that of the persons, it is my view that no profession disqualifies a person from being a member of the Panel. However, in view of the fact that the exercise of investigation under the Constitution will invariably touch law in its large parts, it is my view that a legal person, either a retired Judge or a Solicitor and Advocate of the Supreme Court, preferably of the status or rank of Senior Advocate of Nigeria, should be appointed the Chairman. The other professional groups that should be on the Panel will depend largely on the allegation made against the Governor or Deputy Governor. And so an arm-chair recommendation will not be G

made. The point should be made however that an allegation involving money and falsification of accounts or re-ordering of figures, will certainly need the services of an Accountant. I think I can stop here on this fairly difficult area. Although there is no age restriction, the Chief Judge will certainly go for adults and youths. Youths will be handy if the Governor or Deputy-Governor is himself a youth. Gender is a most sensitive area in contemporary Nigerian society. Although the Constitution does not provide for representation in the Panel on basis of gender, it will not be out of place if the Chief Judge has this in mind in constituting the Panel. I do not want to sound dogmatic on this fairly sensitive area in our contemporary society. The Chief Judge is a man of law and good judgment and should be trusted to take decisions with egalitarian outlook.

The search for membership of the Panel need not be confined to the geographical territory of the State. The Constitution does not so restrict the appointment. A member can be picked and appointed from another State. He could be an indigene of the State. He need not be. As a matter of law, the search could go to the diaspora but here I should confine the appointment to Nigerian citizens in the diaspora by virtue of Chapter 3 of the 1999 Constitution. (p. 358 H)

4. Judge is to apply Nigerian Constitution to Nigerians

Again, the above apart, American jurisprudence has so much developed the political question doctrine in their case law, so much that it has taken a very firm root in their legal system. The political question doctrine is still in its embryonic stage in Nigeria. Let us not push it too hard to avoid the possibility of a still-birth. That will be bad both for Nigerian litigants and the legal system.

I am a Nigerian Judge. This is a very obvious statement and need not be made. There are however instances where one makes an obvious statement to make a less obvious point. As a Nigerian Judge, the condition of my hire is to interpret and apply the Nigerian Constitution to Nigerians and others governed by the Nigerian Legal System and Nigerian jurisprudence. I am not hired to apply any foreign Constitution, however able or competent the provisions are or whether they contain the most

democratic phraseology. While I am prepared to use constitutional provisions of foreign Constitutions which are similar to ours, I cannot see my way clear in using provisions which are kilometres away from ours. I see the impeachment provisions in the United States Constitution in that way, vis-à-vis our section 188. (p. 372 A) B

5. Proceedings of a House of Assembly should be held within parliamentary hours

As there is no evidence when the meeting was held, I shall not go there. But I should say here that proceedings of a House of Assembly, should be held in parliamentary hours. This is the period the Rules have provided that the House should sit. On no account should proceedings of a House be held in unparliamentary hours, that is, during the period not provided for in the Rules. For instance, a House of Assembly has no business to perform in the odd hours of mid-night or in early hours of the morning before the parliamentary hours prescribed by the Rules. (p. 379 B) D

6. Advocacy - Need to avoid smart or cunning conduct in litigation E

If the appellants decided not to respond to the brief of the respondents in the Court of Appeal, they cannot blame the Court of Appeal for their decision. This is because they had all the time in the world to respond to the case presented by the respondents who were the appellants in the Court of Appeal. They were running away (I will not say trickishly shying away) from the truth of the matter and knocking at the corridors which were peripheral. A party who decides to present his case miserly, cunningly, or by deliberate installments to win in the litigation has himself to blame when the strategy backfires. I will return to this later. G

Learned Senior Advocate for the 1st and 2nd respondents cited the case of *Orugbo v. Una* (supra), with particular reference to what I said at page 211 and 212. I should permit myself to quote the passage:

“It has become a fashion for litigants to resort to their right to fair hearing on appeal as if it is a magic wand to cure all their inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litiga-

tion and the court as the umpire, so to say, has a legal duty to apply it in the litigation, in the interest of fair play and justice. The courts must not give a burden to the provision which it cannot carry or shoulder. I see that in this appeal. Fair hearing is not a-cut-and-dry principle which B parties in the abstract always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine the application or applicability of the principle. The principle of fair C hearing is helpless or completely dead outside the facts of the case.”

Like Orugbo, I see such a situation in this appeal. And it is sad that it is so. A party may enjoy in the euphoria of a cunning or smart conduct in the litigation. The truth is that such conduct may not last the length of the litigation because at the end of the day, and here restricting myself to D the end of the litigation day, the court may find out the cunning and smart conduct. That is what has happened in this case.

The point I am struggling to make as it affects or relates to fair hearing is that the fair hearing was dropped at the footsteps of the appel- E lants by Mr. Akintola in the case of Senate President v. Nzeribe (supra), but they did not take advantage of it, most probably because they had no valid defences by way of a counter affidavit. Can such a party really complain of breach or lack of fair hearing? And what is more, the appar- F ent distinction made by the learned trial Judge materially vindicated the decision of the Court of Appeal as it related to originating summons as a court process which is basically on points of law. (p.400 B/401 A/402 F)

G 7. Need for fairness in litigation

Litigation is not a game of cleverness, smartness or tricks. It is not a hide and seek game where one of the parties in all cleverness and smartness takes ambush and waits with all acrobatic dexterity for the opponent to fall into a trap and get him thoroughly harmed or destroyed. Litigation is H not a game of chess where one of the parties attempts to trap the opponent's king to obtain victory. On the contrary, litigation has an inbuilt dispute settling mechanism where the parties come out in the open to make their cases frankly and not cunningly or craftily.

A party who seeks fair hearing from the court must also be fair in the litigation to the adverse party and to the proceedings. A party who intentionally files motions to delay the proceedings is not fair to the adverse party and the proceedings. He should not in any way annoy the proceedings. He has a duty to respond to the procedural needs or requirements of the litigation without applying any baits because the adverse party is a human being; not a fish. He must come out and embrace the litigation with all honesty and sincerity of purpose. Where he decides to plant mines in the judicial process to obtain victory in the event of a possible slip on the part of the court or the adverse party, such a party will not be in a position to ask for the fair hearing of a case, because he has not shown fairness in the process itself. The principles of equity and fairplay will certainly deny him of the fair hearing principle that he refused to surrender in the judicial process. Although fair hearing is a constitutional guarantee, it has some resonance in the principles of equity and fairplay. (p. 406 H)

8. *When and how issue estoppel can be invoked*

Issue estoppel cannot be invoked in the same case but in a different case. It is only in that circumstance that the first case, in appropriate circumstances, act as issue estoppel against the second one. The appropriate circumstances are: (1) That the same question was decided in earlier proceedings. (2) That judicial decision said to create the estoppel was final. (3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. See *Adebayo v. Babalola* (1995) 7 NWLR (Pt. 408) 383. Issue estoppel cannot apply on appeal in the same case. This is because the nature of the appellate process, involves one single case not two cases. Issue estoppel is built in one case against another case where the above three ingredients are present. With respect, counsel got it wrong. It could be some other estoppel but certainly not issue estoppel. (p. 411 B)

9. *Interest of justice was first invoked in appellants' favour*

I should say that in the interest of justice and the need to do substantial justice that I am invoking now, apparently in favour of the respondents, was earlier invoked in favour of the appellants. In the hearing of the appeal, this court in the interest of justice, allowed the appellants to move their motion filed on 4th December, 2006, three days to the date of hearing the appeal, asking for leave to appeal against the decision of the Court of Appeal. In the motion, the appellants sought to repair, if I may use that expression unguardedly, the incompetent grounds of appeal arising from not seeking leave to appeal on mixed law and facts. Certainly, it is not the practice of this court to accommodate an application for extension of time to appeal on the day an appeal is set down for hearing.

In the interest of justice, this court brought some pressure to bear on counsel for the respondents to concede to the most abnormal motion to enable the court hear the appeal. Certainly, the motion in normal circumstances ought to have failed because it had all the vices of overreaching the respondents who had earlier meritoriously attacked most of the grounds of appeal. I think only one ground could have survived the objection and that was most likely to have ended the appeal.

It is good law that justice is not only for the plaintiff. It is not also only for the defendant. It is for both parties. (p. 414 H)

10. *Good law - Implications - Should discourage technicalities*

Good law, in my opinion, must have a human face. Good law should not patronize technicalities that will give rise or room to undeserved victories in litigation. Good law should discourage technicalities such as the one canvassed by the learned Senior Advocate for the appellants that the case should be remitted to the trial Judge for trial on the so-called merits of the case, when I know that the matter will never be concluded before the 29th May, 2007 when the office of Governor will be filled. Good Law will not encourage a situation where a party in litigation will only return home with pyrrhic victory which in reality is no victory at all. After all, it is good law that courts of law do not give orders in vain and in the context of this case, an order given after 29th May, 2007 restoring the 3rd respon-

dent to his office of Governor will certainly be in vain. I will never be a party to such a tall order which has teeth but cannot bite. Teeth that cannot bite are useless to their owner. (p. 415 F)

11. Litigation - Parties should not put all their eggs in one basket

It is not advisable in litigation for parties to put all their eggs in one and the same basket, particularly in a situation where the procedure to be adopted is not neat, but diverse and versatile, such as the procedure in this case. This is because if the basket breaks, all the eggs are broken.

The statement that the law is an ass is not a mere cliché or aphorism but has deep rooted application to the practicalities of law in society. The nature of the ass in law requires that in certain cases, parties should not adopt a highly conservative, ossified and closed-door position but should adopt a versatile position in anticipation of the not too certain destination of the ass.

If I were in their position, that is, in the position of the appellants, I should have entered appearance in protest, filed the counter affidavit, also in protest before raising the preliminary objection on jurisdiction. One other way, if they really had the facts to contradict the affidavit in support, was to force a dispute on the litigation and if they succeeded in that, the trial Judge could not have got the alternative than to convert the originating summons to a writ of summons and order pleadings. That should have enabled them to achieve what they wanted to achieve. I am a Judge; not a legal adviser to the appellants. I do not want to go beyond my job. (p. 416 A/ E)

KUTIGIJSC

12. Court has jurisdiction to consider suit on removal of Governor

It must first of all be understood that the entire Section 188 sub-sections 1-11 must be read together. And a proper reading of the whole section will reveal that the ouster clause in subsection (10) can only be properly resorted to and invoked after due compliance with subsections (1) - (9) that preceded it. Subsection (11) makes it abundantly clear that it is the House of Assembly that decides whether or not a conduct is gross mis-

conduct to warrant the removal of a Governor or Deputy Governor. This must in my view depend on the facts and circumstances of each particular case. Failure to comply with any of provisions of subsections 1- 9 will mean that the ouster clause of subsection (10) cannot be invoked in favour of the House of Assembly.

After reading the affidavit evidence and the authorities, my conclusion is that the High Court had the jurisdiction to try the case and that the Plaintiffs had the locus standi to institute the action when they did. (p. 432 G)

MUSDAPHER JSC

13. When court may adjudicate in legislative matters

In my humble opinion the law is that provided the legislature in its legislative exercise does not breach any constitutional provision or a statute, a court cannot adjudicate in any matter arising from the legislature, because such disputes are non-justiciable and are political. See *EZEOKÉ v. MAKARFI* (1982) 3 NCLR 663. Where the Constitution has made a specific provision as to any particular procedure or mode of exercising any legislative function, if there is breach of such provisions, the courts will assume jurisdiction as the guardians of the Constitution, to intervene and to ensure compliance with the provisions of the Constitution. There is no doubt that the removal of an elected public officer by impeachment involves serious political considerations, but the entire considerations may not be purely political. They may involve legal questions. (p. 446 F)

14. Impeachment - What a CJ should do before appointing 7 man panel

It is also my considered view, that a Chief Judge who has the responsibility of appointing the 7man panel to try the Articles of Impeachment will have to make a decision whether all the proper steps have been taken by the legislature before embarking on the appointment of the 7man panel. For example the allegation of “gross misconduct” must be in writing and signed by not less than 1/3 of the members of the House of Assembly and is presented to the Speaker of the House of Assembly and it shall be the Speaker who shall request the Chief Judge to appoint the panel. The

Chief Judge in all of the mentioned matters has the duty to ensure that all the constitutional provisions relating to the action of removal or impeachment are strictly complied with. The failure to comply with any of the provisions entitles the Chief Judge to refuse to appoint the panel. So under the undoubted facts of this case, when it was not the Speaker who requested the Chief Judge to set up the Seven Man Panel, the Chief judge ought to have refused to appoint the 7man panel. (p. 453 A) B

AKINTAN JSC

15. Appellants' failure to enter appearance - Implications C

The Implications of failure of the appellants to enter an appearance and file a counter-affidavit to controvert the averments in the affidavit filed in support of the originating summons are: (1) by filing and relying on preliminary objection rather than filing a counter affidavit to the merit of the case, they have demurred, contrary to the provisions of Order 24 of the Oyo State High Court (Civil Procedure Rules which abolished demurrer; and (2) it means that the appellants have admitted the facts deposed to in the affidavit filed in supported of the originating summons. They cannot therefore complain that they were not allowed to file a counter affidavit since they have admitted the facts in the said affidavit in support. They can also not complain that they were denied fair hearing since they had the opportunity of putting their defence across, if any, but chose not to avail themselves of that opportunity: *See Igbokwe v. Udobi (1992) 3 NWLR (Pt. 228) 214.* (p. 465 C) D E F

OGBUAGU JSC

16. Implications of failure to enter appearance G

Now, the steps which a defendant should take after he has been served with an originating process, is to “*enter an appearance*” in court. It is said that the purpose of the step, is to prevent judgment being entered against the defendant for default of appearance. I also believe that the learned counsel for the Appellants, know or was/is aware of this fact. As I have shown and as appears in the originating summons of the 1st and 2nd Respondents, the Appellants, were commanded by the summons, to en- H

ter appearance within eight (8) days upon service of the same on each of them. Failure to do so would result in the court allowing the Plaintiff or plaintiffs, to proceed to judgment and execution. Entry of an appearance, is said to be a formal step taken by a defendant to an action after he has
 B been served. See *Adegoke Motors Ltd. v. Dr. Adesanya & anor.* (1989) 3 NWLR (Pt.109) 250 @ 292, 296; (1989) 5 SCNJ. 80 @ 90 where it was held that entering of an appearance, is a technical expression and a formal step taken by a defendant in civil proceedings. Therefore, a defendant, shall before he is heard, enter appearance and if he fails to do so, he
 C is not entitled to be heard by the court. I so hold.

So, on this ground alone, I hold that the court below was right and justified in law to proceed to enter judgment in favour of the Respondents for the failure of the Appellants to enter an appearance whether
 D conditional or unconditional. (p. 482 G)

17. *Voluntary refusal to file counter-affidavit*

As a matter of fact, from the submissions of Ayanlaja, Esq., in respect of
 E their Issue I in paragraphs 4.3 and 4.4 of their Brief, it is clear/plain to me that by the said submissions, the Appellants, refused to file a counter-affidavit to the originating summons, because according to learned counsel, the averments in the affidavit in support, were inadmissible evidence
 F and therefore, it was a waste of time for the Appellants to respond to the same. Fine! By this submission and stance, any complaint by the Appellants of denial of fair hearing, can by no stretch of imagination, be sustained by me. If anything, it confirms without any equivocation, that the Appellants, had the opportunity to file a counter-affidavit, but they voluntarily, decided not to do so because for them, it was a useless exercise to
 G do so and anybody expecting them to so file, was wasting his time. Period! On this ground again, I dismiss the said complaint as being most frivolous and grossly misconceived more so, when the learned counsel,
 H made a U-turn by stating that the Appellants were still within time to enter appearance and file 3 counter-affidavit in reaction to the same affidavit in support of the originating summons which he had declared to be inadmissible. Indeed, he urged the Court in the alternative of dismissing the

suit for lack of jurisdiction, to remit the case to the trial court, where, according to him, the Appellants, will be free to file their counter-affidavit. This request, amounts with respect, to blowing hot and cold at the same time. (p. 487 B)

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OGUNTADE JSC (Dissenting)

18. Proper construction of s. 16 Court of Appeal Act

It is however, my view that Section 16 has to be approached with extreme caution. It cannot be construed in a manner as would bring it in conflict with the 1999 Constitution. Section 16 in my humble view only gives seemingly wide powers to enable the court exhaust finally all the issues arising out of the particular appeal brought before it as revealed in the Notice of Appeal by which the appeal was brought and the issues arising therefrom for determination. Section 16 does not create an omnibus Notice of Appeal which enables the Court of Appeal to look into matters not agitated in the relevant Notice of Appeal. Section 16 does not create a new appellate jurisdiction. It merely states the general powers to be exercised in particular appeals. In all appeals, the extent of the power to be exercised is circumscribed by the grounds of appeal as contained in the Notice of Appeal.

It is erroneous to construe Section 16 of the Court of Appeal Act as giving a new original jurisdiction to the Court of Appeal. To do so will render it inconsistent with the 1999 Constitution and render it void. The Court of Appeal Act, 1976 is subordinate to the 1999 Constitution. Any provision therein is therefore bound to be pronounced invalid to the extent to which it is inconsistent with the 1999 Constitution. The correct view to take is that Section 16 does not confer on the Court of Appeal the original jurisdiction which has been ascribed to it.

The side notes to Section 16 of the Court of Appeal Act are: “General powers of Court of Appeal”. They are not ‘jurisdiction of the Court of Appeal.’ Section 16 is clearly incapable of conferring a new original jurisdiction on the Court of Appeal. It only states the power which the Court of Appeal can exercise in accordance with the Right of appeal under the Constitution of Nigeria. As no Notice of Appeal was filed on the

substantive case before the High Court, the court below could not exercise the powers under Section 16 in relation to the substantive case before the High Court when no ‘decision’ had been made in it.

I observe earlier in this judgment that what Section 16 of the Court of Appeal Act donated to the Court of Appeal are powers not jurisdiction.

Regrettably, it seems that the court below did not appreciate the distinction between both. (p. 511 G/ 514 B)

19. Appeals - When Court of Appeal can exercise jurisdiction

A right of appeal does not exist where a court has not made a decision. The attempt to read into Section 16 of the Court of Appeal Act a jurisdiction to determine appeals even in cases where no decision has been rendered is therefore clearly misguided. The Court of Appeal is a creation of Statute and as is the case with all courts created by statute the jurisdiction of the Court of Appeal is limited by the statute which creates it, in this case the 1999 Constitution of Nigeria.

The major error affecting the judgment which the court below gave on 1/11/06 was that it delved into a matter in respect of which it has no shred of jurisdiction. Its’ want of jurisdiction derives from two causes. First, there was no decision made by the High Court on the substantive suit in respect of which any person could have appealed to the court below. Second, there was in any case no Notice of Appeal in respect of the substantive suit before, the court below. The only appeal before the court below was as to whether or not the High Court had jurisdiction to determine plaintiffs’ suit. The court below only needed to decide the issue of jurisdiction and after that send the case to the High Court, Oyo State for determination of the substantive suit. When an appellate court comes to the conclusion that a trial court had erred in coming to a particular decision, the appellate court could only make the same decision which the trial court could have made had it not made the error. The court below should have borne in mind that if the High Court had held that it had jurisdiction to hear plaintiff’s case, it could only have proceeded with the trial by calling on the defendants to file a defence or counter-affidavit. It was a serious error on the part of the court below to

have proceeded to give judgment against the defendants on the substantive suit when there was no decision in existence on the suit and when in any case there was no appeal on it before the court below.

(p. 518 E/ 520 A)

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20. Delay in proceedings - The test of bias

The conclusions of the court below on the matter in my view is rather strange and unsupportable. Whether or not a litigant has been deliberately wasting time to delay the hearing of a case in court is to be viewed from the angle whether or not he has failed to comply with the requirements of the Rules of court and the stipulation as to time for taking some procedural steps. I am not aware that the defendants have failed to file any of the necessary processes within the period limited by the Rules. In any case, a litigant by himself has no power to delay the expeditious disposal of a case when the court is alert to its responsibilities. It is not a litigant that adjourns a case, it is the court.

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It seems to me that it was grossly unfair to have given judgment against the defendants without allowing them to file a defence in the form of a counter-affidavit when clearly they were not out of time to do so. The test of bias is not a question of whether the trial tribunal has arrived at a fair result but whether the trial tribunal has dealt fairly and equally with the parties before it in arriving at the result. (p. 525 G/ 526 D)

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21. Objection to jurisdiction - Right to file counter-affidavit

A defendant to a suit may raise an objection to the jurisdiction of the court at any stage of the hearing. It is not the requirement of the law that the defendant must first file a defence before raising objection to jurisdiction. If he raises objection and the objection fails, he then has a duty to file his defence so that the suit can proceed to hearing in the usual way.

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A defendant does not lose his right to file a defence to the action on the ground that the objection raised did not succeed. A defendant is permitted to say that even if the facts deposed to in the affidavit in support of an originating summons are correct, that the court would still not have jurisdiction. Similarly, he could say that the fact deposed to in the

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affidavit in support of the originating summons are hearsay and inadmissible. If the court decides that such facts are not hearsay, the defendant is not shut out from filing a counter-affidavit to the affidavit thereafter. (p. 527 E/ 528 A)

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22. Defendants were denied right to fair hearing

It is my firm view that the defendants were denied their constitutional right to a fair hearing in the procedure adopted by the court below to determine the substantive suit. The case in my view should have been left to the High Court to determine on the merits. The defendants would have been able to file their counter-affidavit to contest the facts deposed to in the affidavit in support of the originating summons. When the right to fair hearing as entrenched in Section 36 of the 1999 Constitution is breached in relation to a party, the consequence is that the decision becomes a nullity. In the same way, I pronounce the judgment of the court below on the substantive suit a nullity. (p. 529 H)

E *23. Supreme Court - Need to be extremely cautious in making decisions*

The Supreme Court is the last court in Nigeria. Our decisions in appeals are binding over all the courts in Nigeria on the principles decided. The duty on us is onerous. The principle in a case wrongly decided quickly spreads across the system and is repeated from court to court and difficult to recall. This flows from the doctrine of precedent and what lawyers call *stare decisis*. The doctrine ensures that the decisions in courts are stable and easy to predict. Lawyers are thus better positioned to give suitable advice to their clients in the light of the position of the law. When we give judgments that bear no semblance of affinity with previous case-law and for no good reason, this Court is exposed to ridicule and contempt. The international community thinks little of us as a court.

A court in the process of deciding a case must be guided only by the evidence given before it in court. It must not convey the impression that its judgment is being directed by a desire to heed private or public sentiments. It is argued that even if a judgment is wrong, it is acceptable for as long as it is to public good. That clearly is a fallacy. Public good

lies in giving a judgment in accordance with the Constitution of Nigeria and other relevant laws. Public good is an ever-changing phenomenon. (p. 530 C/ 531 A/C)

24. Implications of the majority decision in this case

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I have a personal reservation about the judgment of the court below which we have affirmed in this Court. Its implications in my view are very serious and far-reaching as we may have unwittingly introduced some uncertainties into the case law of this country. We have decided¹

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1. that Section 16 of the Court of Appeal Act is an all-purpose Notice of appeal invocable in an interlocutory appeal to decide the substantive suit;

2. that it is not necessary for the High Court to have reached any 'decision' before the appellate jurisdiction is invocable;

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3. that Notices of Appeal are not necessary to activate the appellate jurisdiction of the Court of Appeal;

4. that a defendant whose period under court Rules for filing a defence to suit has not expired is precluded from filing one on the ground that he had previously been tardy in the course of the proceedings.

(p. 533 B)

REPRESENTATION

F

M. F. Lana (Attorney-General of Oyo State) with him O. A. Ayanlaja, SAN, L. O. Fagbemi, SAN, J. K. Gadzama, SAN, Chris Uche, SAN, Professor O. Oyewo, R. O. Yusuf, H. O. Afolabi, S. O. Ajayi, K. O. Fagbemi, C. I. Nwako, A. O. Popoola, C. N. Nwankwo, S. I. Kalio, D. E. Ukah, C. P. Oli, A. I. Uchegbu, E. J. Gamaliel, O. U. Ozumba, H. Odangla (Mrs), O. P. Famakin-Johnson, O. K. Omotosho, for the Appellants.

G

Chief Wole Olanipekun, SAN with him Oluwarotimi Akeredolu, SAN, H Kola Awodehin, SAN, Adeniyi Akintola, SAN, Professor Taiwo Osipitan, SAN, Femi Falana, Dele Adesina, Adebayo Shittu, S. S. Akinyele, Fidelis Bisong, K. A. Gbadamosi, Fumi Falana (Mrs), M. O. Adebayo, S. A.

Aborisode, Gabriel Uduagi, Amede Oputa (Miss), D. O. Odunwo, Yemi Giwa, Waheed Gbadamosi, Kunle Jimoh, for 1st and 2nd Respondent.

Yusuf Ali, SAN, with him Afolabi Fasamu, SAN, Mohammed Adoki, SAN,
 B Kehinde Akinlolu, T. A. Okusokan, K. K. Eleja, M. M. Alabelewe, S. A. Oke, M. T. Adekilekun, J. Jacobs, O. Ona, V. Udenze, N. Uregbulam, M. K. Olawale, E. Fatogun, L. A. Ozumaga, for the 3rd Respondent.

Aare I. Abdulsalam, with him K. O. Fagbemi, A. T. Adebayo, W. A. Olayide,
 C for the 4th Respondent.

CASES REFERRED TO

- Din v. Attorney-General of the Federation (1986) 2 NWLR (Pt. 17) 471
- D Obasanyo v. Babafemi (2000) 15 NWLR (Pt. 689) 1
- Akintola v. Aderemi (1962) All MLR 440 at 443
- Ezeoke v. Makarfi (1982) 3 NCLR 663
- Nigerian Breweries Plc v. Lagos State Internal Revenue Board (2002) 5
 E NWLR (Pt. 759) 1
- Alhaji Alubankudi v. Attorney-General of the Federation (2002) 17 NWLR
 (Pt. 796) 338
- Keyamo v. House of Assembly, Lagos State (2002) 18 NWLR (Pt. 799)
 605
- F Igbokwe v. Udobi (1992) 3 NWLR (Pt. 228) 214
- Famfa Oil Limited. v. Attorney-General of the Federation (2003) 18 NWLR
 (Pt. 852) 453
- Adegoke Motors Ltd. v. Dr. Adesanya & anor. (1989) 3 NWLR (Pt.109)
 G 250 @ 292, 296; (1989) 5 SCNJ. 80 @ 90
- Oloyo v. Alegbe (1983) 2 SCNLR 35; Doherty v. Doherty (1967) 1 All
 NLR 245
- Alli v. Okulaja (1972) 2 All NLR 35
- H Dada v. The State (1977) NCLR 135
- Eliochin Nig. Ltd. v. Mbadiwe (1966) 1 NWLR (Pt. 14) 47
- Oladiran v. The State (1986) 1 NWLR (Pt. 14) 75
- Ojora v. Odunsi (1959) 4 FSC 189

- Akinbola v. Plisson Fisko Nig. Ltd. (1988) 4 NWLR (Pt. 88) 335
- Onagoruwa v. Inspector General of Police (1991) 5 NWLR (Pt. 113) 593
- Alhaji Gombe v. PW (Nigeria) Limited (1995) 6 NWLR (Pt.402) 402
- Udo v. Cross River State Newspaper Corporation (2001) 14 NWLR (Pt 732) 116 B
- The Attorney-General of Anambra State v. The Attorney-General of the Federation (1993) 6 NWLR (Pt. 302) 692
- Monye v. Anyichie (2005) 8 WNR 1 at 22
- NDIC v. CBN (2002) 18 WRN 1 C
- Elabanjo v. Dawodu (2006) 15 NWLR (Pt. 1001) 76
- Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530 at 556-556
- Adeyemi v. Opeyori (1976) 9-10 SC 31 at 51
- Tukur v. Governor of Gongola State (1989) All NLR 579 at 599
- Egbuonu v. BRTC (1997) 12 NWLR (Pt. 531) 29 at 43 D
- Barsoum v. Clemesey International (1999) 12 NWLR (Pt. 632) 516
- Chief Utih v. Onoyivwe (1991) 1 NWLR (Pt. 166) 166
- Onyeancheya v. The Military Administrator of Imo State (1997) 1 NWLR (Pt. 482) 429 E
- Madukolu v. Nkemdilim (1962) 2 SCNLJ 341

STATUTES & RULES REFERRED TO

- Constitution of Nigeria 1999 ss.188, 4(8), 241(1), 36(1), 92(1), 94(2), 191(1), 104, 108(1), 92(2)(c), 188(9), 101, 102, 315(3), 242(1), 240 F
- Evidence Act ss. 73, 74, 86, 88, 89, 113, 74(1)(c)
- Oyo State High Court (Civil Procedure) Rules O.24, O.27 r.8
- Constitution of Nigeria 1979 s.170
- Interpretation Act Cap. 192 LFN 1990 s.15 G
- Court of Appeal Act ss.16, 25
- Court of Appeal Rules O.6 r.4(2)

LEAD REASONS FOR JUDGMENT BY TOBI JSC

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On 7th December, 2006, I dismissed this appeal and I indicated that I will give my reasons on 12th January, 2007. I will do so here.

Senator Rasheed Adewolu Ladoja, the party interested and 3rd re-

spondent became the Governor of Oyo State in May, 2003. I think he was sworn in as Governor of the State on 29th May, 2003. Alao-Akala became the Deputy Governor. The relationship was cordial until some members of the Oyo State House of Assembly purportedly removed Senator Ladoja as Governor of Oyo State and swore in Alao-Akala, the Deputy Governor, as Governor. As from that moment, things started falling apart not only between Senator Ladoja and the members who removed him from office but also between Senator Ladoja and Alao-Akala.

C Let me briefly tell the story leading to the removal of Senator Ladoja as Governor of Oyo State as told by the respondents in their affidavit in support of the originating summons. On 13th December, 2005, the Oyo State House of Assembly sat at the usual Assembly Complex Secretariat, Ibadan. The appellants sat at D’Rovans Hotel Ring Road, Ibadan, where D they purportedly suspended the Draft Rules of the Oyo State House of Assembly. The appellants purportedly issued a notice of allegation of misconduct against Senator Ladoja, the Governor, with the purpose of commencing impeachment proceedings against him. On 22nd December, E 2005, without following the laid down rules, regulations and the Constitution of the Federal Republic of Nigeria, the appellants purportedly passed a motion calling for the investigation of the allegations of misconduct against Senator Ladoja without the concurrent consent and approval of F the two-thirds majority of the 32 member House of Assembly. The purported notice of allegations of misconduct against the Governor was not served on each member of the House of Assembly.

Aggrieved by the procedure of removing Senator Ladoja, the respondents as plaintiffs, filed an action at the High Court of Justice, Oyo G State by way of Originating Summons. They asked for six declaratory reliefs and three orders setting aside the steps taken by the appellants/defendants in relation to the issuance of Notice of allegation of misconduct, passage of motion to investigate same and injunction restraining the H appellants/defendants, their agents, servants, privies or through any person or person from taking any further steps, sitting, starting, or continuing to inquire or deliberate on the investigation and impeachment proceedings of His Excellency, Senator Rasheed Adewolu Ladoja.” The ac-

tion was supported by a 17-paragraph affidavit.

In a preliminary objection, the appellants, as applicants contended that the court lacked jurisdiction to entertain the suit and that the plaintiffs lacked *locus standi* to institute the suit. They also contended that the claims did not disclose a reasonable cause of action. B

In his Ruling of 28th December, 2005, the learned trial Judge, Ige, J., upheld the preliminary objection that he had no jurisdiction to deal with the matter. He said at page 57 of the Record:

“When the House of Assembly is exercising its constitutional powers in relation to impeachment proceedings or any matter relating thereto, it is performing a quasi judicial function. Thus it is provided in subsection 11 of Section 188 of the 1999 Constitution that the power to determine what constitutes gross misconduct or a conduct that will lead to impeachment proceedings lies with the House of Assembly and not in the Court. By the combined effect of the above provisions therefore, and having regard to the nature of the reliefs claimed by the plaintiffs, it is clear beyond argument that the jurisdiction of this court is clearly ousted. Impeachment and related proceedings are purely political matters over which this court cannot intervene. The action is not justiciable. See Chief Enyi Abaribe vs. The Speaker Abia State House of Assembly and ors. (2002) 14 NWLR (Pt. 788) p.466 at p.492. It is not part of the duty of the Court to forage into areas that ought to vest either directly or impliedly in the Legislature such as the issue of impeachment which is a matter that comes within the purely internal affairs of the House of Assembly. The Court will therefore decline jurisdiction in this matter. The objection of learned counsel for the Defendants/Respondents is upheld. The Originating Summons is accordingly dismissed.” C D E F G

On appeal to the Court of Appeal, Ogebe, JCA, held that the High Court had jurisdiction to hear the matter. He said at page 486 of the Record:

“For all I have said in this judgment I have no hesitation in holding that the learned trial Judge was wrong in declining jurisdiction. Indeed he had jurisdiction to examine the claim in the light of section 188 subsections 1-9 of the 1999 Constitution and if he was not satisfied that H

the impeachment proceedings were instituted in compliance thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process that what happened thereafter was the internal affair of the House of Assembly and he would have no jurisdiction to intervene.”

The learned Justice of the Court of Appeal invoked the powers conferred on the Court by section 16 of the Court of Appeal Act and took the merits of the matter before the High Court. He gave judgment to the respondents. Ogebe, JCA, said at page 489 of the Record:

“It is my view that no factional meeting of any members of a State House of Assembly can amount to a constitutional meeting of the whole House of Assembly as envisaged and provided for in the Constitution. There was no counter-affidavit before the lower court to prove that any member of the House of Assembly of Oyo State was suspended or that the plaintiffs/appellants were removed as Speaker and Deputy Speaker in accordance with the provisions of the Constitution. It follows therefore that all the steps taken by the faction of the defendants/respondents purporting to initiate impeachment of Senator Ladoja as Governor of Oyo State were not actions of the Oyo State House of Assembly under Section 188 of the 1999 Constitution. Consequently, I allow the appeals of the plaintiffs/appellants and the interested party/appellant and set aside the ruling of the trial court declining jurisdiction. I hereby enter judgment for the appellants and grant the following reliefs...”

Ogebe, JCA, granted eight of the nine reliefs sought by the respondents. He did not grant the relief of injunction. It should be pointed out that Senator Ladoja was joined as an interested party in the Court of Appeal.

Dissatisfied with the judgment of the Court of Appeal, the appellants have come to us. As usual, briefs were filed and duly exchanged. The appellants formulated the following issues for determination:

“1. Whether the Court of Appeal was right in its determination that the High Court has jurisdiction to entertain the question of impeachment of the Party Interested/Respondent as the Governor of Oyo State without:

(a) a decision of the Lower Court as to whether or not there has been any non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria, 1999 and or

(b) proof of non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria? This issue is covered by B ground 1 of the Grounds of Appeal contained in the Amended Notice of Appeal dated 20th November, 2006 but filed on 21st day of November, 2006.

2. Whether the Court of Appeal was right in its determination that C the High Court of Justice Oyo State has jurisdiction to entertain a question as to the impeachment of the Party Interested/Respondent as the Governor of Oyo State having regard to:

(i) the provision of Section 188(10) of the Constitution of the D Federal Republic of Nigeria; and

(ii) the question of locus of the Plaintiffs? This issue is covered by grounds 9, 10 and 11 of the Grounds of Appeal contained in the Amended Notice of Appeal aforesaid.

3. Whether the Court of Appeal was right in considering the merits E of the Originating Summons and granting all the reliefs sought by the Plaintiffs/Respondents pursuant to Section 16 of the Court of Appeal Act and in the absence of the power in the High Court of Oyo State in granting those reliefs as at the stage of proceedings before it and also in F not affording the Defendants/Appellants the opportunity to present their own defence (by way of Counter-Affidavit) to the action. This issue is covered by grounds 2, 3, 4, 5, 6, 7 and 8 of the grounds of appeal contained in the Amended Notice of Appeal aforesaid.”

The 1st and 2nd respondents formulated the following issues for G determination:

“(i) Having regard to the circumstances of this case and a specific H relief claimed by the Respondents praying the lower court to give them judgment as per the claims in their originating summons, whether or not the lower court did not act rightly in acceding to the Respondents’ prayers pursuant to the powers vested in that court under and by virtue of section 16 of the Court of Appeal Act - grounds 3, 4, 5, 6, 7-and 8.

(ii) *Whether by the decision of the lower court, Appellants were denied the opportunity to controvert the claims of the Plaintiffs - ground 2.*

(iii) *Whether the Respondents have the locus standi to institute this action - ground 9.*

(iv) *Whether the lower court was not right in its decision to the effect that section 188(10) of the 1999 Constitution could only oust the jurisdiction of the trial High Court if sub-sections (1)-(9) of the said section have been complied with ground's 1, 10 and 11."*

The 3rd respondent formulated the following issues for determination:

"1. Whether the Court of Appeal was not right in its construction and interpretation of the provisions of Section 183 of the 1999 Constitution and in coming to the conclusion that the Ouster Clause in Section 188 (10) of the same Constitution cannot avail the Appellants having regard to the peculiar facts and circumstances of this case.

2. Whether the Court of Appeal was not right, having regard to the peculiar circumstances of this case in invoking the provisions of Section 16 of the Court of Appeal Act in giving judgment in favour of the Respondents and whether the right to fair hearing of the Appellants was thereby breached.

3. Whether the court below was not right to have held that the 1st and 2nd Respondents had the locus standi to institute the case that culminated into this appeal."

It should be mentioned that both the 1st and 2nd respondents and the 3rd respondent raised preliminary objection on the competence of some of the grounds of appeal.

Mr. O. Ayanlaja, learned Senior Advocate of Nigeria, for the appellants in an apparent submission on Issue No. 1 pointed out that the affidavit in support of the originating summons did not warrant the calling on or of the defendants to enter a defence, as the action was obviously unsustainable and therefore constituted an abuse of court process. He cited *AG of Duchy of Lancaster v. L and NWRLY 3 (1892) 3 Ch. 274*. Counsel claimed that there was no admissible evidence in the affidavit in

support of the originating summons. He reproduced the entire affidavit at pages 9 to 11 of his brief and argued that most of the averments offended sections 72, 74, 86, 88, 89 and 113 of the Evidence Act. Relying on *Nonye v. Anyichie* (2005) 8 WNRI at 22; *NDIC v. CBN* (2002) 13 WRN 1 and *Elabanjo v. Dawodu* (2006) 15 NWLR (Pt. 1001) 76, learned Senior Advocate contended that in the determination of the issue of jurisdiction only the plaintiff's claims are looked into. Confining himself to paragraphs 6 to 11 of the affidavit in support, learned Senior Advocate submitted that as the averments contained therein are not admissible and cannot sustain the claims of the plaintiffs, it is useless and time wasting to call or expect the defendants to respond to the inadmissible averments.

On Issue No. 2, learned Senior Advocate submitted that the plaintiffs have no *locus standi* to maintain the action as the complaints in the plaintiffs claim show that all their grievances affect the personal rights of Senator Ladoja. He pointed out that as the plaintiff constituted only a minority, they did not show in their affidavit that they were acting for and on behalf of the House of Assembly of Oyo State. He cited *Oloriode v. Oyebe* (1984) 5 SC 1 at 28; *In Re Ijelu* (1992) 9 NWLR (Pt. 266) 414 at 422 to 423 and *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669.

Learned Senior Advocate submitted that section 188 of the Constitution is not justiciable as it ousts the jurisdiction of the courts. He relied on *Ritter v. United States* 84 Ct. Cl. 293 (1936) Cert. Denied 300 US 668 (1937) and *Baker v. Car* 369 US 186, 218 to 219 (1962). He argued that by the doctrine of separation of powers, the courts cannot inquire into the impeachment of Governors. He cited *A-G Bendel State v. A-G of the Federation* (1932) 3 NCLR 1 at 69 and section 4(8) of the Constitution. Taking specifically section 188(10), learned Senior Advocate relied on *Alhaji Musa v. Hamza* (1982) 3 NCLR 229 at 253; *Shell Petroleum Development Co (Nig) Ltd. v. Isaiah* (2001) 11 NWLR (Pt. 723) 158; *Abaribe v. The Speaker Abia State House of Assembly* (2002) 14 NWLR (Pt. 788) 466 and *Nwosu v. Imo State Environmental Sanitation Authority* (1990) 2 NWLR (Pt. 135) 688.

On Issue No. 3, learned Senior Advocate submitted that the Court of Appeal having upheld the appeal of the plaintiffs against the decision of

the High Court dismissing their case and setting the decision aside, had no jurisdiction to proceed to consider the merits of the substantive case and grant all the reliefs claimed in the action. He cited section 241(1) of the Constitution. He contended that the Court of Appeal cannot assume
 B jurisdiction on an issue upon which the trial court had no opportunity to express its opinion and that a Court of Appeal is limited in its consideration of the appeal and decision thereon to the issues formulated for consideration in the case. He cited *A. W. Nigeria Limited v. Supermaritime (Nigeria) Limited* (2005) 6 NWLR (Pt. 922) 563 at 577 and 578; *Jinadu v. Esurombi-Aro* (2005) 14 NWLR (Pt. 944) 142 at 178-179; *Ekpe v. Fagbemi* (1978) 3 SC 209; *Ikweki v. Ebele* (2005) 11 NWLR (Pt. 936) 397 at 424 and 425; *Isulight (Nigeria) Limited v. Jackson* (2005) 11 NWLR (Pt. 937) 629 at 648 and *Awuse v. Odili* (2005) 16 NWLR (Pt. 982) 416
 D at 462.

Learned Senior Advocate argued that since the defendants were still within time to enter appearance and file counter-affidavit in reaction to the affidavit in support of the originating summons, the Court of Appeal would have left them to take whatever steps were necessary to present their defence, including the entry of appearance and filing of counter-affidavit. He cited *Elabanjo v. Dawodu* (2006) 15 NWLR (Pt. 1001) 76 at 127, 128 and 140; *Okafor v. A-G Anambra State* (2006) 15
 E WRN 103 at 113; *Egbe v. Alhaji* (1990) 1 NWLR (Pt. 128) 546; *Onibubo v. Akibu* (1982) All NLR 207; *Odiya v. Oboh* (1974) 2 SC 23 and *Nwankwo v. Ononoeze-Madu* (2005) 4 NWLR (Pt. 915) 470. Learned Senior Advocate urged the court to set aside the decision of the Court of Appeal on the merits of the originating summons and remit the case to the High
 G Court for trial on the merits, if the Supreme Court decides that the High Court has jurisdiction to hear the matter.

Counsel submitted that the reliance on the affidavit in support of the originating summons by the Court of Appeal to decide the case without giving the defendants any opportunity to controvert the affidavit constituted a breach of the defendants' right to fair hearing. He cited section 36(1) of the Constitution. He pointed out that at the time the Court of Appeal decided on the matter, the defendant still had up to twenty-five

days to file their defence to the originating summons. He cited Elabanjo v. Dawodu (2006) 15 NWLR (Pt. 1001) 76; Ndukauba v. Kolomu (2005) 4 NWLR (Pt. 915) 411 at 429; Governor of Ekiti State v. Osayomi (2005) 2 NWLR (Pt. 909) 67 at 90; Unongo v. Aku (1933) 2 SCNL 332 at 352; Alsthom S.A. v. Saraki (2005) 3 NWLR (Pt. 911) 208 at 228 and B 229; Okike v. LDDC (2005) 15 NWLR (Pt. 949) 531 at 532 and Olumesan v. Ogundopo (1996) 2 NWLR (Pt. 433) 628.

Learned Senior Advocate submitted that the Court of Appeal was wrong in applying section 16 of the Court of Appeal Act, as the exercise of the court's power under the section is limited to taking decisions which the trial court could competently have taken in the circumstance. He said that the Court of appeal wrongly applied the case of Attorney-General of Anambra State v. Okeke (2002) 12 NWLR (Pt. 782) 572. He urged the court to allow the appeal and set aside the decision of the Court of Appeal and dismiss the plaintiffs' case for lack of jurisdiction in the trial court. In the alternative, counsel urged the court to remit the case to the trial court where the appellants would be free to file counter affidavit to the affidavit of the plaintiffs/respondents for the matter to be heard and determined in accordance with the rules of the High Court of Oyo State. D E

Learned Senior Advocate for the 1st and 2nd respondents, Chief Wole Olanipekun, in his preliminary objection, submitted that Grounds 1, 2, 3, 4, 5, 6, 7, 9 and 11 are incompetent being grounds of mixed *law and* fact for which leave was required. As no leaves as sought, he urged the court to strike out the grounds. He dealt with the preliminary objection in some detail at pages 4 to 10 of the brief. F

Arguing Issues Nos. 1 and 2 together, learned Senior Advocate called the attention of the court to the specific relief claimed by the respondents praying the Court of Appeal to give them judgment as per the claims in their originating summons, and submitted that the Court of Appeal rightly invoked section 16 of the Court of Appeal Act. He cited UNTHMB v. Nnoli (1994) 8 NWLR (Pt. 363) 373 at 402; Mokelu v. Federal Commissioner of Works (1976) 3 SC 35; National Bank of Nigeria v. Alakija (1978) 9-10 SC 59 and Achineku v. Ishagba (1998) 4 NWLR (Pt. 89) 411. He observed that the appellants as respondents in the Court G H

of Appeal did not specifically reply to the above prayer that the Court should exercise its powers under section 13 of the Court of Appeal Act. To learned counsel, what could be gleaned from the brief of the appellants in the Court of Appeal as respondents, was their appreciation in full
 B measure the fact that the appeal fell and still falls within the narrow interpretation of section 188(10) of the Constitution and that was why they attached to their Brief of Argument an article written by Professor Ben Nwabueze, SAN, published in Thursday Newspaper of 3rd February 2006, titled “The Ouster provision in Section 188(10).” Counsel called the at-
 C tention of the court to pages 24 and 26 of the Record where according to him, the appellants as respondents, in their preliminary objection raised defence to the action of the plaintiffs. He said that everything or every subject or material which needed to be considered was before the Court
 D of Appeal and the judgment of the court completely covers the field.

Citing paragraphs 5, 6, 7, 8, 9, 10 and 11 of the affidavit in support and the cases of Jadesimi v. Okotie-Eboh (1986) 1 NWLR (Pt. 16) 264; CGG (Nig) Ltd. v. Ogu (2005) 8 NWLR (Pt. 927) 366 at 382; Arjay
 E Ltd. v. AMS Ltd. (2003) 7 NWLR (Pt. 820) 577 at 630 and 635; Yusuf v. Obasanjo (2003) 16 NWLR (Pt. 847) 554 at 632 and 633 and Adeyemi v. Y. R. S. Ike-Oluwa and Sons Ltd. (1993) 8 NWLR (Pt. 309) 27 at 41, learned Senior Advocate submitted that the Court of Appeal rightly in-
 F voked section 16 of the Court of Appeal Act. He justified the use of the case of A-G Anambra State v. Okeke (2002) 12 NWLR (Pt. 782) 575 by the Court of Appeal.

On the issue of fair hearing, learned Senior Advocate referred the court to the proceedings of the High Court at pages 37 to 47 of the
 G Record and contended that if anybody should complain of denial of justice, they should be the respondents whose counsel was denied adjournment for no just reason known to law. He referred to Omo v. JSC Delta State (2000) 12 NWLR (Pt. 682) 444 at 456; Oyeyipo v. Oyiniloje (1987)
 H 1 NWLR (Pt. 50) 356; Orugbo v. Una (2002) 16 NWLR (Pt. 792) 175 at 211 and 212.

In reacting to the appellants’ argument that the case be sent back to the High Court to allow them give evidence, learned Senior Advocate

asked the following questions:

“What type of evidence do they want to raise or give? Is it evidence of two-thirds of 32 members of the Legislative House? Or is it evidence in respect of sitting or conducting proceedings at D’Rovans Hotel, Ring Road, Ibadan? Or is it evidence in respect of the issues contained in their Notice to contend that the judgment of the trial Court be varied, which as demonstrated above, has been abandoned at the lower court?”

Counsel provided an answer in the following sentences:

“Surely what Appellants want to do is not aimed at justice but to further frustrate the speedy determination of the case, if peradventure, any such order is made so as to enable them file further questionable preliminary objections and plant additional landmines to obstruct a speedy administration of justice.”

Counsel took time to enumerate what he regarded as frustrating the attainment of speedy justice in paragraph 4.18, pages 31 to 33 of the brief. Relying on the cases of NNSC v. Sabana Ltd. (1988) 2 NWLR (Pt. 74) 23 and Famfa Oil Ltd. v. A-G Federation (2003) 18 NWLR (Pt. 852) 453 at 467, learned counsel said that if this court accedes to the request or prayer of the appellants by remitting this case to the trial court, the victory of the respondents will become a pyrrhic one and the justice would become technical, while the entire purpose of initiating the case by way of originating summons will be defeated.

Learned Senior Advocate quoted what the learned trial Judge said at page 39 of the Record to the effect that the issues for determination in the case *“are basically on points of law in which no affidavit evidence is required”* and submitted that the appellants did not file an appeal against the ruling of the court, which counsel argued now constitutes issue *estoppel*. He cited Titiloye v. Olupo [1991] 7 NWLR (Pt. 205) 519; Yusufu v. Kupper-International NV (1996) 5 NWLR (Pt. 446) 17; P. N. Udoh Trading Co. Ltd. v. Abere (2001) 11 NWLR (Pt. 723) 114; Adebayo v. Babalola (1995) 7 NWLR (Pt. 408) 383 at 401; Ikoku v. Ekeukwu (1995) 7 NWLR (Pt. 410) 637 at 652; Adesanya v. Otuewu (1993) 1 NWLR (Pt. 270) 414 at 436; Kosile v. Folarin (1989) 3 NWLR (Pt. 107) 1 at 16-17

and Mogaji v. Cadbury Nig. Ltd. (1985) 2 NWLR (Pt. 7) 393 at 408.

On Issue No. 3, learned Senior Advocate relied on paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the affidavit in support and paragraph 5 of the further affidavit and submitted that the Speaker and his deputy have *locus standi* to institute the action. He called in aid sections 92(1), 94(2) and 188 of the Constitution and the following cases: Owoduni v. Registered Trustees of CCC (2000) 10 NWLR (Pt. 675) 315 at 355; Ladejobi v. Oguntayo (2004) 18 NWLR (Pt. 904) 149 at 173; Adamawa State v. A-G Federation (2005) 18 NVVLR (Pt. 958) 581 at 623 and 654; Olagunju v. Yahaya (1968) 3 NWLR (Pt. 542) 501; Ogbuehi v. Governor Imo State (1995) 9 NWLR (Pt. 417) 53 and Okafor v. Asoh (1999) 3 NWLR (Pt. 593) 35.

On Issue No. 4, learned Senior Advocate submitted that the trial court abdicated its responsibility by hastily dismissing the plaintiffs' case. He referred to the word "provisions" in section 188(1) and argued that the word covers the entire section and not restricted to section 188(10). He contended that it is after full compliance with the mandatory provisions of section 188(2), (3) and (4) that the Chief Judge of a State can appoint a Panel of seven members. He pointed out that the Chief Judge shall only set up the Panel at the request of the Speaker of the House of Assembly and no one else, because the Constitution specifically restricts the person to request the setting up of the Panel to the Speaker. He cited the cases of Bamgboye v. Administrator General 14 WACA 616; Vera Cruz (1884) AC 59 at 68 and Martin Schroeder and Co. v. Major and Company (Nig.) Ltd. (1989) 2 NWLR (Pt. 101) 1 and sections 92 and 188 of the Constitution, particularly the use of the word *shall* in section 188(2) of the Constitution. He cited Bamaïyi v. Attorney-General of the Federation (2001) 12 NWLR (Pt. 727) 468 at 497; Ifezue v. Mbaduga (1984) 1 SCNJ 427 and Chukwuka v. Ezulike (1986) 5 NWLR (Pt. 45) 892. Urging the court to read together section 188 of the Constitution, counsel cited Rabi v. State (1981) 2 NCLR 293; Attorney-General Bendel State v. Attorney-General Federation (1982) 3 NCLR 1 at 66; Okogie v. Attorney-General Federation (1981) 2 NCLR 337 at 348 and 349 and Anyah v. Attorney-General Bornu State (1984) 5 NCLR 225. He submit-

ted that subsections (1) to (9) of section 188 constitute condition precedent to the ouster clause in section 188(10) and full compliance with them must be demonstrated and proved before any court can say that its jurisdiction has been rightly ousted. He cited *Sule v. Nigerian Cotton Board* (1985) 2 NWLR (Pt. 5) 17; *Atologbe v. Awuni* (1997) 9 NWLR (Pt. 522) 536; *Labiya v. Antetiola* (1992) 8 NWLR (Pt. 258) 139 at 163 and 164; *Aqua Ltd. v. Ondo State Sports Council* (1988) 4 NWLR (Pt. 91) 622. On the requirement of two-thirds majority, counsel cited *National Assembly v. President* (2003) 4 NWLR (Pt. 824) 104 and argued that the defendants who went to the D’Rovans Hotel to congregate there did so on a frolic and not in pursuance of any constitutional implementation. He cited *Akintola v. Aderemi* (1962) All NLR 440 at 443; *Hamilton v. Alfayed* (2000) 2 All ER 224 and *Attorney-General of Bendel State v. Attorney-General of the Federation* (1981) 2 NSCC 314.

On the ouster clause, learned Senior Advocate submitted that for it to operate or oust the jurisdiction of the court, the donee of the power must act within the substantive and procedural limits prescribed by the enabling law. He cited *Anisminic Ltd. v. Foreign Compensation Commission* (1969) 2 AC 147 and *The Bribery Commissioner v. Ranasingne* (1965) AC 172. Examining decisions of the Court of Appeal on impeachment, learned Senior Advocate submitted that they are not binding. He examined *Abaribe v. The Speaker Abia State House of Assembly* (supra); *Musa v. Hamza* (supra); *Ekpo v. Calabar Local Government* (supra); *Jimoh v. Olawoye* (supra) and *Ekekeugbo v. Fiberesima* (supra).

Learned Senior Advocate submitted that the issues formulated in the appellants’ brief do not flow directly from the grounds of appeal and the arguments on the issues run counter, and not only to the grounds of appeal but also to the formulated issues. He gave as an example the complaint that the affidavit in support of the originating summons offends some sections of the Evidence Act. He argued that as the appellants did not raise the issue of faulty affidavit in the Court of Appeal, they cannot now just wake up to raise the issue in the Supreme Court. He submitted that this court has no jurisdiction to countenance the complaints on the affidavit in support. He claimed that the appellants abandoned their grounds

of appeal and by extension, the entire appeal; and *a'fortiori*, no proper brief has been presented to the court and urged the court to so hold.

Learned Senior Advocate for the 3rd respondent, Yusuf Ali, Esq., SAN, like Chief Olanipekun, raised a preliminary objection on the competence of the grounds of appeal and urged the court to dismiss the appeal. The grounds of objection took the same trend as Chief Olanipekun's.

Arguing Issue No. 1, learned Senior Advocate said that it is the claim of the plaintiff/claimant that the court will look at in determining the issue of jurisdiction of the court, in other words, it is the case put forward by the plaintiff that will be taken into consideration in answering whether or not the trial court has jurisdiction. The defence of the defendant, whether imagined or real, is irrelevant, counsel contended. He cited *Okulate v. Awosanya* (2000) 2 NWLR (Pt.646) 530 at 555 and 556; *Adeyemi v. Opeyori* (1976) 9-10 SC 31 at 51; *Tukur v. Government of Gongola State* (1989) All NLR 579 at 599 and *Egbuonu v. BRTC* (1997) 12 NWLR (Pt. 531) 29 at 43.

Taking *Rabiu v. The State* (1981) 2 NCLR 293 at 326 and 327; *Any a v. Iyayi* (1993) 7 NWLR (Pt. 305) 290 at 315; *Adisa v. Oyinwolu* (2000) 10 NWLR (Pt. 674) 116; *Salami v. Chairman LEDB* (1989) 5 NWLR (Pt.123) 539; *Ekpo v. Calabar Local Government* (1993) 3 NWLR (Pt. 281) 324 at 337 on the interpretation of the Constitution, learned Senior Advocate submitted that the High Court has jurisdiction to entertain the action. To learned Senior Advocate, a proper reading of the whole of section 188 of the Constitution will reveal that the ouster clause in that section can only be resorted to and invoked, after compliance with the other subsections that preceded it. He took pains to analyze each of the subsections in admirable detail in his brief. He cited *A-G Bendel State v. A-G Federation* (1981) All NLR 86 at 127 and 133; *Jimoh v. Olawoye* (2003) 10 NWLR (Pt. 828) 307 at 338 and 339; *Adebisi v. Sorinmade* (2004) All FWLR (Pt. 239) 933 at 948.

Learned Senior Advocate submitted on issue No. 2 that what the Court of Appeal did was in consonance with the decision of this court in *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264 at 276. He also cited *Imonkhe v. A-G Bendel State* (1992) 6 NWLR (Pt. 248) 396 at 410;

Adabla v. Agama (1940) 5 WACA 28; Okoya v. Sentili (1990) 2 NWLR (Pt. 131) 172 at 207 and Akpan v. Otong (1996) 10 NWLR (Pt. 476) 108 at 123. To counsel, section 16 is a residual provision to take care of the situation that has arisen in this case.

On the issue of fair hearing, learned Senior Advocate referred to paragraphs 6, 7, 8, 9, 10, 11 and 12 of the affidavit in support and submitted that the Court of Appeal and this court have the statutory authority to take judicial notice of the facts deposed in the paragraphs by virtue of section 74(1)(c) of the Evidence Act as the facts deal with the course of proceedings of the Oyo State House of Assembly. He also referred to the ruling of the learned trial Judge to the effect that “*the issues for determination in the originating summons in this case are basically on point of law in which no affidavit evidence is required.*” Chief Olanipekun of counsel for the 1st and 2nd respondents made similar submission.

Learned Senior Advocate submitted that it will amount to approbating and reprobating or blowing hot and cold for the appellants to now predicate the alleged denial of fair hearing by the Court of Appeal on the lack of opportunity to file counter-affidavit. After all, the learned trial Judge had said there was no necessity in filing affidavit in support of the originating summons, counsel said. On another, wicket, learned Senior Advocate argued that the lack of fair hearing is not sustainable because even without the affidavit in support of the originating summons, the Court of Appeal had the benefit of the letter written by the 1st respondent on 23rd December, 2005 to the Acting Chief Judge of Oyo State.

Still on the issue of fair hearing, learned Senior Advocate said that the appellants refused to take advantage of the golden opportunity offered them by Mr. Niyi Akintola, SAN, that the court can take the objection to jurisdiction and the merits of the originating summons together, vide the case of Senate President v. Nzeribe (2004) 9 NWLR (Pt. 878) 251.

Learned Senior Advocate submitted that by filing and relying on preliminary objection rather than filing a counter-affidavit to the merit of the matter, the appellants have demurred contrary to the provisions of Order 24 of the Oyo State High Court (Civil Procedure) Rules which

abolished demurrer. It therefore means that the appellants have admitted the depositions in the affidavit in support of the originating summons and cannot therefore complain that they were not allowed to file a counter-affidavit since they have admitted the facts in the affidavit in support, B counsel contended. He cited *Igbokwe v. Udobi* (1992) 3 NWLR (Pt. 228) 214 at 225 and 229. He further cited *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356 at 370; *Chime v. Ude* (1996) 7 NWLR (Pt. 461) 379 at 418; *Jadcom Ltd. v. Oguna Electricals* (2004) 3 NWLR (Pt. 859) 153 at 178; *Nuba Comm. Ltd. v. Nat. Merchant Bank* (2001) 16 NWLR (Pt. 740) 510 at 520 and *Omo v. Delta State* (2000) 12 NWLR (Pt. 682) 444 C at 456.

On Issue No. 3, learned Senior Advocate said that it is the claim of the plaintiff that the court will look at in the consideration of the issue of D *locus standi*. He cited *Ajagunbade v. Laniyi* (1999) 13 NWLR (Pt. 633) 92 at 111; *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669 and *A-G Kaduna State v. Hassan* (1985) 2 NWLR (Pt. 8) 483. Counsel submitted that the 1st and 2nd respondents, being the Speaker and the Deputy Speaker, E respectively, had *locus standi* in the matter. He urged the court to dismiss the appeal.

Learned Senior Advocate for the appellants, Mr. Ayanlaja, submitted in his reply brief that the Court of Appeal was wrong in using section F 16 to give judgment on what the court itself regarded as allegations and serious questions which still needed to be resolved by the High Court. I realize that the Reply Brief is essentially a repetition of the Appellants' Brief and I do not think I should involve myself in that repetitive exercise. After all, the function of a Reply Brief is to reply to new substantial points G raised in the Respondent's Brief. See *Okpala v. Ibeme* (1989) 2 NWLR (Pt. 102) 208; *Uneji v. Attorney-General of Imo State* (1995) 4 NWLR (Pt. 391) 882; *Iiade v. Ogunyemi* (1996) 9 NWLR (Pt. 470) 17, *Ajileye v. Fakoyode* (1998) 4 NWLR (Pt. 545) 184.

H **The action was commenced in the High Court by originating summons. Commencement of action by originating summons is a procedure which is used in cases where the facts are not in dispute or there is no likelihood of their being in dispute. Originating sum-**

mons is also reserved for issues like the determination of short questions of construction and not matters of such controversy that the justice of the case could demand the setting of pleadings. See *Din v. Attorney-General of the Federation* (1986) 2 NWLR (Pt. 17) 471; *Obasanyo v. Babafemi* (2000) 15 NWLR (Pt. 689) 1; *Nigerian Breweries Plc v. Lagos State Internal Revenue Board* (2002) 5 NWLR (Pt. 759) 1; *Alhaji Alubankudi v. Attorney-General of the Federation* (2002) 17 NWLR (Pt. 796) 338; *Keyamo v. House of Assembly, Lagos State* (2002) 18 NWLR (Pt. 799) 605.

In *Famfa Oil Limited. v. Attorney-General of the Federation* (2003) 18 NWLR (Pt. 852) 453, Belgore, JSC, (as he then was) said at page 467:

“The very nature of an originating summons is to make things simpler for hearing. It is available to any person claiming interest under a deed, will or other written instrument whereby he will apply by originating summons for the determination of any question of construction arising under the instrument for a declaration of his interest... It is a procedure where the evidence in the main is by way of documents and there is no serious dispute as to their existence in the pleadings of the parties to the suit. In such a situation, there is no serious dispute as to facts but what the plaintiff is claiming is the declaration of his right.”

Where facts are in dispute or riotously so, an originating summons procedure will not avail a plaintiff who must come by way of writ of summons. See *Oloyo v. Alegbe* (1983) 2 SCNLR 35; *Doherty v. Doherty* (1967) 1 All NLR 245; *Famfa Oil Limited v. Attorney-General of the Federation* (supra). **In other words, an originating summons will not lie in favour of a plaintiff where the proceedings are hostile in the sense of violent dispute.**

In originating summons, facts do not have a pride of place in the proceedings. That cynosure is the applicable law and its construction by the court. The situation is different in a trial commenced by writ of summons where the facts are regarded as holding a pride of place and the fountain head of the law, in the sense that the facts lead to a legal decision on the matter. That is not the

position in proceedings commenced by originating summons where facts do not play a central role but an infinitesimal role, if at all. I

seem to be repeating myself. It is intentional. I should not take this issue further as the parties have not joined issues on whether the action was
 B properly commenced by originating summons. All I want to highlight or bring to the fore is the inconsequential status of facts in action commenced by originating summons, and I do hope I have made the point. It is a useful baseline to draw from though not a barometer.

I should take a pause here to deal with the preliminary objection
 C raised by the respondents in respect of the grounds of appeal. As it is, both sets of respondents attacked the grounds of appeal *in limine*, and vehemently. While the 1st and 2nd respondents raised and argued their preliminary objections from pages 4 to 10 of their brief, the 3rd respon-
 D dent raised and argued his preliminary objection from pages 6 to 9 thereof. The briefs of the respondents were filed on 29th November, 2006. On 4th December, 2006, the appellants filed a motion for:

“1. *AN ORDER granting leave to the Appellants/Applicants to*
 E *appeal against the decision of the Court of Appeal delivered on 1st November, 2006 on grounds other than that of law alone.*

2. *AN ORDER deeming the Appellants’ Amended Notice of Appeal dated 20th November but filed on 21st November, 2006 as properly*
 F *filed and served.*

3. *AN ORDER deeming the Appellants’ brief of argument based on the grounds contained in the Amended Notice of Appeal dated 20th day of November, 2006 but filed on 21st day of November, 2006 as properly*
 G *filed and served.*

AND FOR SUCH FURTHER OR OTHER order(s) as this Honourable Court may deem fit to make in the circumstance.

FURTHER TAKE NOTICE that the grounds of this application are that:

H (i) *Appellants/Applicants have a subsisting appeal against the judgment of the Court of Appeal;*

(ii) *Appellants/Applicants’ grounds of appeal are not that (sic) of law alone;*

(iii) *Appellants/Applicants counsel are in doubt as to whether the grounds of appeal particularly grounds 1, 2, 3 and 4 of the Notice of Appeal filed on 6th November, 2006 and grounds 1, 2, 3, 4 and 5 of the Amended Notice of Appeal are of law alone or mixed Law and fact;*

(iv) *Appellants/Applicants appeal has entered in this court;*

(v) *Time within which to appeal has not run out; and*

(vi) *Appellants have filed and served their Brief of Argument based on the Amended Notice of Appeal.”*

Although the motion was clearly designed to overreach the very well taken preliminary objections of the respondents, this court had to bend backwards in the overall interest of justice to accommodate it. The court went the extra kilometre to persuade Chief Olanipekun and Yusuf Alli, Esq. to concede to the motion, again in the interest of justice. Counsel, in their wisdom, and a good one in the circumstances, reluctantly acceded to the request of the court and a motion which was otherwise most unmeritorious was granted by consent of the respondents. I will return to this magnanimity later in the judgment.

There is still a preliminary point and it is the order the learned trial Judge made when he held that he had no jurisdiction to hear the matter. Learned counsel for the defendants in the trial court, Mr. Lana, Attorney-General of Oyo State, in his submission on jurisdiction, urged the court to dismiss the originating summons. The learned trial Judge accepted the invitation and dismissed the suit. He said at page 57 of the Record:

“The Court wilt therefore decline jurisdiction in this matter. The objection of learned counsel for the Defendants/Respondents is upheld. The Originating Summons is accordingly dismissed.”

That is not all. Mr. Ayanlaja, learned Senior Advocate for the appellants, urged this court to dismiss the case of the plaintiff for lack of jurisdiction in the trial court.

Are Mr. Lana, the learned trial Judge and Mr. Ayanlaja, in that chronological order, correct? Does the submission and decision reflect the state of the law? Is it really the law that a case should be dismissed when the court has no jurisdiction to entertain it? With respect, that is not the law and that cannot be the law. **The law is that when a court comes**

to the conclusion that it has no jurisdiction to entertain a suit, it will be struck out and not dismissed.

In *Din v. Attorney-General of the Federation* (1986) 1 NWLR (Pt. 17) 471, this court held that where a court holds that it has no jurisdiction to entertain an action, it does not dismiss the action but merely strikes it out. A dismissal of action is adjudication on the merits and there can be no adjudication on the merits where there is no jurisdiction or competence to adjudicate. There is a plethora of case law on the issue, so much so that the issue is very well settled in law and should no longer give rise to any other position. See *Ojora v. Odunsi* (1959) 4 FSC 189; *Akinbola v. Plisson Fisko Nig. Ltd.* (1988) 4 NWLR (Pt. 88) 335; *Onagoruwa v. Inspector General of Police* (1991) 5 NWLR (Pt. 113) 593; *Alhaji Gombe v. PW (Nigeria) Limited* (1995) 6 NWLR (Pt.402) 402; *Udo v. Cross River State Newspaper Corporation* (2001) 14 NWLR (Pt 732) 116.

Where an action is filed in a court which has no jurisdiction, it should be struck out and not dismissed in order to give the plaintiff another opportunity to file the action, if possible, in a court of competent jurisdiction or by way of amending the action to fall in line with the jurisdiction of the court it was initially filed. By this, the plaintiff is given an opportunity to have a second bite at the cherry and that is not bad.

Dismissal of an action *in limine* is the most punitive relief that a court can grant a defendant against the plaintiff. Because of its punitive nature, courts of law are reluctant or loath in granting it. In other words, courts of law cannot grant the relief for the mere asking on the part of the defendant. There must be legal basis for the request and a corresponding legal basis for granting it.

I am rather surprised, though not flabbergasted, that Mr. Lana, learned Attorney-General of Oyo State and Mr. Ayanlaja, learned Senior Advocate, asked the High Court and this court, respectively, to dismiss the action for lack of jurisdiction. While I say this, I am not unaware of the professional duty counsel owe to their clients to present their cases to the best of their professional ability. This is the first and foremost duty

counsel owe their clients. And in the desire and zeal to perform that professional duty, counsel can ask for any relief, meritorious or unmeritorious, under the sun (and a few of them ask for unmeritorious reliefs), but it is left for the court to remove the chaff from the grain in the context of the enabling law and grant or refuse the relief. There are B times when counsel ask for a relief with the full knowledge that the law is not on the side of his client. In such a situation, counsel merely tests the legal strength of the Judge, who in his capacity as the unbiased umpire and master and expert of the law, should give judgment according to the law. While the parties are the clients of the Lawyers, the law is the C Judge's clientele and constituency and he must apply it properly without fear or favour. That is the oath he took on the day he was sworn in as a Judge *qua judex*.

The learned trial Judge, with the greatest respect, was in serious D error when he dismissed the action for lack of jurisdiction, instead of striking it out. He had no jurisdiction to dismiss the action for lack of jurisdiction to entertain it but he had jurisdiction to strike it out. Accordingly, in the event that I come to the same conclusion that the High Court E has no jurisdiction to entertain the action, I will do the lawful thing of striking it out.

The fulcrum of this appeal is the interpretation or construction of section 188 of the Constitution, the state counterpart of section 143 of F the Constitution which provides for the removal of the President or Vice President from office. The provisions of the two sections are similar. As this case concerns section 188, that is the section I will take and not section 143.

It is a fairly long section of about 584 words. Because of its central G position in this appeal, I will state the section *verbatim et literatim*:

“188. (1) *The Governor or Deputy-Governor of a State may be removed from office in accordance with the provisions of this section.*

(2) *Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly -*

(a) *is presented to the Speaker of the House of Assembly of the State;*

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detail particulars of which shall be specified,

the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within three months of its appointment, report its findings to the House of Assembly.

(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in

respect of the matter.

(9) *Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.* B

(10) *No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.* C

(11) *In this section -*

“gross misconduct” means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.” D

Before I proceed to analyze the section, I should take a matter by the way and at large. It is the use of the word “impeachment”. The word is used freely and indiscriminately by the parties. The two courts below E also used the expression freely, though not indiscriminately. Where do they get the word in section 188 of the Constitution, I ask? It is clear from the section I have stated above that there is no such word in the section. And so I ask once again, where do all counsel and the courts get F the word?

Because I did not want to hide my ignorance (if it is an ignorance at all on the issue), I raised it during the hearing of the appeal. Mr. Ayanlaja graciously called my attention to section 191 of the Constitution where the word is used. That did not satisfy my query. The action was filed on G the basis of section 188 and not on the basis of section 191(1). Section 191(1) merely provides that the Deputy Governor of a State “*shall hold the office of Governor of the State if the office of Governor becomes vacant by reason of death, resignation, impeachment, permanent incapacity or removal of the Governor from office...*” H

In view of the fact that the action was brought under section 188, it is my view that the originating summons and all that follow by way of

other court processes and proceedings should honestly and loyally follow the wording of section 188. This was not the position in the first relief and a number of other court processes. In the first relief, the plaintiffs/respondents claimed:

B “A declaration that the purported Notice of Allegation of Misconduct made against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, as a preparatory step to his impeachment by the Defendants is unconstitutional, null and void, and of no effect whatsoever, having regard to the provisions of section 188(1) and (2) of the
C 1999 Constitution of the Federal Republic of Nigeria.”

**The point I have been struggling to make is clear from the above relief. Section 188(1) and (2) does not provide for the word “impeachment”. The appropriate word is removal, although section 188(1) contains the verb “removed”. In the circumstances, the
D first relief should have used the word “removal” in the place of “impeachment”.**

**What is the meaning of impeachment? Black’s Law Dictionary
E defines the word as follows:**

*“A criminal proceeding against a public officer, before a quasi-political court, instituted by a written accusation called articles of impeachment; for example a written accusation of the House of Representatives of the United States to the Senate of the United States against
F the President, Vice President, or an officer of the United States, including Federal judges.”*

**This definition, with a slant for the United States Constitution, does not totally reflect the content of section 188 of the Constitution, as it conveys so much element of criminality. Section 188 is not so worded. The section covers both civil and criminal conduct. I am not saying that the definition vindicates the totality of the impeachment provision of the United States Constitution. It is my
G view that the word should not be used as a substitute to the removal provisions of section 183. We should call spade its correct name of spade and not a machete because it is not one. The analogy
H here is that we should call the section 188 procedure one for the**

removal of Governor or Deputy Governor, not of impeachment.

I should now take the subsections of section 188 seriatim.

Subsection (1)

(i) The operative and telling word is “provisions”. It is the plural of “provision”. B

(ii) By its plural content, the subsection covers subsections (2) to (9).

(iii) By the subsection, a removal of a Governor or Deputy Governor must comply with subsections (2) to (9). C

Subsection (2)

(i) There must be a notice of allegation in writing signed by not less than one-third of the members of the House of Assembly. That will be approximately 11 members out of the 32 members of the Oyo State House of Assembly, it means that a notice of allegation signed by less than 11 members is not valid. D

(ii) The notice must be presented to the Speaker of the House.

(iii) The notice should state that the Governor or Deputy Governor is guilty of gross misconduct in the performance of the functions of his office. The notice must specify detailed particulars of the gross misconduct. Vague, loaded and imprecise particulars should not receive the action of the Speaker.

(v) Within a period of 7 days from the date of receipt of the notice, the Speaker will cause a copy of the notice to be served on the Governor or the Deputy Governor as the case may be. F

(vi) The same notice as in (v) must be served on each member of the House, that is, on every member of the House.

(vii) By subsection (2)(b) the Speaker is expected to procure a written statement from the Governor or the Deputy Governor in reply to the notice of allegation provided for in subsection (2). The reply must also be served on each member of the House. In sum, the members of the House will be in possession of the notice of allegation and the reply to the allegation. If the Governor or the Deputy Governor fails or refuses to reply to the allegation, he should be presumed as having no reply. G H

Subsection (3)

(i) Within a period of 14 days of the presentation of the notice to the Speaker of the House, the House must resolve by motion, without any debate whether or not the allegation should be investigated.

(ii) The action in (i) above will be taken whether or not the Governor nor or the Deputy Governor sent any statement in reply to the notice of allegation.

(iii) It must be emphasized that the motion that the allegation should be investigated or not will not be debated. It would appear to be the intention of the makers of the Constitution that there should be no room for campaign on the floor to sway members at that early stage.

Subsection (4)

(i) A motion that the House investigate the allegation will be declared as passed if it is supported by the votes of not less than two-thirds of all members of the House.

(ii) In the context of the House of Assembly of Oyo State, the motion can only be passed if it is supported by appropriately 21 members of the House. A simple majority is not compliance with the subsection.

Subsection (5)

(i) Within 7 days of the passing of the motion under subsection (4), the Chief Judge of the State will appoint a Panel of 7 persons to investigate the allegation.

(ii) The Chief Judge can only set up the Panel at the request of the Speaker. It therefore means that where the Speaker does not request for the setting up of the Panel, the Chief Judge cannot do so by the request of any other member or, *suo motu*.

(iii) The Panel must not exceed 7 persons. It must also not be less than 7 persons. The number 7 is indelible and constant. And so be it.

(iv) The 7 persons must not be members of any public service, legislative house or political party. The subsection disqualifies members of the public service, legislative house or political party.

As it is, the Constitution vests in the Chief Judge the power to appoint the 7 persons. Although the Chief Judge is under no constitutional duty to share the power with his brother Judges, it will not be a bad exercise of power to consult his brothers, particularly the most senior

ones. It will not be wrong if he asks them for names. He is not bound by the names they send to him out at the end of the day, there will be mutuality of confidence in the matter and that is good both for the Chief Judge and his brother Judges.

The subsection only talks about the integrity of the persons. The subsection does not talk about the professional callings, age, gender and all that of the persons, it is my view that no profession disqualifies a person from being a member of the Panel. However, in view of the fact that the exercise of investigation under the Constitution will invariably touch law in its large parts, it is my view that a legal person, either a retired Judge or a Solicitor and Advocate of the Supreme Court, preferably of the status or rank of Senior Advocate of Nigeria, should be appointed the Chairman. The other professional groups that should be on the Panel will depend largely on the allegation made against the Governor or Deputy Governor. And so an arm-chair recommendation will not be made. The point should be made however that an allegation involving money and falsification of accounts or re-ordering of figures, will certainly need the services of an Accountant. I think I can stop here on this fairly difficult area. Although there is no age restriction, the Chief Judge will certainly go for adults and youths. Youths will be handy if the Governor or Deputy-Governor is himself a youth. Gender is a most sensitive area in contemporary Nigerian society. Although the Constitution does not provide for representation in the Panel on basis of gender, it will not be out of place if the Chief Judge has this in mind in constituting the Panel. I do not want to sound dogmatic on this fairly sensitive area in our contemporary society. The Chief Judge is a man of law and good judgment and should be trusted to take decisions with egalitarian outlook.

The search for membership of the Panel need not be confined to the geographical territory of the State. The Constitution does not so restrict the appointment. A member can be picked and appointed from another State. He could be an indigene of the State. He need not be. As a matter of law, the search could go to the diaspora but here I should confine the appointment to Nigerian citizens in the diaspora by virtue of Chapter 3 of the 1999 Constitution. (v) The 7 persons must, in the opin-

ion of the Chief Judge, be persons of unquestionable integrity. Integrity is a matter of character of the human being and the character must be unblemished, consistent in doing correct things and not doing wrong or bad things. The character must be transparent, honest and trustworthy.

B He must be a person of great strength and strong principle and conviction. He must be clean, in and out, like the white ostrich. The Constitution provides for the epithet “unquestionable”. This means that the person must not be one of questionable integrity. He should be a person without taint. A person who believes in vengeance or vendetta is not one of unquestionable character. An overzealous human being with superlatives, or extremities or idealisms, will not be a person of unquestionable integrity because some of his superlatives or extremities or idealisms may turn out to be utopian and will be a bad way of judging a Governor in a realistic way in the running of a State. So too a person with pompous and arrogant bones in his chemistry with so much egotic flare. The Chief Judge should avoid them in his Panel as if they are plagues. Pompous and arrogant people are not the best Judges.

E (vi) It is merely saying the obvious that the Chief Judge can only invoke his constitutional powers under section 188(5) if the provisions of section 188(2), (3) and (4) are complied with. Putting the position in a negative language, the Chief Judge will not invoke his constitutional powers under section 188(5) if the provisions of section 188(2), (3) and (4) are not complied with. This, in my humble view, is the intendment of the makers of the Constitution. It will not be out of place for the Chief Judge to ask from the Speaker a certificate of compliance under the signature of the Speaker. I am not insisting on this because the Constitution does not so provide.

H (vii) In order to pick persons of integrity, the Chief Judge himself must be a person of integrity. The fact that he is appointed Chief Judge is a presumption of integrity in his favour and he will never betray the confidence the Constitution has placed on him. On no account should he be involved in favouritism and nepotism. So too partisanship in the exercise of his quasi-judicial function. He must perform his constitutional function above board, like Caesars’ wife. He should not give the slightest

room for lobbying and one way of doing that is to set up the Panel with utmost speed and alacrity. Of course, he should bow to the 7 days rule in section 188(5). This does not mean that the Chief Judge must wait for 7 days to set up the Panel. The requirement of the subsection is that the Panel must be set up within a period of 7 days. B

Subsection (6)

(i) The Governor or the Deputy Governor as the case may be has the right to defend himself before the Panel

(ii) He also has the right to be represented before the Panel by a legal practitioner of his own choice. C

Subsection (7)

(i) The powers and functions to be exercised by the Panel will be determined in accordance with procedure as prescribed by the House. The procedure prescribed should not be ad hoc but should apply to all investigations. This is one way of avoiding different standards in otherwise similar matters. Of course, the House can revise or update the procedure as and when circumstances dictate. The House should avoid changing the rules at the middle of the investigation to assist or ruin the Governor or the Deputy Governor. Either is bad, because it will breed injustice. D

(ii) Within 3 months of its appointment, the Panel should report its findings to the House. The constitutional period should not, or better, cannot be extended. This is not just one inquiry set up by Government which can always ask for extension of time, it is a constitutional provision which the Panel must comply with. The lawmakers have a reason for giving such a fairly long period. It is to ensure that a thorough investigation is carried out by the Panel. Although the Panel need not take the whole of the 3 months, an investigation of the magnitude of the gross misconduct of a Governor or Deputy Governor should certainly take more than 2 to 7 days as is the trend. An investigation which takes a very short period will lead to some speculation or conjecture that the Panel made up its mind early in the day and merely worked towards the achievement of that mind. The speculation or conjecture may not be out of place. How can a Panel complete an investigation in 2 to 7 days when the Constitution provides a maximum of 3 months? E F G H

(iii) The report of the Panel should be precise, concise and exact to the minutest detail. There should be no room for doubt as to what the Panel decided. The report of the Panel should be unequivocal and not fluid or rigmarole.

B Subsection (8)

(i) The Panel can make one of two recommendations, not two. The Panel can either report that the allegation made against the Governor or Deputy Governor is proved or is not proved.

C (ii) If the report is that the allegation is not proved, the matter ends there. The House has no constitutional right to set up another Panel to receive more ‘favourable’ report. That will be tantamount to persecution of the Governor or Deputy Governor and the Constitution has no place for a second bite at the cherry. The House becomes functus officio.

D (iii) It is however not my understanding of subsection (8) that no removal proceedings will be initiated against the Governor or Deputy Governor for the rest of his tenure qua office. The House is competent to initiate another removal proceedings, if the Governor or Deputy Governor commits any other gross misconduct within the meaning of subsection 11. And so, the Governor or Deputy Governor cannot go home and jubilate that he has passed through the firing line and that will be for the rest of his tenure. Let that Governor or Deputy Governor watch his conduct in office.

F Subsection (9)

(i) If the report of the Panel says that the allegation against the Governor or the Deputy Governor is proved, the report will be considered by the House within 14 days of the receipt of the report by the House.

G (ii) This is the most crucial area and members should be most loyal to the oath they took on that eventful day of their swearing in ceremony. On that day, they swore or affirmed inter alia to perform “my functions honestly to the best of my ability, faithfully and in accordance with the Constitution of the Federal Republic of Nigeria and the law, and the rules of the House of Assembly and always in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of the Federal

Republic of Nigeria...” It is at times the experience that some Nigerians regard the oath as another kindergarten recitation, to the extent that they do not attach any importance to it. Some forget the wordings of the oath as they finish. It should not be so. Members are at the bar of history and would not like history to judge them badly. They must therefore be at their parliamentary best. In debating the report, there should be no consideration of political party and political leanings. The exercise is much more than the party the Governor or Deputy Governor belongs and the party a merger belongs. It is an exercise for the good of the State and members must remove their political hats or togas. A member who does not see anything good in what the Governor or Deputy Governor does, will definitely arrive at a bad decision. So too the one who sees nothing wrong in what the Governor or Deputy Governor does. Let the debate and the subsequent findings of the House be donated by the report of the Panel and not by sentiment.

(iii) The House can take one of two actions, it can adopt the report of the Panel. It can reject the report of the Panel, if it rejects the report of the Panel, the matter ends there. The Governor or the Deputy Governor can smile home as a victor.

(iv) If the House adopts the report of the Panel, the Governor or Deputy Governor stands removed from office as from the date of adoption of the report. He has to pack his personal belongings from Government House before the Police arrive to force him out. After all, he is flushed out with his section 308 immunity. The day of reckoning has finally arrived. There is no going back, so be it.

Subsection (11)

I will skip subsection (10) for now and deal with subsection (11). I will return to subsection (10) after doing, subsection (11). The reordering of the subsections is to facilitate the flow or trend of argument. It has no legal basis.

(i) The word “gross” in the subsection does not bear its meaning of aggregate income. It rather means, generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some

extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct. Whether a conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in vacua or in a vacuum but in relation to the facts of the B case and the law policing the facts.

(ii) Gross misconduct is defined as (a) a grave violation or breach of the provisions of the Constitution and (b) a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct. C

(iii) By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in the context does D not mean an excavation in earth in which a dead body is buried, rather it means, in my view, serious, substantial, and weighty.

(iv) The following, in my view, constitute grave violation or breach of the Constitution: (a) Interference with the constitutional functions of E the Legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b) Abuse of the fiscal provisions of the Constitution, (c) Abuse of the Code of Conduct for Public Officers, (d) Disregard and breach of Chapter IV of the Constitution on fundamental rights, F (e) Interference with Local Government funds and stealing from the funds or pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) Instigation of military rule and military government, (g) Any other subversive G conduct which is directly or indirectly inimical to the implementation of some other major sectors of the Constitution.

(v) The following in my view, are some acts which in the opinion of the House of Assembly, could constitute grave misconduct (a) Refusal to perform constitutional functions. (b) Corruption. (c) Abuse of office H or power. (d) Sexual harassment. I think I should clarify this because of the parochial societal interpretation of it to refer to only the male gender. The misconduct can arise from a male or female Governor or Deputy Governor as the case may be. (e) A drunkard whose drinking conduct is

exposed to the glare and consumption of the public and to public opprobrium and disgrace unbecoming of the holder of the office of Governor or Deputy Governor. (f) Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other person, (g) Certificate forgery and racketeering. Where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor, it will not, in my view, matter whether the misconduct was before the person was sworn in. Once the misconduct flows into the office, it qualifies as gross misconduct because he could not have held the office but for the misconduct. Such a person, in my view, is not a fit and proper person to hold the office of Governor or Deputy Governor. It is merely saying the obvious that a Governor or Deputy Governor who involves in certificate forgery and racketeering during his tenure has committed gross misconduct.

It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organized vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct. Accordingly,

where a misconduct is not gross, the section 188 weapon of removal is not available to the House of Assembly.

Subsection (10)

I will take the issue of jurisdiction here. **Jurisdiction is a radical and crucial question of competence for if the court has no jurisdiction to hear the case, the proceedings, are and remain a nullity ab initio, however well conducted and brilliantly decided they might be, as a defect in competence is not intrinsic, but rather extrinsic, to the entire adjudication.** See *Onyeancheya v. The Military Administrator of Imo State* (1997) 1 NWLR (Pt. 482) 429; *Madukolu v. Nkemdilim* (1962) 2 SCNLJ 341. **Jurisdiction is the nerve centre of adjudication; it is the blood that gives life to the survival of an action in a court of law; in the same way blood gives life to the human being and the animal race.** See generally *Barsoum v. Clemesey International* (1999) 12 NWLR (Pt. 632) 516; *Chief Utih v. Onoyivwe* (1991) 1 NWLR (Pt. 166) 166.

There is a common agreement that in the determination of jurisdiction, the court process to be used is the pleadings of the plaintiff, which is the statement of claim. As this action is commenced by originating summons, the court process to be used is the affidavit in support of the summons. In other words, the court will not examine a counter-affidavit even if filed. Fortunately or unfortunately, no counter affidavit was filed in this case. And so the learned trial Judge had no choice than to examine the affidavit in support, which stands for all intents and purposes, as vindicating the plaintiff claims. Put differently, it is the case put forward by the plaintiff that determines the jurisdiction of the court. See *Monye v. Anyichie* (2005) 8 WNR 1 at 22; *NDIC v. CBN* (2002) 18 WRN 1; *Elabanjo v. Dawodu* (2006) 15 NWLR (Pt. 1001) 76; *Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530 at 556-556; *Adeyemi v. Opeyori* (1976) 9-10 SC 31 at 51; *Tukur v. Governor of Gongola State* (1989) All NLR 579 at 599 and *Egbuonu v. BRTC* (1997) 12 NWLR (Pt. 531) 29 at 43.

In some cases, the court may need to take some evidence before determining the issue of jurisdiction. But this will not be

necessary where all the materials necessary to determine whether or not the court has jurisdiction are already before the court, as in this case. See *The Attorney-General of Anambra State v. The Attorney-General of the Federation* (1993) 6 NWLR (Pt. 302) 692. In the determination of the issue of jurisdiction, the court should not be influenced by sympathy for the case of one of the parties but must base its decision on the law, particularly in the light of the enabling law. After all, jurisdiction is a matter of hard law. B

In determining the jurisdiction of a court in relation to a constitutional provision, the court must take into consideration the totality of the enabling section or sections and not subsections in isolation. This is because the journey to the jurisdiction of the courts in the Constitution, at times, could be cumbersome and not straight or simple. In this appeal, this court must determine the totality of section 188 in unison and not the subsections in isolation. D C

With the above general and basic principles on jurisdiction, I will now go straight to section 188(10) of the Constitution, the hub, or should I say, plank of the jurisdictional palaver in this appeal. I will take the issue from two angles although the respondents took it only from one angle, and it is the angle of section 188(1) to (9) laying a pre-condition for the attainment of the section 188(10) ouster provision. E

I think I can just take that first, and this I will do by quoting in extenso what Ogebe, JCA, said at pages 485 and 486 of the Record: F

“It is my view that the trial court had serious questions to consider before hastily throwing out the suit. For example it was alleged that 18 defendants/respondents met outside the chambers of the House of Assembly in a hotel to commence impeachment, proceedings, the court had a duty to determine whether proceedings before such a group amounted to proceedings of Oyo State House of Assembly. It was also alleged that the House of Assembly in Oyo State had 32 members and for the removal of a Governor which requires the resolution of two third majority of all members of the House, the court had a duty to inquire whether a factional meeting of 18 members constituted the required two-third majority of all members. The court also had to consider whether impeachment G H

proceedings in which the Speaker of the House of Assembly is excluded from his leading role as provided for in Section 188 of the Constitution can amount to proper proceedings of impeachment. For all I have said in this judgment I have no hesitation in holding that the learned trial judge was wrong in declining jurisdiction. Indeed he had jurisdiction to examine the claim in the light of section 188 subsections 1-9 of the 1999 Constitution and if he was not satisfied that the impeachment proceedings were instituted in compliance thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process then what happened thereafter was the internal affairs of the House of Assembly and he would have no jurisdiction to intervene."

I have quoted the learned Justice in some detail. I have no apologies for sounding prolix because it is germane to the whole issue.

It is good law that where the Constitution or a statute provides for a precondition to the attainment of a particular situation, the pre-condition must be fulfilled or satisfied before the particular situation will be said to have been attained or reached. Our common and popular pet expression is "condition precedent" which must be fulfilled before the completion of the journey, which is the terminus and in our context, that terminus is section 188(10).

Learned Senior Advocate for the appellants cited the case of *Abaribe v. Speaker Abia State House of Assembly* (supra) and submitted that the Court of Appeal was wrong in not giving effect to that case, on the ground that the issue of non-compliance with the provisions of the Constitution did not arise in that case.

In *Abaribe*, the Court of Appeal held that section 188(10) of the 1999 Constitution forbids all courts from allowing any proceedings or determination of a House of Assembly or its Panel with respect to proceedings under section 188 to be challenged before it. It also forbids all courts from allowing any matter relating to such proceedings and determination to be entertained before it. I entirely agree with the decision as it relates to full compliance with the preconditions in section 188(2) to (9). That is a straightforward

construction of section 188(10) of the Constitution. Like Ogebe, JCA, I am inclined to the view that the “question of non-compliance with subsections 1-9 did not arise in that case.” And that is the crux of the issue here. And so the case of Abaribe is not applicable in this case.

Learned Senior Advocate for the appellants, in an effort to fault the Court of Appeal on that issue, pointed out at page 26 of the appellants’ brief that “the jurisdiction of the court was invoked because the plaintiff felt that conditions precedent to impeachment of the Governor were not satisfied. He quoted the grounds and particulars upon which the reliefs were sought at page 26 of the Brief. Counsel however was silent on the case of Abaribe. I take it that by his silence, he had no answer to the position taken by the Court of Appeal and he cannot get a proper answer in law because the Court of Appeal is correct in the distinction of the facts of Abaribe and those of this case. I will take the case of Musa v. Hamza (supra) later.

Learned Senior Advocate cited some cases decided on the United States Constitution and referred to Tribe’s book, on American Constitutional Law, 2nd Edition (1988), pages 289-296. I think I should take the liberty to quote paragraph 5.10a of the appellants’ brief.

“In the interpretation of Section 188 of the 1999 Constitution, it is necessary to understand the history and development of impeachment process under the American Presidential Constitution from where it was adopted into the 1979 and 1999 Constitutions. The United States Supreme Court held in Ritter v. United States 84 Ct. Cl. 293 (1936) Cert. Denied, 300 US 668 (1937) that ‘the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its body against and its decision is final.’ The United States Supreme Court bars judicial review of impeachment under the political doctrine (see Baker v Car, 369 US 186, 218-219 (1962). See also Laurence H. Tribe, America Constitutional Law, 2nd Edition (1988) 289-296.”

I do not think I am comfortable with the historical stuff presented by learned Senior Advocate. Apart from the fact that the position taken

by learned Senior Advocate is not vindicated by Reports of the Constitution Drafting Committee Volume II (1976) pages 67 to 69, I disagree entirely with him that the “impeachment” provisions in our 1979 and 1999 Constitutions were adopted from the impeachment process of the American Presidential Constitution. There could at best be a possibility of adoption but certainly there was no adoption; not at all.

Let me go into more specifics on the issue. I will do so by quoting the very short impeachment provision in the Constitution of the United States. Article 1, section 3 provides:

“6. *The Senate have the sole Power to try all impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the Concurrence of two thirds of the Members present.*”

7. *Judgment in Cases of Impeachment shall extend further than to removal from Office, and disqualification to hold and enjoy any Office of honour, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.*”

I have taken the trouble to count the number of words in the above provision of the Constitution of the United States. They are about 103. I have also taken the trouble to count the number of words in section 188 of the Constitution of the Federal Republic of Nigeria, 1999. They are about 584. There cannot be an adoption. I am almost trying to change my mind whether there was even an adaption but I will not yield to the temptation. After all, whether there was an adoption or an adaption is not relevant to the live issues before this court. Let me not instigate a litigation not before this court.

What is relevant however is whether this court should make use of the cases cited by learned Senior Advocate of Nigeria? It is the law that decisions of foreign courts, however learned they are or may be, are of persuasive authority and not binding on this court. The courts have held that decisions of English courts are of persuasive authority as they lack binding effect in our principles of stare

decisis. See *Alli v. Okulaja* (1972) 2 All NLR 35; *Dada v. The State* (1977) NCLR 135; *Eliochin Nig. Ltd. v. Mbadiwe* (1966) 1 NWLR (Pt. 14) 47; *Oladiran v. The State* (1986) 1 NWLR (Pt. 14) 75. In my Book on Sources of Nigerian Law (1996), I said at page 94:

“Certainly, it will not only be ridiculous but an abuse of statehood with all its attendant ramifications in international law, for courts of a sovereign country operating an equally sovereign and independent legal system to be bound by decisions of courts of another country having the same status in international law and practice. The United Nations Charter clearly recognizes the equality of States as subjects of international law, even the smallest States, and so the question of one sovereign nation succumbing to the judicial decisions of another sovereign nation should not arise at all, no matter the historical tie or connection. Viewed from this angle, it is submitted that decisions of English courts whether by the House of Lords or the Court of Appeal, should be persuasive authorities in Nigeria, and this applies to all Nigerian courts.”

The above apart, **a case is decided on the facts before the court and the facts of the case erect the ratio decidendi of the case. And so the cases cited by learned Senior Advocate were decided on the provisions of the United States Constitution which are clearly different from our section 188. One clear difference is that our section 188 does not contain the word “impeachment”. That apart, Article 1 section 3 of the Constitution of the United States does not provide for the details of our section that apart, our section 188 does not provide for the situation in Article 1, Section 3(7).**

Another difference between the Constitution of the United States and that of Nigeria is in respect of the quorum for the removal of the office holder. In the United States Constitution, the quorum is two-thirds of the members present. In our Constitution, it is two-thirds of all the members of the House. There is a world of difference between the two. Is learned Senior Advocate really justified in asking this court to follow decisions of the United States courts on the provision of the United States Constitution on impeachment? I shudder. I will not and that is legal and constitu-

tional.

Again, the above apart, American jurisprudence has so much developed the political question doctrine in their case law, so much that it has taken a very firm root in their legal system. The political question doctrine is still in its embryonic stage in Nigeria. Let us not push it too hard to avoid the possibility of a still-birth. That will be bad both for Nigerian litigants and the legal system.

I am a Nigerian Judge. This is a very obvious statement and need not be made. There are however instances where one makes an obvious statement to make a less obvious point. As a Nigerian Judge, the condition of my hire is to interpret and apply the Nigerian Constitution to Nigerians and others governed by the Nigerian Legal System and Nigerian jurisprudence. I am not hired to apply any foreign Constitution, however able or competent the provisions are or whether they contain the most democratic phraseology. While I am prepared to use constitutional provisions of foreign Constitutions which are similar to ours, I cannot see my way clear in using provisions which are kilometres away from ours. I see the impeachment provisions in the United States Constitution in that way, vis-à-vis our section 188.

In *Attorney-General of Ondo State v. Attorney-General of the Federation* (2002) 9 NWLR (Pt 772) 222, Ejiwunmi, JSC, said at 462:

"Now, having regard to the principles enunciated above with regard to the interpretation of a Constitution, it is necessary to observe that what has to be construed is the constitutional wherein all the provisions for the governance of the nation, Nigeria have been set out. In other words, it is the Constitution of Nigeria 1999 that is under scrutiny in this matter. It is certainly not the Constitution of any other country no matter how desirable and perfect that Constitution may be. We as Nigerians have to live and abide with all the provisions of the Constitution which have been fashioned for us by those whose fate was ordained to fashion the Constitution for the governance of the people of Nigeria."

In *Olafisoye v. Federal Republic of Nigeria* (2004) 4 NWLR (Pt. 864) 580, I said at page 674:

"As our country is sovereign, so too our Constitution and this

court will always bow or kowtow to the sovereign nature of our Constitution, a sovereignty which gives rise to its supremacy over all laws of the land, including decisions by foreign courts. Gone are the days when all things from older common law jurisdictions were preferred to everything from the younger common law jurisdictions. Gone are also the days when differences between judgments of this court and foreign judgments implied that the judgments of this court could be wrong. Let those days not come back and they will not come back." B

The above reminds me of what Karibi-Whyte, JSC, said in *Adigun v. The Attorney-General of Oyo State* (No. 2) (1987) 2 NWLR (Pt. 56) 197, at page 230: C

"This Court has reached the stage when it does not regard differences from the highest English or the Commonwealth Court or other courts of common law jurisdiction as necessarily suggesting that it is wrong." D

And that takes me to the second aspect of the issue and I will do so by taking the case of *Musa v. Hamza*. In that case, the Court of Appeal said at page 253 of the judgment, and I will quote the court in extenso: E

"It is important to state clearly that whatever the Supreme Law of the land has vested unequivocally and in clear words, in any of its principal departments cannot lightly be taken away by means of any construction extraneous and exotic to the expressed intentions and aspirations of the Constitution. That the Constitution has vested the power to remove the Governor or Deputy Governor in the State House of Assembly is not questioned. Section 170(i) provides as follows - F

'The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this Section.' G

Then the provision of Subsection (2)-(9) spells out the circumstances for the removal or non-removal. The proceedings for the removal of the Governor or his Deputy in my view seems to commence, when a notice of any allegation in writing and signed by not less than one-third of the members of the Assembly is presented to the Speaker of the House of Assembly of the State, stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office speci- H

flying detailed particulars of such gross misconduct (Section 170(2)). All the ensuing proceedings of the service on the Governor with a notice of the copy thereof within 7 days and his reply to every member of the House of Assembly, Section 170(2), and a resolution of the House of Assembly, B within 14 days of presentation of the notice to the Speaker, whether allegation shall be investigated - Section 170(3); and supported by not less than two-thirds majority of all the members of the House of Assembly - Section 170(4). Within 7 days of this motion, the committee of seven C persons shall be appointed by the Speaker with the approval of the House of Assembly, to conduct the investigation. All these are actions exclusively within the competence of the Legislature. It is relevant to observe that the Section preserves the fundamental rights of the Governor to defend himself before the committee, Section 170(3). It is in this regard D that the submission of Dr. Odje that appellant is a special person who is not subject to the jurisdiction of the courts becomes pertinent.”

With the greatest respect, the Court of Appeal in the above dictum would seem to have mixed up the expressions: procedure E and proceedings. Procedure is the set of actions necessary for doing something. It is also the method and order of directing business in an official meeting. On the contrary, proceedings are the records of activities. In this definition, procedure generally comes before pro- F ceedings. Putting it in another language, proceedings are built on the procedure established for the particular activity or business.

The arrangement of section 188 vindicates the above position I have taken and the difference between the two expressions. While section 188(7)(a) provides for the first word “procedure”, G section 188(8) provides for the second word “proceedings”. The Court of Appeal mixed up the two expressions when the court taking section 170 of the 1979 Constitution held that the proceedings for the removal of the Governor or his Deputy commences with a notice of H any allegation in writing is presented to the Speaker; including the appointment of 7 persons by the Speaker to conduct the investigation, in my humble view, section 188(1) to (6) sets out the procedure to be adopted in the removal process. The proceedings com-

mence from section 188(7) and ends in section 188(9). In my view, proceedings will commence from section 188(7) when the Panel of 7 members call the first witness to testify in the investigation of the allegation. And that continues until the conclusion of the deliberations of the report by the House.

The section 188(10) ouster clause is clearly on proceedings or determination of the Panel or the House. It does not relate to or affect the procedure spelt out in section 188(1) to (6). Parliamentary proceedings which result in the Hansard cannot be the same as the procedure which Parliament invokes or adopts during the proceedings.

This court cannot in the interpretation of specific provisions of the Constitution, gallivant about or around what the makers of the Constitution do not say or intend. On the contrary, this court must interpret any section of the Constitution to convey the meaning assigned to it by the makers of the Constitution.

Ouster clauses are generally regarded as antitheses to democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the courts invoke section 6 as barometer to police their constitutionality or constitutionalism. The courts become helpless when the Constitution itself provides for ouster clause, such as section 188. In such a situation, the courts hold their heads and arms in despair and desperation. They can only bark but cannot bite. Their jurisdiction is to give effect to the ouster clause because that is what is in the Constitution or what the Constitution says. It is in the light of this very helpless situation of the courts, the upholders of the rule of law, that parties should not urge them to interpret section of the Constitution as ousting their jurisdiction when it is not. Ouster clause is a very hard matter of strict law which must be clearly donated by the provision. It is not a subject of speculation or conjecture, in sum, I am of the view that in the circumstances of this case, the wrong procedure adopted is clearly outside the section 188(10) ouster clause, and I so hold.

I am not yet done with section 188. As it is, the section has so much to do with days oscillating between 7 and 14 days. How will the days in the section be calculated? In view of the fact that the procedure in section 138 could be taken at anytime, there is need to know what constitutes a day in law. I should here, quickly make reference to the interpretation Act merely as a guide because it is not applicable to the States. The Act applies to matters in the Exclusive Legislative List and therefore will apply to procedure for the removal of the President and the Vice-President. Fortunately we are not there and God is good that we are not there.

Let me read section 15 of the Interpretation Act, Cap. 192, Laws of the Federation of Nigeria, 1990:

“(1) A reference in an enactment to the time of day is a reference to the time which is one hour in advance of Greenwich mean time.

(2) A reference in an enactment to a period of days shall be construed -

(a) where the period is reckoned from a particular event, as excluding the day on which the event occurs;

(b) where apart from this paragraph the last day of the period is a holiday, as continuing until the end of the next following day which is not a holiday.

(3) Where by an enactment any act is authorized or required to be done on a particular day and that day is a holiday, it shall be deemed to be duly done if it is done on the next following day which is not a holiday.

(4) Where by an enactment any act is authorized required to be done within a particular period which does not exceed six days, holidays shall be left out of account in computing the period.

(5) In this section holiday means a day which is a Sunday or a public holiday.”

I have not taken the trouble to use the Interpretation Law of Oyo State because it is not an issue in this appeal, I thought I should complete the removal picture by setting out the procedure. I think I can stop here on that.

And, finally on Section 188. Subsections (2), (4) and (9) involve some arithmetic. As my arithmetic is not the best, I do not know whether I got the answer in computing one-third or two-thirds of the 32-member House of Oyo State. What I did was to use the number 50 as the half of 100 and approximate one-third or two-thirds of 32 to the nearest number, in other words, what I did to get one-third or two-thirds of 32 members was to approximate to the nearest figures. That is how I came by the figures 11 and 21. I did this because the human body cannot be divided and I cannot be a party to the division of the bodies of the members of the House. I do hope I am not wrong. It will be bad if I am. I do not want to remember the case of Awolowo v. Shagari (1979) 12 NSCC 87. Arithmetic is not the Judge's tool.

Now that I have taken section 188, this is a convenient place to slot in the acts of violation, contravention or breach of the section by the appellants. They are as follows:

1. The holding of the meeting by the appellants at D'Rovans Hotel, Ring Road, instead of on the floor of the House of Assembly.
2. The absence of a constitutional notice of allegation against the 3rd respondent.
3. The non-service of a constitutional notice of allegation against the 3rd respondent.
4. The failure to obtain the constitutionally required two-thirds majority of all the members of the House for the removal of the 3rd respondent.
5. The non-involvement of the Speaker in the so-called proceedings leading to the removal of the 3rd respondent.
6. The unconstitutional procedure adopted in the suspension of Order of the House of Assembly. In other words, the unconstitutional application of Rule 23 of the Draft Rules of the Oyo State House of Assembly.

I should briefly take the above, not before I make an important point that all the above conditions need not be breached before a court of law can hold that the procedure is unconstitutional. Breach of one condition is enough. It appears to me from the intention of

the Constitution that the House of Assembly will sit in the building provided for it and for that purpose. By the provision of section 104 of the Constitution, the House shall sit for a period of not less than one hundred and eighty-one days in a year. By section 108(1), the Governor of a State may attend a meeting of the House of Assembly either to deliver an address on State affairs or to make such statement on the policy of government as he may consider to be of importance to the State.

In my humble view, a community reading of the two sections show that the intention of the Constitution is to make the House of Assembly sit physically in the building provided for that purpose. If I am wrong and the appellants are right, it will then mean that the Governor has to move to a Hotel to address the members anytime the House sits there and he wants to take advantage of section 108. Can that be the intention of the makers of the Constitution? Will that not be ridiculous?

In *Akintola v. Aderemi* (1962) All MLR 440 at 443, it was held that anything done outside the House of Assembly to remove the Governor of the old Western Region was/is a nullity. The Governor is elected by the people - the electorate. The procedure and the proceedings leading to his removal should be available to any willing eyes. And this the public will see watching from the gallery. It should not be a hidden affair in a hotel room.

A Legislature is not a secret organization or a secret cult or fraternity where things are done in utmost secrecy in the recess of a hotel. On the contrary, a Legislature is a public institution, built mostly on public property to the glare and visibility of the public. As a democratic institution, operating in a democracy, the actions and inactions of a House of Assembly are subject to public judgment and public opinion. The public nature and content of the Legislature is emphasized by the gallery where numbers of the public sit to watch the proceedings. Although I concede the point that a Legislature has the right to clear the gallery in certain deliberations for security reasons, I do not think proceedings for the removal of a Governor should be hidden from

the public.

I want to ask a few questions on the mace. Was the mace at the D’Rovans Hotel? If it was there, was that the proper place? If it was not there, can parliamentary decisions, be taken constitutionally without the mace? If the mace was there, who carried it? Was the Sergeant-at-Arms B there? I have still one or two more questions to ask about the D’Rovans Hotel meeting, but I think I should stop here.

As there is no evidence when the meeting was held, I shall not go there. But I should say here that proceedings of a House of Assembly, C should be held in parliamentary hours. This is the period the Rules have provided that the House should sit. On no account should proceedings of a House be held in unparliamentary hours, that is, during the period not provided for in the Rules. For instance, a House of Assembly has no business to perform in the odd hours of mid-night or in early hours of the D morning before the parliamentary hours prescribed by the Rules.

Section 188(2) clearly provides for a notice of allegation which must be presented to the Speaker for action within 7 days of his receipt of the notice. Who received the section 188(2) notice as the Speaker was E not in the D’Rovan Hotel meeting? Can a notice of allegation not presented within the provision of section 188(2) be constitutional?

Related to the above is the service of the notice of allegation to each member of the House. Was the provision complied with in the ab- F sence of the Speaker? Again, who served the notice and when was it served? Was section 188(3) complied with? If so, who conducted the proceedings leading to the motion that the allegation against the Governor be investigated or not?

Was section 188(9) complied with? In other words, end putting it G bluntly in naked figures, did the 18 members that purportedly removed the 3rd respondent constitute two-thirds majority of all the members of the Oyo State House of Assembly? Why was the Speaker not involved in the removal of the 3rd respondent? Was the Speaker constitutionally H removed from his position qua office in accordance with section 92(2)(c) of the Constitution? In the grounds of preliminary objection, the appellants said that the Speaker was removed on 13th December, 2005. How

many members removed him? Did the number make up the two-thirds fraction within the meaning, of section 92(2) of the Constitution? Is the Speaker just one cleaner in the Oyo State House of Assembly that can be removed just for the asking? Can the appellants answer the above questions correctly?

I should now take the issue of locus standi. **Locus standi or standing is the legal right of a party to an action to be heard in litigation before a court of law or tribunal. The term entails the legal capacity of instituting or commencing an action in a competent court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.**

It is the law that to have locus standi to sue, the plaintiff must show sufficient interest in the suit. One criterion of sufficient interest is whether the party could have been joined as a party to the suit. Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship from the litigation. If the Judge is satisfied that he will so suffer, then he must be heard as he is entitled to be heard. See generally Chief Ojukwu v. Governor of Lagos State (1985) 2 NWLR (Pt. 10) 806; Justice Williams v. Mrs. Dawodu (1988) 4 NWLR (Pt. 87) 189; Chief Nwosu v. Administrator-General Bendel State (1999) 2 NWLR (Pt. 173) 275; Egolum v. Obasanjo (1999) 7 NWLR (Pt. 611) 355.

A party who seeks a declaratory relief in the Constitution must show that he has a constitutional interest to protect and that the interest is violated or breached to his detriment. The interest must be substantial, tangible and not vague, intangible or caricature. In ascertaining whether the plaintiff in an action has locus standi, the pleadings, that is, the statement of claim, must disclose a cause of action vested in the plaintiff and the rights and obligations or interests of the plaintiff which have been violated. See Adefulu v. Oyesile (1989) 1 NWLR (Pt. 22) 377; Adesokan v. Prince Adegrolu (1991) 3 NWLR (Pt. 179) 293; Attorney-General of Enugu State v. Avoo Plc (1995) 6 NWLR (Pt. 399) 90; Chief (Dr.) Thomas v. The Most Rev. Olufosoye (1985) 3 NWLR (Pt. 13) 523. The question as to the compe-

tence of a plaintiff to institute an action is gathered from the statement of claim and not from the evidence that is subsequently led. See Ladejobi v. Shodipo (1989) 1 NWLR (Pt. 99) 596.

Where the competence of a plaintiff to institute an action is challenged or is in issue, the onus would be on him to establish that he is competent to sue as plaintiff. See Ezeafulukwe v. John Holt Limited (1996) 2 NWLR (Pt. 432) 511; Pharmatek Industrial Projects Limited v. Trade Bank of Nigeria Plc (1997) 7 NWLR (Pt. 514) 639; Okafor v. Asoh (1999) 3 NWLR (Pt. 593) 35.

In this case, the respondents sought four declarations based on section 188 of the Constitution of the Federal Republic of Nigeria. This apart, the affidavit in support deposed to a number of violations of section 188 by the appellants. A community reading of the reliefs sought by the respondents and the affidavit in support clearly, in my view, vest locus standi on the respondents.

Section 188 mentions the Speaker in very substantial parts, so much so that he has sufficient interest in the protection of the section, a'fortiori the violation, or breach of it. By section 95 of the Constitution, at any sitting of the House, the Speaker will preside, and in his absence the Deputy Speaker will. How can a person who presides over a house under section 95 and who is given specific constitutional function to perform in the procedure and proceedings of removal of a Governor or his Deputy, not have a sufficient interest to commence an action complaining on the violation or breach of section 188?

Learned Senior Advocate tried to push in this matter affecting the Constitution, locus standi in company law when he submitted that the plaintiffs constituted a minority of the members of the House of Assembly and so had no locus standi to commence the action. He also submitted that in the absence of evidence that the plaintiffs were acting on behalf of the whole House, they had no locus standi. Although learned Senior Advocate did not specifically refer this court to the company or commercial law case of Foss v. Harbottle (1834) 2 Hare 461, it will not be a wrong guess if I say that he has that case in mind. After all, Mr.

Lana, learned Attorney-General of Oyo State, submitted in the High Court that the 2nd plaintiff under Rules in *Foss v. Harbottle* cannot institute an action - *Alhaji Imam Abubakar v. Smith* (1973) All NLR 634-634:

What is notoriously referred to as the Rule in *Foss v.*

B Harbottle is in the following terms:

“The company or association is the proper plaintiff in all actions in respect of injuries done to it. No individual will be allowed to bring actions in respect of acts done to the company which could be
C *ratified by a simple majority of its members.”*

Certainly, the above Rule cannot apply in this case which deals with the breach of a section of the Constitution. The House of Assembly cannot, in any sense or imagination, be equated to a company. One is a constitutional body; the other is a corporation in
D business or commerce. The minority element learned Senior Advocate introduced in the issue is, with the greatest respect, neither here nor there. Counsel cannot talk about majority to win over minority in the context of section 188 in order to make the action
E of the minority unconstitutional. That is company or commercial law practice and it is wrong to import that to the determination of locus standi under the Constitution. In the search for locus standi in the Constitution, the searcher will have good company in section
F 6(6)(b) and any specific section in the Constitution, such as section 188 as it relates to this appeal. The searcher will not go outside the Constitution for case law on minority shareholding because that is inapposite.

G Really, why should learned Senior Advocate submit that the plaintiffs “are all busy bodies who are fighting the cause of Senator Rasheed Adewolu Ladoja”? Why should he import the minority principle in company or commercial law in a matter which is clearly constitutional and which the Constitution donates locus standi? Why should he say that the
H plaintiffs are busy bodies or why should he think so? I think I am repeating myself. I think I need the repetition for emphasis. Section 188 does not only mention the Speaker and the members of the House of Assembly, but also gives them functions to perform in the removal

process. Can such persons be branded with any seriousness as busy bodies in a case where the relevant section is violated, contravened or breached? This is quite new learning to me and I do not think I am prepared to learn it, not because I hate to learn or I am not willing to learn, but because there is nothing to learn. In sum, I come to the conclusion that the Speaker, Deputy Speaker and members of the House of Assembly Oyo State have locus standing to commence action in this matter, and I so hold.

That takes me to an examination of the evidence before the trial Judge. The Affidavit of Urgency on pages 1 to 2 of the Record reads in substantial part:

“4. That the subject matter of this suit is for the interpretation of the Constitution of the Federal Republic of Nigeria 1999 vis-à-vis the purported move of the Defendants to impeach the Governor of Oyo State, Senator Rasheed Adewolu Ladoja via a ruse notice of allegations of misconduct purportedly issued in an Hotel in Ibadan which is outside the jurisdiction of Oyo State House of Assembly.

5. That the Defendants herein crystallized their intention of impeachment proceedings on 22nd December, 2005 amidst chaos and violence when they purportedly moved a motion to investigate the so-called allegations of misconduct against Governor Rasheed Adewolu Ladoja without serving the said notice on all the members of the State House of Assembly and without the concurrent consent of the Plaintiffs herein.

6. That it is necessary to bring this action and stop the Defendants timeously in their diabolical moves of creating chaos and anarchy in Oyo State and destabilize the Government machinery.

7. That it is in the interest of justice, fair play and indeed the teeming populace of Oyo State to hear this suit and the accompanying applications speedily and with utmost urgency.

8. That the Defendants will not be prejudiced if the suit and the applications are heard speedily.”

The Affidavit in Support of the Originating Summons on page 8 also reads in substantial part:

“5. That I know as a fact that the 1st Plaintiff herein is the

Honourable Speaker of the Oyo State House of Assembly while the 2nd Plaintiff is the deputy speaker of the House of Assembly respectively.

6. That the 1st and 2nd Plaintiffs herein informed me and I verily believe them that the Oyo State House of Assembly sat at the Assembly Complex Secretariat Ibadan on 13th December, 2005 while the Defendants chose to sit outside the official designated House Chamber located at the House of Assembly Complex instead they sat at D’Rovans Hotel Ring Road Ibadan.

7. That at the purported sitting of the Defendants herein at the D’Rovans Hotel Ring Road Ibadan, the Defendants purportedly suspended the draft rules of the Oyo State House of Assembly Rules and thereby compromised the interest of the Plaintiffs vis-à-vis their right as legislators and also compromise the rules and regulation of the Oyo State House of Assembly.

8. That I was informed by 1st and 2nd Plaintiffs and I verily believe them that the Defendants purportedly issued a notice of allegation of misconduct against the governor of Oyo State, Senator Rasheed Adewolu Ladoja with the purpose of commencing an impeachment proceedings against the latter.

9. That the Defendants further on 22nd December, 2005 without following the laid down rules and regulations and the Constitution of the Federal Republic of Nigeria purportedly passed motion calling for the Investigation of the alleged allegations of misconduct against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State without the concurrent consent approval of the two-third majority of the 32 (thirty-two) members House of Assembly.

10. That the issuance of the purported notice of allegations of misconduct by the Defendants was also done not only outside the designated official venue of the Assembly but was done without the concurrent consent of the 32 (thirty two) members House of Assembly.

11. That I was informed by the 1st and 2nd Plaintiffs and I verily believe them that the required service of the purported notice of allegations of misconducts against Governor Rasheed Adewolu Ladoja which the Defendants issued from D’Rovans Hotel was not served on each mem-

ber of the House of Assembly of Oyo State.

12. *That I was informed by the Plaintiffs herein and I verily believe them that the business of the House of Assembly of Oyo State is meant to be conducted within the House of Assembly Chambers and/or on the floor of the parliament.*

B

13. *That I know as a fact and by virtue of my profession that serious issues of law and the Constitution have been raised in the originating summons.*

14. *That I know that this case involves the interpretation of law vis-à-vis the interpretation of the Constitution of Nigeria 1989.*

C

15. *That it is in the interest of justice and democracy to grant the reliefs in the originating summons.*

16. *That the Defendant will not be prejudiced in any way if the reliefs in the originating summons are granted."*

D

Before I deal with other evidence, this is a convenient place to take the objection of learned Senior Advocate to paragraph 6 to 11 of the affidavit in support. He has attacked the paragraphs in the light of sections 73, 74, 86, 88, 89 and 113(b) of the Evidence Act. Relying on sections 73, 74 and 113(d) of the Evidence Act, learned Senior Advocate submitted that the facts proffered as evidence in the affidavit in support did not qualify as admissible evidence to justify cognizance and reliance on them for the purpose of the originating summons.

E

While section 73 provides that no fact of which the court must take judicial notice need be proved, section 74 provides for situation or instances where the court can take judicial notice of facts. These relevantly vindicate the course of proceeding of the House of Assembly of the States of Nigeria. Section 113(d) provides "*for the proceedings of a State House of Assembly by the minutes of that body or by published Laws or by copies purporting to be printed by the order of Government.*" Attacking paragraphs 6, 7 and 11(a) specifically, learned Senior Advocate submitted that the respondents ought to have produced Hansard of the House to show when the defendants sat, when they left the House to sit somewhere else and who were the members that sat as the House.

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G

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It is my view that the submission of learned Senior Advocate is on

the possibility that the facts in the affidavit in support are true and in their element of truth cannot be admissible because of the essentially parol element in them. That explains why he queried the absence of the Hansard. To that extent, counsel cannot be said to have contradicted the affidavit in support, rather he accepted it but says it has not materially advanced the case of the respondents. **It is good law that unchallenged or uncontradicted oral evidence is admissible to establish the existence of a fact on which it is based.** See *Alalade v. ICAN* (1975) 4 SC 59; *Okupe v. Ifemembi* (1974) 3 SC 97; *Ajao v. Ashiru* (1973; 11 SC 23; *Odulaja v. Haddard* (1973) 11 SC 357. Where oral evidence is cogent and relevant, there is no need for documentary evidence as the oral evidence has properly covered the entire evidential scene. Hansard, though a useful documentary evidence of the proceedings of the House of Assembly, is not always necessary for proof of any aspect of the proceedings. A cogent oral evidence is enough. In this case, the affidavit in support deposed to the facts mentioned by counsel in paragraph 4.8 of the appellants' brief, depositions which were enough for appellants to react one way or the other.

Draft Rules, like laws, need not be exhibited in an affidavit. Counsel can make use of them when necessary Counsel can also call for them when necessary. They need not be exhibited for the court to take judicial notice of them. The Evidence Act does not say that Rules should be exhibited to enable the court take judicial notice of them.

Section 86 provides that every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true. By section 88, when a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he must set forth explicitly the facts and circumstances forming the ground of his belief. And section 89, which relates to section 88, provides that when such belief is derived from information received from another person,

the name of the informant should be stated and reasonable particulars should be given respecting the informant, and the time, place and circumstances of the information.

I have carefully read paragraphs 8, 9, and 10 of the affidavit in support and I am unable to agree with learned Senior Advocate B that the paragraphs offend sections 86, 88 and 89 of the Evidence Act. I do not see any extraneous matter by way of objection, prayer, legal argument or conclusion. I see on the contrary, factual statements. In paragraph 8, Sunday Aborisade, the deponent, deposed C to the source of his belief as the 1st and 2nd plaintiffs and said that he believed them, thus complying with section 88 of the Act. Paragraph 9 cannot be said to be an extraneous matter by way of objection, prayers or legal argument. On the contrary, the paragraph D contains factual statements. So too, paragraph 10 thereof. In sum the objection on the paragraphs of the affidavit in support fails. The issue was not raised in the Court of Appeal and so cannot be raised here without leave of the court. No such leave was sought. From whatever way one looks at the objection, it fails. E

With that parenthesis on the admissibility of the paragraphs in the affidavit in support, vide sections 86, 88 and 89 of the Evidence Act, I return to the examination of the evidence before the learned trial Judge.

The appellants in their preliminary objection of 23rd December, F 2005 on jurisdiction gave the following seven grounds:

“(a) By virtue and under the Provisions of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Oyo State House of Assembly as represented by the Defendants who are in the majority, have power to regulate its own procedure including the procedure for summoning and recess of the House. G

(b) By the combined effects of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Defendants/Applicants herein who are in the majority may act notwithstanding any vacancy in the membership of the House. H

(c) By virtue of Section 188(10) of the 1999 Constitution of the Federal Republic of Nigeria, no court of law can entertain any issue

relating to the proceedings or determination of a Panel or the House of Assembly or any matter relating to impeachment proceedings.

(d) *The 1st and 2nd Plaintiffs have no necessary standing to institute this action in that the two of them are impostors. The 1st Plaintiff B was removed from office as Speaker of the House of Assembly on 13th December 2005 while the 2nd Plaintiff was never made the Deputy Speaker, and was indeed suspended member of the Oyo State House of Assembly.*

(e) *Rule 23 of the Draft rule of Oyo State House of Assembly C made pursuant to Section 101 of the 1999 Constitution vested in the Defendants/Applicants herein the power to suspend any order of the House of Assembly and to wit suspend any member of the House. The 2nd Plaintiff/Respondent remains a suspended member of the Oyo State House of Assembly along side six others.*

(f) *Legislative Proceedings is neither subject to Litigation nor D justiceable.*

(g) *The claims of the Plaintiffs/Respondents herein neither discloses any reasonable cause of action against the Defendants/Applicants nor E discloses the interest which the Plaintiffs/Respondents intends to protect which affect them directly.*

(h) *The suit of the Plaintiffs/ Respondents is an abuse of the process of this Honourable Court.”*

F I will return to this later in the judgment.

In a further affidavit dated 28th December, 2005, Mr. Sunday Aborisode, deposed to a letter written by the 1st respondent in reply to a press release on the purported proceedings of the Oyo State House of Assembly sittings in the Parliamentary Hall on 22nd December, 2005. I G reproduce the letter written to the Acting Chief Judge of the State, for case of reference:

“Your Lordship Sir,

My attention had been drawn to a paid advertisement contained H in the Nigerian Tribune of today the 2nd day of December, 2005 on the above stated subject matter.

I need to officially inform your Lordship

(i) that the press release did not emanate from Oyo State Assembly

at Parliament Buildings as fraudulently claimed in the paid Advert;

(ii) that due to security breaches by some hoodlums at the Parliament Buildings yesterday the 22nd December, 2005, there was no any legislative business as mischievously claimed by the author of the press release;

(iii) that the House stood adjourned to 28th December, 2005 from its Sittings of the 21st December, 2005 which the said author acknowledged and avoided and I did not order for the re-call sitting of the House and;

(iv) assuming without conceding, that some members met at D'Rovans Hotel, Ring Road, Ibadan for a press briefing, unimpeachable information, disclosed that only six Honourable members attended the press briefing, the suspended author inclusive.

Your Lordship, can we substitute the provision of S.188(3)(4) of the 1999 Republican Constitution which is expected to be observed by a 32 members House with a press briefing? The answer is an EMPHATIC NO! S.188(3)(4) of the 1999 Constitution reads thus:

“Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly... **THE HOUSE OF ASSEMBLY SHALL RESOLVE BY MOTION, WITHOUT ANY DEBATE WHETHER OR NOT THE ALLEGATION SHALL BE INVESTIGATED.**”

S.188 (4)

“A motion of the House of Assembly that the allegation he investigated **SHALL NOT BE DECLARED AS HAVING BEEN PASSED UNLESS IT IS SUPPORTED BY THE VOTES OF NOT LESS THAN TWO-THIRDS MAJORITY OF ALL THE MEMBERS OF THE HOUSE OF ASSEMBLY.**”

Your Lordship, your attention needs to be drawn to the status of the author of the said paid advertisement of today, i.e. Hon. Eesuola Ahmed Babatunde

(a) he is one of the five suspended Honourable members of the House vide the resolution of 21st day of December, 2005 and its public notice published in the Nigerian Tribune of 22nd December, 2005. A copy is hereby attached and that the said author as confessed on the said paid

advertisement impersonated Civil Servant i.e. the position of Permanent Secretary of...

(b) the House who doubles as the Clerk of the House.

In view of the above and the DISCLAIMER CONTAINED IN B THE Nigerian Tribune of 15th December, 2005 disclaiming the said author Honourable, your Lordship is hereby urged to disregard any purported resolution springing only on pages of Dailies without any official proceedings or motion as same was made without authority of the appropriate Officers i.e. my humble self and the Clerk of the House who are C both presently in office. Order 6 Rule 4 of the Oyo State House of Assembly, is self explanatory.

I count a lot on your Lordship's maturity and wealth of experience."

D It must be mentioned that the further affidavit was served on the appellants vide the address for service at page 32 of the Record. This means that the contents of the letter to the Acting Chief Judge were known to the appellants.

E I now move to section 16 of the Court of Appeal Act. The section reads:

"The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in appeal, and F may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the G court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the H purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with that case in accordance with the powers of that court or in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard

by a court of competent jurisdiction.”

Section 16 is one long sentence of 206 words with seven comas and the traditional one sentence full stop. It also consists of eight “ors” - the disjunctive particle conjunction and seven conjunctive “ands”. The disjunctive particle generally expresses or marks an alternative in a statute. It indicates or gives a choice of one among two or more things. The word plays a functional role and therefore, a functional word so to say to depict or show an alternative between different or unlike things. There are instances where the word creates a multiple rather than an alternative obligation. In the section 16 context, the word basically expressed or marks an alternative. The word, therefore, has an element of expansiveness or expansibility in terms of the powers vested in the Court of Appeal by the section. The above brief exercise in diction is to identify the broadness or largeness of the section. But this is not to say that the section is as wide as an ocean. No. It has limitations.

The Courts have construed or interpreted the section in its broadness or largeness. In *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264, Karibi-Whyte, JSC, said at page 274:

“Concisely stated, the powers of the Court of Appeal with respect to the determination of appeals before it is by way of re-hearing. The word re-hearing in the context means a hearing on printed records by re-examining the whole evidence both oral and documentary tendered before the trial court and forwarded to it. It means an examination of the case as a whole. The Appeal Court is entitled to evaluate the evidence and may reject conclusions of the trial. Judge from facts which do not follow from the evidence or may be regarded as perverse... Those are very wide powers which enable the appellate court to exercise all the powers of a court of first instance.”

In *Okoye v. Santilli* (1990) 2 NWLR (Pt. 130) 172, Agbaje, JSC, said at page 207:

“By virtue of Section 16 of the Court of Appeal Act, the lower court has all the powers of the trial, court, i.e. the powers the Federal High Court has in the matter before it which is now before us on appeal. So, in my view, the lower court, in order to settle completely and finally

the matters in controversy between the parties to this appeal in the matter before the lower court and in order to avoid multiplicity and legal proceedings concerning any of those matters, can grant all such remedies as any of the parties may appear to be entitled to. However in my judgment
 B *a party will appear to be entitled to such a remedy only after a claim to it has been plainly made out though not formally claimed and dealt with according to the relevant principles governing such a claim if it has been formally made.”*

C In *Union Bank of Nigeria Limited v. Fajobe Foods and Poultry Farms* (1994) 5 NWLR (Pt. 344) 325, it was held that the section gives the Court of Appeal amplitude of power to deal with any case before it on appeal, and the power includes the jurisdiction of a court of first instance; as it is in this case, in *Chief Igiehon Orogie* (1993) 2 NWLR (Pt.
 D 276) 398, the court held that the section confers wide powers on the court to enable it make orders which the High Court would have made in a matter. See further *Chief Ejowhomu v. Edok-Eter Mandilas Limited* (1986) 5 NWLR (Pt 39) 1; *Igweshi v. Atu* (1993) 6 NWLR (Pt. 300)
 E 484; *Chief Uzokwu v. Igwe Ezeonu II* (1991) 6 NWLR (Pt. 200) 708; *Kokoro-Owo v. Ogunbambi* (1993) 8 NWLR (Pt. 313) 627.

The Court of Appeal can exercise its section 16 power if only the High Court has jurisdiction in the matter. Accordingly, jurisdiction of the High Court is a precondition for the invocation of the provision of section 16 by the Court of Appeal. In the more recent case of *Professor Olutola v. University of Ilorin* (2004) 18 NWLR (Pt. 905) 416, this court held that the Court of Appeal can exercise
 G **its power under section 16 if only the trial court has jurisdiction in the matter.** See *NICON v. Power and Industrial Engineering Co. Ltd.* (1990) 1 NWLR (Pt. 129) 697; *Faleye v. Otapo* (1995) 3 NWLR (Pt. 381) 1.

H The section commences, in the following terms:
 “*The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal.*”

The word “real” in the context means actual. It also means true. The word “question” contextually means the issue involved in

the appeal. The word “controversy” means dispute. Accordingly, the real question in controversy means the actual issue in dispute in the appeal. The real issue in the appeal must be clearly donated by the ground or grounds of appeal, since that is the legal basis of the complaint by an appellant. Therefore, before a section 15 power could be invoked the determination of the real question in controversy in the appeal, that question must be a ground of appeal.

In *Nneji v. Chief Chukwu* (1988) 3 NWLR (Pt. 81) 184, this court held that the general powers conferred on the Court of Appeal by section 16 includes the power to make any order necessary for determining the real question in controversy in the appeal. In interpreting the section, Oputa JSC, said at page 206:

“It is thus clear that the prior responsibility of the Court of Appeal (as well as all other courts) is to hear the parties out, not to shut out any party, to hear the merits of the case on appeal and decide according to those merits.”

The real question in controversy in this appeal is whether the removal of the 3rd respondent complied with section 188 of the 1999 Constitution or whither it was in violation or in breach of that section. The grounds of appeal and their particulars before the Court of Appeal clearly donated the real question in controversy. And so the coast was clear for the Court of Appeal to decide on the real question in controversy by invoking its section 16 power.

What did the Court of Appeal say on the section? Ogebe, JCA, after citing the decision of this court in *Attorney-General of Anambra State v. Okeke* (2002) 12 NWLR (Pt. 782) 575, said in his judgment at page 487 of the Record:

“Since the facts of the case are not disputed and what is to be decided is purely interpretation of Section 188 of the 1999 Constitution, this is an appropriate case for us to resolve the entire case in this court under Section 16 of the Court of Appeal Act.”

Chukwuma-Eneh, JCA (as he then was) said at page 534:

“I think I should proceed to determine the matter finally, having exhaustively construed the provisions of Section 188 in all its ramifica-

tions. It will be anachronistic to remit the case to the court below at this staged to start *de novo* in another court. I am aware that under Section 16 of the Court of Appeal Act that in this situation this court has all the powers of the court below in this regard to hear and determine the matter.”

Ogunbiyi, JCA, added the following on the section at page 551:

“However, and despite the error so committed, by the provision of section 16 of the Court of Appeal Act, this court can assume jurisdiction and wear the shoes which the lower court refused to put on. This I say in view of the nature of the claim the reliefs sought for, which borders purely on the interpretation of section 188 of the Constitution of the Federal Republic of Nigeria, 1999.”

Mikailu, JCA, gave a final helping hand when he said at page 560:

“I think considering the wide powers given this court under section 16 of the Court of Appeal Act as well as Order 1 Rule 19(3) and (4) and Order 3 Rule 23(1) of the Court of Appeal Rules, 2002 this court can proceed and consider the only affidavit and give its judgment thereof.”

Learned Senior Advocate for the appellants, Mr. Ayanlaja, argued that as there was no material before the trial court upon which the High Court could have determined the case on the merits, there was no basis for the assumption of full jurisdiction by the Court of Appeal under section 16 to take over the proceedings and give judgment which the lower court could have, but refused to give.

With respect, I do not agree with learned Senior Advocate. I have itemized in this judgment evidence available in the trial court, which in my view, was enough for the Court of Appeal to invoke its section 16 power. For ease of reference, I can name them here, though at the expense of prolixity. I should take the liberty of this second exercise to add to the list: affidavit of urgency, affidavit in support of the originating summons, the originating summons itself, motion *ex-parte* for order of interim injunction and affidavit in support, notice of preliminary objection with particular reference to the eight grounds of objection, motion on notice for an

order of interlocutory injunction and affidavit in support; further affidavit in which the respondents deposed to the letter written by the 1st respondent to the Acting Chief Judge in respect of a press release and the totality of the submissions of learned counsel in the High Court, particularly those Mr. Lana, learned Attorney-General of Oyo State, when counsel freely made reference to the reliefs sought by the respondents and the affidavit in support, without objecting to their veracity or authenticity. B

There is still one more aspect when section 16 is invoked and it is to facilitate the speedy administration of justice. It is designed to avoid multiplicity of proceedings and hearings. Instead of sending the case back to the trial Judge for a trial, section 16 empowers the Court of Appeal to assume the jurisdiction of the trial court and determine the real question in controversy. This is to save the much needed time in the administration of justice. C D

The Court of Appeal made reference to this important aspect of time with due regard to the protection of the res when the court invoked section 16. Ogebe, JCA, said at page 487 of the Record: E

“It is necessary for us to do so in view of the fact that the res of the dispute, that is who is the rightful Governor of Oyo State before the tenure ends in May next year should be determined without further delay.” F

Chukwuma-Eneh, JCA (as he then was), said at page 533:

“In conclusion, there is clearly an urgent need to dispose of this matter as time is of the essence. The office of Governor in this dispensation is bound to expire by effluxion of time on 29th May, 2007 that is in a couple of months from now that to allow this case to run up and down the hierarchy of the courts will surely defeat the course of justice.” G

I will return to the need to expedite or better, accelerate the hearing of this matter later in the judgment.

I realize that I have quoted profusely from the judgment of the Court of Appeal on section 16 of the Court of Appeal Act. I lack the law - substantive or adjectival - to fault the above position ably taken by the Court of Appeal on their section 16 power, which is the counterpart of H

section 22 of the Supreme Court Act. Four out of the five justices examined the section thoroughly and I cannot see my way clear in disagreeing with them. They are correct, very correct indeed.

Learned Senior Advocate seems to make heavy weather of the B fact that the High Court did not embark on a determination of the merits of the case and that the Court of Appeal was in error in doing so on appeal. He cited *Garuba v. KIC Limited* (2005) 5 NWLR (Pt. 917) 160 at 180. At page 180 of the judgment, Oguntade, JSC, said:

C *“The 1st respondent’s counsel in its brief rightly in my view submitted that the power of the Court of Appeal under section 16 of the Court of Appeal Act was not at large or unlimited. Counsel submitted that in the exercise of its power under section 16, the court below could only have awarded the same remedies or reliefs which was open or avail-*
D *able to the trial court to grant to a party.”*

The position of the law is correctly stated. This court had earlier dealt with the limits of section 16. That was in the case of *Attorney-General v. Okeke* (2002) 12 NWLR (Pt. 782) 575 where Ayoola, JSC, E said at pages 606 and 607:

“It is not disputed that the Court of Appeal has ample powers under Section 16. However, no one will suggest that those powers are unlimited? The question is what are the limits of those powers? Such F limits are to be determined case by case and not by a priori general propositions.”

There can hardly be a statute which vests power or jurisdiction on a court limitlessly, or without limit. Section 16 is not an exception, or better, should not be an exception. It has limits as it
G **must have limits. But as rightly pointed out by Ayoola, JSC, the limits will be determined case by case, that is, in the light of the peculiar facts of each case, in my humble view, this is a good and clear case for the invocation of section 16. I seem to be losing sight**
H **of the point made by learned Senior Advocate for the appellants that I was trying to pursue. I now remember it. It is the fact that the Court of Appeal invoked section 16 when the learned trial Judge did not embark on a determination of the merits of the case. I**

think I should call in aid what Karibi-Whyte, JSC, said in *Jadesimi v. Okotie-Eboh* (supra) at page 276:

“In the appeal before us the trial Judge ought, although in the circumstances he need not, to have heard the application for stay of proceedings before dismissing the application. The Court of Appeal B was quite competent to determine the application even though without hearing in the court below. There is the jurisdiction and competence to do so.”

Learned Senior Advocate submitted that the Court of Appeal C wrongly misapplied the principles enunciated in *Okeke* to this case because Ayoola, JSC, held that the power of the Court of Appeal under section 16 is limited. With respect, I do not agree with learned counsel. Ayoola, JSC, as seen from the above held that the limits of section 16 will be determined case by case, it is in that circumstance D that the Court of Appeal held and rightly, in my view, that the section was applicable in the appeal before the court. In other words, the Court of Appeal did not see any limits in section 16 to stop the application of the section in the appeal before the court. I E do not see anything wrong with that conclusion deserving the hammer of counsel.

I think I can now drop section 18 for good and take the issue of fair hearing aggressively canvassed by learned Senior Advocate for the F appellants. He made a great play of the principle. Section 36 of the 1999 Constitution provides for the fair hearing in the determination of the civil rights and obligations of a person. The constitutional provision mainly stems or germinates from two common law principles of natural justice. G They are *audi alteram partem* and *nemo iudex in causa sua*. It is the first of the two that is relevant to this appeal. The meaning of the latinism is “hear the other side; hear both sides. No man should be condemned unheard”. See Black’s Law Dictionary, 6th edition, page 131. What the rule or doctrine means is that the parties must be given equal opportunity H to present their cases to the court and that no party should be given more opportunity or advantage in the presentation of his case. See generally *LPDC v. Fawehinmi* (1985) 2 NWLR (Pt. 7) 300; *Onwumechili v.*

Akintemi (1985) 3 NWLR (Pt. 13) 504; Garba v. The University of Maiduguri (1986) 1 NWLR (Pt. 16) 550.

The crux of the complaint on lack of fair hearing is that the appellants were not given the opportunity to file their counter affidavit and contest the originating summons on its merit. Counsel cited Elabanjo. v. Dawodu (supra) and Okafor v. Attorney-General (supra) and three other cases. The two cases cited by learned Senior Advocate involved writ of summons where pleadings play a very important role. The cases are therefore distinguishable from this case which involved affidavit evidence only and by the very nature of originating summons; the facts do not play the same role as an action filed by a writ of summons.

Learned Senior Advocate for the appellants give the impression that the issue on non-compliance with section 188 was not before the court and that court ought to have restricted itself to the appeal before it. I think I touched the submission. I should perhaps complete it. Apart from the grounds of appeal, the following issues were formulated by the respondents, as appellants in the Court of Appeal:

“1. Having regards to the originating summons filed before the lower court, including the issues for determination and the reliefs sought therein, whether or not the lower court was not in grave error to have declined jurisdiction to hear the plaintiff’s case and going ahead to dismiss same.

AND/OR

2. Whether the lower court is precluded from looking into matters relating to non-compliance with the mandatory provision of section. 188(1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Constitution of Federal Republic of Nigeria, 1999 by virtue of section 188 (10) of the same Constitution.”

In paragraph 11.1 of the brief, the appellants as respondents in the Court of Appeal asked for the following relief:

“... Your Lordships are urged to allow this appeal, set aside the ruling of Ige, J, dated 28th December, 2005 and considering the fact that this is a purely constitutional matter calling strictly for the interpretation of section 188 of the Constitution, give judgment for the plaintiffs, or, in

the alternative, remit the case to another Judge of the Oyo State High court to hear and determine it on an accelerated basis on the grounds either canvassed in this Brief, including but not limited to the fact that..."

The brief thereafter enumerated eleven grounds for the Court of Appeal to grant the relief. B

Can any relief seeking court process be clearer than the above? Can this court come to the conclusion in the light of the above, that the main issue of non-compliance with section 188 of the Constitution was not before the Court of Appeal? If it was not there, where was it? I do not think the appellants can answer the above questions correctly because the point they made in paragraph 6.8 of their brief is very wrong and I so hold. The case of *A.W. Nigeria Limited v. Supermaritime Nig. Ltd.* (2005) 6 NWLR (Pt. 922) 563 cited by learned Senior Advocate is, with the greatest respect, most irrelevant. C D

What is the complaint about fair hearing in the Court of Appeal? The appellants as defendants/respondents in the Court of Appeal filed a comprehensive brief of fifteen pages under the signature of learned Senior Advocate for the appellants. In that brief, the following single issue E was formulated for determination:

"Whether the court below was right in holding that the jurisdiction of the Court has been ousted by section 188(10) of the Constitution of the Federal Republic of Nigeria." F

In the brief, counsel raised a Respondents' Notice to uphold the ruling of the learned trial Judge on four additional grounds apart from that on which the ruling was based.

Although the brief purposely and cunningly restricted the arguments to the issue of jurisdiction, the brief of the appellants in the Court of Appeal, who are now the respondents here, covered this merits of the case. And that leads me to an important question. What is the purpose of a respondents' brief in the Court of Appeal? Order 6 rule 4(2) of the Court of Appeal Rules reads: G H

"The respondent's brief shall answer all material points of substance contained in the appellant's brief and contain all points raised therein which the respondent wishes to concede as well as reasons why the

appeal ought to be dismissed. It shall, mutatis mutandis, also conform with rule 3(1), (2), (3), (4) and (5) of this Order.”

See Oba Aromolaran v. Oladele (1990) 7 NWLR (Pt. 162) 359; Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266; Weide and Co B (Nig) Ltd. v. Weide and Co. Hamburg (1992) 6 NWLR (Pt. 249) 627; Alade v. Akande (1994) 5 NWLR (Pt. 345) 418; Okeke v. Attorney-General Anambra State (1997) 9 NWLR (Pt. 519) 123; Yahaya v. Oparinde (1997) 10 NWLR (Pt 523) 126.

C *If the* appellants decided not to respond to the brief of the respondents in the Court of Appeal, they cannot blame the Court of Appeal for their decision. This is because they had all the time in the world to respond to the case presented by the respondents who were the appellants in the Court of Appeal. They were running away (I will not say trickishly D shying away) from the truth of the matter and knocking at the corridors which were peripheral. A party who decides to present his case miserly, cunningly, or by deliberate installments to win in the litigation has himself to blame when the strategy backfires. I will return to this later.

E Learned Senior Advocate for the 1st and 2nd respondents cited the case of Orugbo v. Una (supra), with particular reference to what I said at page 211 and 212. I should permit myself to quote the passage:

“It has become a fashion for litigants to resort to their right to F fair hearing on appeal as if it is a magic wand to cure all their inadequacies at the trial court. But it is not so and it cannot be so. The fair hearing constitutional provision is designed for both parties in the litigation and the court as the umpire, so to say, has a legal duty to apply it in the litigation, in the interest of fair play and justice. The courts must not G give a burden to the provision which it cannot carry or shoulder. I see that in this appeal. Fair hearing is not a-cut-and-dry principle which parties in the abstract always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court. Only the facts of the case can influence and determine H the application or applicability of the principle. The principle of fair hearing is helpless or completely dead outside the facts of the case.”

Like Orugbo, I see such a situation in this appeal. And it is sad that

it is so. A party may enjoy in the euphoria of a cunning or smart conduct in the litigation. The truth is that such conduct may not last the length of the litigation because at the end of the day, and here restricting myself to the end of the litigation day, the court may find out the cunning and smart conduct. That is what has happened in this case. B

I said it in the past and I will say it here again that the duty of the court, trial and appellate, is to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to make sure that a party takes advantage of the atmosphere or environment by involving C himself in the fair hearing of the case. A party who refuses or fails to take advantage of the fair hearing process created by the court cannot turn around to accuse the court of denying him fair hearing. This is not fair to the court, and counsel must not instigate his client to accuse the court of denying him fair hearing. After all, there is the adage that the best the D owner of the horse can do is to take it to the water. He cannot force it to drink the water. The horse has to do that itself and by the act of sipping. If the horse is unwilling to sip, that ends the matter. The horse will not blame anybody for death arising from lack of water or hydrate. E

Counsel for the plaintiffs in the High Court, Mr. Adeniyi Akintola, SAN, urged the court to follow the procedure suggested by the Court of Appeal in *Senate President V. Nzeribe* (2004) 9 NWLR (Pt. 878) 251. The Court of Appeal held in the case that the decision of a court on F whether or not to hear parties on an objection to its jurisdiction over a matter separate from a hearing of the merits of the suit lies within the discretion of the court, in a case brought by originating summons where the whole of the evidence required to determine the merits of the case is G in the form of affidavit evidence already filed before the court, it may be prudent to hear together the arguments as to jurisdiction and the merits of the case. Where, however, it is a case involving the taking of evidence of several witnesses as to the merits of the case, it is wise to first separately dispose of the issue of jurisdiction. H

Mr. Latinwo submitted in the High Court that the implication of raising a preliminary objection is that all the facts deposed to by the applicant shall be considered. If the originating summons is to be taken, the

defendants must file a counter affidavit and where no counter affidavit has been filed it is only the preliminary objection that will be taken, counsel submitted.

The learned trial Judge in his ruling at page 39 of the Record said:

B *“Having listened to the arguments of learned counsel on both
sides, I am of the view that the facts and circumstances of the Nzeribe’s
case relied upon by Mr. Akintola are clearly distinguishable from the
present case. The originating summons in Nzeribe’s case was on determi-
C nation as to membership whereas all the issues for determination in the
originating summons in this case are basically on points of law in which
no affidavit evidence is required. In the circumstances therefore, it is my
view that the proper thing to do in the circumstance is to take the Notice
D of preliminary objection first because its success or failure will determine
the fate of the originating summons.”*

The decision of the Court of Appeal in Senate President v. Nzeribe (supra), given by Oduyemi, JCA and Oguntade JCA (as he then was), in my humble view, is very brilliant and sound and I expected the learned
E trial Judge to follow it. The dichotomy is well taken procedurally and it was most relevant to this case which was also commenced by originat-
ing summons. Because the learned trial Judge refused to follow the deci-
sion in Senate President v. Nzeribe (supra) with the help of Mr. Latinwo,
F counsel for the defendants, the golden opportunity offered by Mr. Akintola was lost and the victim of it all where we are now and what we are
seeing. The point I am struggling to make as it affects or relates to fair
hearing is that the fair hearing was dropped at the footsteps of the appel-
G lants by Mr. Akintola in the case of Senate President v. Nzeribe (supra), but they did not take advantage of it, most probably because they had no
valid defences by way of a counter affidavit. Can such a party really
complain of breach or lack of fair hearing? And what is more, the appar-
ent distinction made by the learned trial Judge materially vindicated the
H decision of the Court of Appeal as it related to originating summons as a
court process which is basically on points of law. The Court of Appeal
held in the case (if I may repeat for emphasis) that a matter brought by
originating summons where the evidence required is in the form of affi-

davit, it may be prudent to hear together the arguments as to jurisdiction and the merits of the case. I had earlier pointed out that the cases cited by learned Senior Advocate on the need to hear the preliminary objection first were inapposite as they involve writ of summons.

It should be noted that the Court of Appeal conceded that much in Senate President v. Nzeribe, that is, in cases filed by writ of summons. Although the decision of Senate President v. Nzeribe is merely of persuasive authority, I will certainly persuade myself to follow it, if it was cited to us in the Supreme Court. Of course, I am not surprised that the appellants as defendants in the High Court did not urge that court to follow it. After all, delay in this matter was the golden fish in their aquarium. I take, the issue of delay now.

The appellants clearly had their heads, minds and eyes on the 29th May, 2007 and they assiduously worked towards that day when the result in this matter will be wiped out. That, to the appellants, was the red-letter day and they needed that day to come very badly. On the contrary, the respondents and all the three courts, that is, the High Court, the Court of Appeal and this court, were conscious of the fact that this litigation was very much liable to time and should be completed within the time frame, looking at 29th May, 2007 as the important and almighty day. And so, I see two situations which were diametrically opposed, one to delay the proceedings and the other to expedite the proceedings. I do not think I have made myself clear. I should perhaps do so by taking specific events sequentially. First on the side of the appellants to slow down the proceedings:

1. I realize that the appellants did not enter appearance, in this matter. Learned Senior Advocate for the appellant said that in the brief. I have the impression that such was an intentional act to delay the proceedings.

2. Preliminary objection on jurisdiction was filed without formally entering appearance and not taking advantage of the decision of the Court of Appeal in Senate President v. Nzeribe. Instead of following that decision, they relied on cases commenced by writ of summons at page 31 of their brief.

3. In an application for abridgement of time within which the plaintiffs/appellants in the Court of Appeal can file their brief, the defendants/respondents in that court, who are the appellants in this court, insisted on their statutory 45 days, which Fabiyi, JCA, granted them. In a case where time is the essence, I expected the appellants to bend backwards to file their brief well under 45 days. After all, there is nothing sacrosanct about 45 days which a party can waive.

4. By a motion on notice dated 8th February 2005, the appellants as respondents in the Court of Appeal prayed for an order striking out the Notice of Appeal on grounds of incompetence. In his Ruling of 2nd March, 2006, Fabiyi, JCA, held that the appeal is competent? He said at page 193 of the Record:

“In short, the appeal is competent and this court is imbued with requisite jurisdiction to deal with it. The application challenging competence of the appeal is hereby refused. It is accordingly dismissed.”

In her contribution, Augie, JCA, said at page 196 of the Record:

“In this case, the Appellants filed a simple application to abridge time within which to file briefs of argument, and one day’s journey has taken us weeks to arrive at our destination because of this flimsy and nonsensical objection filed by the 2nd-19th Respondents, which has only succeeded in wasting the court’s time and resources and no more.”

5. On 9th May, 2006, the appellants as applicants filed a motion in the Court of Appeal for an order staying further proceedings in the Court of Appeal in respect of the respondents’ appeals, pending the hearing and determination of the appellants’ appeal to the Supreme Court.

6. On the same day of 9th May, 2006 the appellants as applicants filed another motion for an order striking out the brief of argument on behalf of the interested party/appellant, who is Senator Ladoja.

7. On 5th June, 2006, the appellants as applicants in the Court of Appeal filed a notice of discontinuance/withdrawal of their motion for stay of proceedings filed on 9th May, 2006.

8. On the same day of 5th June, 2006, the appellants filed a motion in the Supreme Court for an order staying further proceedings in the Court of Appeal in respect of the respondents’ appeals pending the hear-

ing and determination of the appellants' appeal to the Supreme Court.

9. In a motion filed on 13th June, 2006, at the Court of Appeal, the applicants asked for an order staying further proceedings in the Court of Appeal in Appeal No. CA/1/21/2006 pending the hearing and determination of the Applicants' motion for stay of proceedings pending at the Supreme Court in Appeal No. SC/112/06 and SC/116/06 involving all the parties in the case.

Abdullahi, PCA, was not quite happy with the plethora of motions. He said at page 446 of the Record:

"The Applicants for reasons best known to them discontinued and withdrew the application by notice dated 3/6/06... I am afraid this classification has in my view added some smokescreen to the real intention of this application before us..."

The Court of Appeal granted the motion not so much for the merit but more because the court was not prepared to rush the matter, "*being a constitutional matter on such weighty issues*". I entirely agree with Abdullahi, PCA.

10. On 6th July, 2006 the appellants as applicants argued their motion for further stay of proceedings, which this court refused. Katsina-Alu, JSC, in his short ruling said:

"I have carefully examined the motion for further stay of proceedings and have considered the submissions of learned Senior Counsel for the Appellants-Applicants and I do not see any way in granting it in the light of the decided cases."

And so, the courts were treated to a cocktail or harvest of motions and motions galore, basically aimed at slowing down the proceedings and frustrating the hearing of the merits of the matter. Can such a party complain about fair hearing when it did not show or extend fairness to the adverse party and the proceedings? I will return to this.

On the contrary, the courts were clearly on the side of expediting the case so that it could be heard before the 29th May, 2007. Learned trial Judge was on the side of the speedy hearing of the matter, though he took the wrong procedure.

The appeal was argued in the Court of Appeal on 26th September,

2006 and judgment was delivered on 1st November, 2006. Ogebe, JCA, was conscious of the time element or time factor in the case and that was one reason why he correctly invoked section 16 of the Court of Appeal Act and in the light of the evidence before the court.

B On our part, the appeal came before us on 21st November, 2006. This court ordered the filing of briefs and adjourned it for hearing on 7th December, 2006. The Chief Justice of Nigeria, Hon Justice Belgore, presided. He abridged the time for parties to file their briefs, which normally
C could have taken the case to February, 2007 or so.

Came 7th December, 2006, the appeal was heard and judgment was delivered on the same day. This court did so because of the urgency of the matter; a practice of the court.

D It is clear from the above that while the appellants worked towards the delay of the case because that was convenient to them, the courts and the respondents worked in the opposite direction. Although the judicial process is slow most of the time, almost taking a snail's pace, this is one case, which the judiciary must take the fast lane in the relay
E race and has in fact taken the fast lane. This explains the remarkably short journey of this case from the High Court to this court; a journey of about one year or so. I commend the Court of Appeal for the speedy hearing of the appeal. The appeal was filed in that court in February,
F 2006 and despite the plethora of motions, the Court of Appeal was able to deliver judgment on 1st November, 2008. This is most commendable, and I commend the court.

G The appellants were so miserly in the way they approached the court in this matter. They kept so much of their defence (if they had any defence at all) in their bosom and cleverly making efforts to out-smart the respondents. All their strategy was to delay the proceedings till the 29th May, 2007 to make the judgment of this court barren or useless, if in
H favour of the respondents. What type of cleverness is that? What type of smartness is that? What type of trick is that? I am tempted to add "prank" to the list. I will not yield to the temptation.

Litigation is not a game of cleverness, smartness or tricks. It is not a hide and seek game where one of the parties in all cleverness and

smartness takes ambush and waits with all acrobatic dexterity for the opponent to fall into a trap and get him thoroughly harmed or destroyed. Litigation is not a game of chess where one of the parties attempts to trap the opponent's king to obtain victory. On the contrary, litigation has an inbuilt dispute settling mechanism where the parties come out in the open B to make their cases frankly and not cunningly or craftily.

A party who seeks fair hearing from the court must also be fair in the litigation to the adverse party and to the proceedings. A party who intentionally files motions to delay the proceedings is not fair to the adverse party and the proceedings. He should not in any way annoy the C proceedings. He has a duty to respond to the procedural needs or requirements of the litigation without applying any baits because the adverse party is a human being; not a fish. He must come out and embrace D the litigation with all honesty and sincerity of purpose. Where he decides to plant mines in the judicial process to obtain victory in the event of a possible slip on the part of the court or the adverse party, such a party will not be in a position to ask for the fair hearing of a case, because he has not shown fairness in the process itself. The principles of equity and E fairplay will certainly deny him of the fair hearing principle that he refused to surrender in the judicial process. Although fair hearing is a constitutional guarantee, it has some resonance in the principles of equity and fairplay. Can the appellants really ask for what they were unable to F supply in the hearing of this case? I ask again, can they, this time rhetorically?

Mr. Anyanlaja contended that the appellants did not wait to respond to the affidavit in support because it is inadmissible evidence. Now G that I have held that the affidavit evidence is admissible, the appellants are boxed to and against the wall. There is no route of or for escape, all their struggles notwithstanding. Why should the appellants now ask that the case be remitted to the High Court to enable them file a counter affidavit? Do they really, need to file a counter-affidavit to an inadmissible affidavit? H They seem to blow hot and cold with the same breath. Can they really blow hot and cold with the same breath?

What really did the appellants want to present and prove before

the High Court that was not before the Court of Appeal? Why were they hoarding or hiding it? Did the appellants genuinely believe that they had a good defence to the originating summons that they wanted to present before the High Court? What is that evidence? Chief Olanipekun, SAN, B asked some pertinent questions at page 31 paragraph 4.17 of his brief.

“Appellants are through this appeal, praying this court to send the case back to the trial court to allow them give evidence. Some pertinent questions arise, that is, what type of evidence do they want to raise or give? Is it evidence of two-thirds of 32 members of the Legislative House? Or is it in respect of sitting or conducting proceedings at D’Rovans Hotel, Ring Road, Ibadan? Or is it evidence of the locus standi of the plaintiffs? Or, finally, is it evidence in respect of the issues contained in their Notice to Contend that the judgment of the trial High Court be varied, which, as demonstrated above, has been abandoned at the lower court? Surely, what Appellants want to do is not aimed at justice but to further frustrate the speedy determination of the case, if peradventure any such order is made so as to enable them file further questionable preliminary objections and plant additional land mines to obstruct a speedy administration of justice.”

I entirely agree with learned Senior Advocate. There is really nothing that the appellants will raise in the High Court by way of defence. It is all an orchestrated game plan to further delay the proceedings and frustrate the course of justice. Will this court be a party to such a game plan? No. Not at all. This is a court of both law and equity.

And that takes me to the grounds of objection in respect of the preliminary objection on jurisdiction. The grounds of objection cleverly avoided the number of members of the House of Assembly that purportedly removed the 3rd respondent. Instead of dealing with that in relation to section 188(9), the appellants raised sections 101 and 102 of the Constitution which are not really germane to the main issue.

Section 101 vests in the House of Assembly the power to regulate its own procedure. By section 102, the proceedings of the House cannot be invalidated by the fact that there is a vacancy in its membership. This seems to be an answer in the appellants’ way to the 18 persons who

purportedly removed the 3rd respondent. **The law is elementary that where the Constitution or a statute contains a general provision as well as a specific provision, the specific provision will prevail over the general provision. In this wise, it is my view that the specific prevision of section 188(9) will prevail over the general provision of section 102. Accordingly, the removal of the 3rd respondent is governed by section 188(9) and not section 102 of the Constitution.** B

While a Legislature is competent to suspend particular rule or rules to enable it deal with a situation in the overall interest of the common good of the body, and the persons it represents, this must be done bona fide and not male fide. A bona fide action will vindicate the totality of good parliamentary action, practice and conduct. A male fide action will violate parliamentary action, practice and conduct. Whether an action is bona fide or male fide is a question of fact to be deduced from the factual milieu giving rise to the decision. I have no difficulty in coming to the conclusion that the suspension of the rules of the House of Assembly and the Speaker of the House in a hotel apartment were clearly male fide as the act was designed to carry out illegal and unconstitutional acts which were ultra vires section 188 of the Constitution. C D E

The appellants tried as much as they could to avoid the number of members of the House that purportedly removed the 3rd respondent. That number is 18. They avoided it like a plague. They danced around it in their grounds of preliminary objection on jurisdiction. They tried to dance around it in the submission of Mr. Lana, learned Attorney-General for the defendants in the High Court, they did not know when the submission of counsel exposed them at page 40 of the Record: F G

“Mr. Lana - refers to paragraph 9 of the affidavit filed in support. We believe 14 out of 32 who sued are the minority and therefore the use of the name of House of Assembly is a misconception and must therefore be struck out.” H

The point I want to make will be clear when I reproduce paragraph 9 referred to by Mr. Lana. The paragraph reads:

“That the Defendants further on 22nd December, 2005 without fol-

lowing the laid down rules, regulations and the Constitution of the Federal Republic of Nigeria purportedly passed motion calling for the investigation of the alleged allegation of misconduct against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State without the concurrent consent approval of the two-thirds majority of the 32 (thirty-two) members House of Assembly.”

I want to do a simple arithmetic, though I am not a friend of the subject. It is this: 32 minus 14 or 32 take away 14 gives the figure 18. By the showing of Mr. Lana and by his making specific reference to paragraph 9 of the affidavit in support, it is clear that 18 members did the bad job of removing the 3rd respondent. And they are the 18 appellants. Is that two-thirds of 32 members? Can the appellants answer that question comfortably? I do not think the appellants have any valid defence to the merits of the matter and that is the truth, and society says truth is bitter. Why is truth the correct thing is said to be bitter? I am not there. I just thought aloud. All they wanted was to continue with their harvest or cocktail of motions aimed at frustrating the matter from being heard. This court saw that gimmick and so delivered judgment on 7th December, 2006. What we did is clearly within the brackets of the law and our rules of court and it is a long standing practice. It did not spring from the blues for this appeal.

Learned Senior Advocate for the 1st and 2nd respondents raised issue estoppel. It is necessary to take it. It was the argument of learned Senior Advocate that appellants are stopped from requesting to remit the case to the High Court for taking of evidence when that court held that the filing of affidavits was not required or necessary. He relied on what the learned trial Judge said when he reacted to the submission of counsel for the appellants in the case of Senate President v. Nzeribe (supra).

Perhaps, I should repeat the dictum for ease of reference though at the expense of prolixity:

“The originating summons in Nzeribe’s case was on determination as to membership whereas as the issues for determination in the originating summons in this case are basically on points of law in which no affidavit evidence is required.”

Learned Senior Advocate made two points. The first is that there is no appeal on the above finding of the learned trial Judge. The second, in his view, apparently arising from the first one is that the point now constitutes issue estoppel. While I agree with learned Senior Advocate on the first, I am not with him in the second. Issue estoppel cannot be invoked in the same case but in a different case. It is only in that circumstance that the first case, in appropriate circumstances, act as issue estoppel against the second one. The appropriate circumstances are: (1) That the same question was decided in earlier proceedings. (2) That judicial decision said to create the estoppel was final. (3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies. See Adebayo v. Babalola (1995) 7 NWLR (Pt. 408) 383. Issue estoppel cannot apply on appeal in the same case. This is because the nature of the appellate process, involves one single case not two cases. Issue estoppel is built in one case against another case where the above three ingredients are present. With respect, counsel got it wrong. It could be some other estoppel but certainly not issue estoppel. I cannot assist him, the adversary system that we operate and my position as the unbiased umpire; although I seem to know the estoppel.

But he has got the first point right. It is in respect of appeal. He submitted that as no appeal was lodged to the Court of Appeal on the conclusive finding of the learned trial Judge, it is binding on the appellants. I think he is right here. **Where a party is not satisfied with the finding of a court of law other than the Supreme Court, he can only do so by way of appeal. If the judgment is in favour of the party, but he is not comfortable with a particular finding, his remedy is to cross appeal. If he does not cross appeal, the presumption is that he has no complaint about the entire judgment. This is because the only way for a party to express his rejection of a judgment of a lower court to an appellate court is by way of appeal.**

In view of the fact that the appellants did not cross appeal on the finding of the learned trial Judge that the case involved basically points of law in which no affidavit evidence is required, the

appellants cannot now be heard to urge this court to remit the case to the trial court to enable them file counter affidavit. The trial court which held that the case does not need affidavit evidence will be functus officio to entertain the action by receiving counter affidavit from the appellants, evidence he has clearly ruled is not required. A Judge is a man of consistency and the learned trial Judge, being a man of consistency, will never like to contradict himself in this way. Even if he is willing to do so, our adjectival law will stop him from doing so.

One very flabbergasting and curious aspect of this matter is that the appellants did not say in the High Court, the Court of Appeal and this court that the affidavit in support of the originating summons told a lie or lies or contained a lie or lies. All they did was to attack some paragraphs in the light of the Evidence Act. The case, I think, involved at least two Senior Advocates that I very much respect for their learning and knowledge. None of them challenged the veracity and or authenticity of the averments in support of the originating summons either orally or by way of court process. All they said was that time was still in favour of their clients and that they were waiting to file counter affidavit. They were waiting for the doomsday that did not come but their clients have some doom now without bargaining for it.

It is the nature of the human being with the instinctive human automation to react quickly or spontaneously to a lie told against him. He will not or never wait for a moment to do so. That is the habit of most human beings, including me. And what is more, if my little experience on the bench is anything to write home about, I should say that the filing of counter affidavit normally follows an affidavit in support as a matter of course or routine in the judicial process as the night follows the day and vice versa. Parties do not keep their counter evidence to themselves, nursing them for the rainy day; which may not come as in this case now. The long and short of the counter affidavit episode is that the appellants had no evidence to silence the affidavit in support and so decided to play the trick of the tortoise and the hare, developing, or should I say

melting to the moral kindergarten story of “slow and steady wins the race”. Unfortunately for the appellants, the slowness on their part made them lose the race. I have held the view above that the issue of remitting the case to the High court is not available to the appellants in the light of the clear circumstances of this case.

In the most unlikely event that I am wrong, I should go further to examine whether this court will be doing substantial justice by an order of remitting the case to the High Court for further proceedings. Justice is not only one loud and large term, it is a most important expression in the judicial system and the administration of justice, and here I emphasize justice in the context. Justice in its simplistic content means quality of being just, fairplay and fairness. It has an element of quality of egalitarianism in its functional context.

Lord Denning, a very fine Judge, in his very well written book, *Family Story*, said at page 174:

“My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help in the instant case. I would emphasize however, the word ‘legitimately’; the judge himself is subject to the law and must abide by it.”

For quite some time now, this court has moved from the regime or domain of doing technical justice to the regime or domain of doing substantial justice. This is in keeping with the jurisprudence of the wider world and its legal system. The need for courts of law to do substantial justice becomes more imperative when considering the provisions of the Constitution, the fons et origo of any democracy.

In Attorney-General of Bendel State v. Attorney-General of the Federation (1982) 3 NCLR 1, Idigbe, JSC, said at page 64:

“I incline to the view that in suits calling for decisions on issues relating to the Constitution this court ought not unduly to allow tech-

nicalities to deter it from making vital pronouncements.”

Nnamani, JSC, added at page 109:

“If the plaintiff is entitled to be heard by this court how he comes to be heard may be immaterial. I do not agree that in a complex suit such as this touching on matters which lie at the very foundation of the stability of this country this court should be unduly bogged down by technicalities. This court has in many recent decision, while affirming the importance of observance of Rules of Court, stated that it is more concerned with doing substantial justice between the parties.”

The statement by Nnamani, JSC, is germane to this case when the learned Justice mentioned the stability of the country. The plethora of removal proceedings in respect of Governors is not only frightening but is capable of affecting the stability of Nigeria. It is almost like a child’s play as same State Legislatures indulge in it with all the ease and comfort like the way the English man sips his coffee on his breakfast table. Unless the situation is arrested, Nigerians will wake up one morning and look for where their country is. That should worry every good Nigerian. It does not only worry me; the idea frightens me so much.

With the above parenthesis, I take the case of Famfa Oil Limited v. Attorney-General of the Federation (2003) 18 NWLR (Pt. 852) 453 where Iguh, JSC, said at pages 471 and 472:

“I should perhaps mention in the above regard that this court for quite some time now has consistently shifted away from the narrow technical approach to justice which characterized some earlier decisions of courts on various matters and now pursues, instead, the course of substantial justice. Accordingly, courts of law should not be unduly tied down by technicalities, particularly where no miscarriage of justice would be occasioned. Justice can only be done in substance and not by impeding it with mere technical procedural irregularities that occasion no miscarriage of justice.”

I should say that in the interest of justice and the need to do substantial justice that I am invoking now, apparently in favour of the respondents, was earlier invoked in favour of the appellants. In the hearing

of the appeal, this court in the interest of justice, allowed the appellants to move their motion filed on 4th December, 2006, three days to the date of hearing the appeal, asking for leave to appeal against the decision of the Court of Appeal. In the motion, the appellants sought to repair, if I may use that expression unguardedly, the incompetent grounds of appeal arising from not seeking leave to appeal on mixed law and facts. Certainly, it is not the practice of this court to accommodate an application for extension of time to appeal on the day an appeal is set down for hearing. B

In the interest of justice, this court brought some pressure to bear on counsel for the respondents to concede to the most abnormal motion to enable the court hear the appeal. Certainly, the motion in normal circumstances ought to have failed because it had all the vices of overreaching the respondents who had earlier meritoriously attacked most of the grounds of appeal. I think only one ground could have survived the objection and that was most likely to have ended the appeal. C D

It is good law that justice is not only for the plaintiff. It is not also only for the defendant. It is for both parties. I do not see why the appellants should complain if this court in the interest of doing substantial justice and in consideration of the time element, and the facts before the trial Judge, hold that the Court of Appeal was right in invoking section 16 of the Court of Appeal Act. The Englishman says that what is good for the goose is also good for the gander. I do not think I know who the goose is and who the gander is. Perhaps the appellants are the goose and the respondents the gander. E F

Good law, in my opinion, must have a human face. Good law should not patronize technicalities that will give rise or room to undeserved victories in litigation. Good law should discourage technicalities such as the one canvassed by the learned Senior Advocate for the appellants that the case should be remitted to the trial Judge for trial on the so-called merits of the case, when I know that the matter will never be concluded before the 29th May, 2007 when the office of Governor will be filled. Good Law will not encourage a situation where a party in litigation will only return home with pyrrhic victory which in reality is no victory at all. After all, it is good law that courts of law do not give orders in vain G H

and in the context of this case, an order given after 29th May, 2007 restoring the 3rd respondent to his office of Governor will certainly be in vain. I will never be a party to such a tall order which has teeth but cannot bite. Teeth that cannot bite are useless to their owner.

B It is not advisable in litigation for parties to put all their eggs in one and the same basket, particularly in a situation where the procedure to be adopted is not neat, but diverse and versatile, such as the procedure in this case. This is because if the basket breaks, all the eggs are broken. This is what the appellants did. All their concentration was to play on safely in the litigation towards the 29th May, 2007 date so that, they can go free with their acts of unconstitutionally or unconstitutionality. And so they refused to enter appearance. They also refused to file a counter affidavit and they assured themselves that they had so much time to file the processes. They beat their chests in the Nigerian way in approval of their strategy with some heroic mind. They did not accept the genuine offer of the decision in *Senate President v. Nzeribe* (supra) by Mr. Akintola. Unfortunately for them, the whole basket has broken and they find themselves in trouble. They will blame themselves and not this court.

The statement that the law is an ass is not a mere cliché or aphorism but has deep rooted application to the practicalities of law in society. The nature of the ass in law requires that in certain cases, parties should not adopt a highly conservative, ossified and closed-door position but should adopt a versatile position in anticipation of the not too certain destination of the ass.

If I were in their position, that is, in the position of the appellants, I should have entered appearance in protest, filed the counter affidavit, also in protest before raising the preliminary objection on jurisdiction. One other way, if they really had the facts to contradict the affidavit in support, was to force a dispute on the litigation and if they succeeded in that, the trial Judge could not have got the alternative than to convert the originating summons to a writ of summons and order pleadings. That should have enabled them to achieve what they wanted to achieve. I am a Judge; not a legal adviser to the appellants. I do not want to go beyond my job.

I have said so much in this judgment. It is perhaps neater and tidier if I say by way of recapitulation as follows:

1. The provisions of section 188(1) to (9) must be strictly complied with before a Governor or Deputy Governor can be constitutionally removed from office.

2. It is only when the provisions of section 188(1) to (9) are complied with that the ouster clause of section 188(10) can be invoked in favour of the House and to the disadvantage of the removed Governor or Deputy Governor.”

3. It is only when section 188(1) to (9) is complied with that the jurisdiction of the courts is constitutionally ousted.

4. The provision of section 188(11), though generic and vague in its wording, cannot be extended beyond its onerously generic and vague nature to include misconduct which are not gross.

5. The specific acts of misconduct I have outlined in this judgment cannot be and should not be taken as exhaustive but should be taken as some acts of misconduct. This is not however a licence for the Legislature to open a pandora’s box of vendetta and rake up misconducts that are not gross.

6. Any business of the House should be held and conducted in parliamentary hours which are set out in the Rules governing the sitting of the House. On no account should business of the House be held in unparliamentary hours. Such business is unconstitutional and the courts will declare it null and void ab initio.

7. Every person involved in the removal exercise must be, like Caesar’s wife, above board. They are the Speaker, the members of the House of Assembly, the Chief Judge and members of the Investigation Panel.

Are we still in the learning process? What type of lessons will the appellants still need on section 188? About four months to the end of a two-term of four years each making a total of eight years, or even a single, term of four years, legislators cannot express ignorance of the provisions of section 188. They cannot say that they are still learning the provision or they need more tutorials on the section. Unfortunately, no

teacher will be available to them. A worst student of history can be a master of the subject after a period of four to eight years, if he still remains a novice of the subject after such a period, then history will not forgive him in its judgment.

B The Legislature is the custodian of a country's Constitution in the same way that the Executive is the custodian of the policy of Government and its execution, and also in the same way that the Judiciary is the custodian of the construction or interpretation of the Constitution. One major role of a custodian is to keep under lock and key the property under him so that it is not desecrated or abused. The Legislature is expected to pet the provisions of the Constitution like the way the mother pets her day-old baby. The Legislature is expected to abide by the provisions of the Constitu-
D tion like the way the clergyman abides by the Bible and the Imam abides by the Koran. And so, when the Legislature, the custodian, is responsible for the desecration and abuse of the provisions of the Constitution in terms of patent violation and breach, society and
E its people are the victims and the sufferers; and in this particular context, the Oyo State society and the respondents, particularly the 3rd respondent. Fortunately, society and its people are not to-
F tally helpless as the Judiciary, in the performance of its judicial functions under section 6 of the Constitution, is alive to check acts of violation, breach and indiscretions on the part of the Legisla-
ture. That is what I have done in this judgment. I do hope that this judgment will remove the apparent wolf in the appellants as mem-
bers of the House of Assembly of Oyo State. I am done.

G It is for the above reasons that I dismissed the appeal on 7th December, 2006. For the avoidance of doubt and for completeness, I confirm the following reliefs granted to the respondents by the Court of Appeal:

H 1. A DECLARATION that the purported Notice of allegation of misconduct made against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State as a preparatory step to his removal by the defendants is unconstitutional, null and void, and of no effect

whatsoever, having regard to the provisions of S.188(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria.

2. A DECLARATION that the purported Notice of allegation of misconduct made by the defendants against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State not having been received and or served B on each of the 32 (thirty two) members of the Oyo State House of Assembly as envisaged by S.188(2) of the 1999 Constitution of the Federal Republic of Nigeria is unconstitutional, null and void and of no effect whatsoever.

3. A DECLARATION that the motion passed by the defendants on C 22nd December, 2005 calling for the investigation of the allegation of misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, is in contravention of S.188(3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria, and to that extent, D the said motion is unconstitutional, null, void and of no effect whatsoever.

4. A DECLARATION that no valid Notice of allegation of misconduct has been issued by the defendants, same not having been passed E through the Clerk of the Oyo State House of Assembly nor received formally by the Honourable Speaker of the Oyo State House of Assembly, Hon. Adeolu Adeleke in accordance with the provisions of S.188(2) Para, (a) and (b) and S.188(3) of the Constitution of the Federal Republic F of Nigeria.

5. A DECLARATION that the purported suspension of the Draft Rules of the Oyo State House of Assembly 1999, by the defendants on 13th December, 2005 preparatory to the issuance of the Notice of allegation of misconduct against His Excellency, Senator Rasheed Adewolu G Ladoja, the Governor of Oyo State in the absence of the Honourable Speaker of the Oyo State House of Assembly, is unconstitutional, invalid and contrary to the provisions of SS.101 and 102 of the 1999 Constitution and Rules 23(1) - (4) of the Draft Rules of Oyo State House of H Assembly.

6. A DECLARATION that the purported sitting of the defendants at the D'Rovans Hotel Ring Road, Ibadan, where the purported Notice of

allegation of misconduct was issued, and which is outside the designated official venue of the Oyo State House of Assembly is unconstitutional, invalid, null and void.

7. A DECLARATION that the purported service of the Notice of B allegation of misconduct on His Excellency, Senator Adewolu Ladoja, the Governor of Oyo State through piecemeal publication on the pages of the Nigerian Tribune Newspaper which was not addressed to Senator Rasheed Adewolu Ladoja is no service on His Excellency, it is of no effect and it is C a breach of his constitutional right to fair hearing as contained in S.36 of the 1999 Constitution of the Federal Republic of Nigeria.

8. AN ORDER setting aside all the steps taken by the Defendants in relation to the issuance of Notice of allegation of misconduct, passage D of motion to investigate same and the purported directive to the Honourable Chief Judge of Oyo State, the said steps having breached the provisions of Section 188 of the 1999 Constitution of the Federal Republic of Nigeria.

In the light of the foregoing, the 3rd respondent, Senator Ladoja, E remains the legally, constitutionally and democratically elected Governor of Oyo State, and I so order.

I want to take this opportunity to thank all counsels for their invaluable submissions to the development of this important area of our F law. In my restricted knowledge, this is the first pronouncement on this fairly troublesome area of our law on the removal of Governors. They have materially assisted this court for which I thank them. Like the Court of Appeal, and for the same reason, I will not make any order as to costs G in favour of the respondents. Certainly their interest will not be in costs but in the development of the law and that I think this court has been able to do with the assistance of counsel.

H **KUTIGI JSC**

After hearing this appeal on the 7th day of December, 2006, I dismissed it as unmeritorious and affirmed the judgment of the Court of Appeal. I promised to give my reasons for doing so today. I shall now

proceed to do just that.

The Plaintiffs in the High Court of Oyo State holden at Ibadan on the 23rd December, 2005 commenced this action by way of Originating Summons instead of a writ of Summons or an Originating Motion, thus making it clear that the facts in issue or most of them, are not disputed or likely to be disputed, see for the determination of the following questions by the Court -

“Having regard to the clear provisions of the 1999 Constitution with particular reference to the powers conferred on the Oyo State House of Assembly, to wit: initiate and carry out impeachment proceedings against the Governor or the Deputy Governor of a State and particular Section 188(1), (2), (3), (4) and (5) thereof of the 1999 Constitution of the Federal Republic of Nigeria is not to be read in isolation and complete exclusion of other sections of the Constitution relating to the Legislative powers of the House of Assembly.

(1) Whether or not the purported Notice of Allegation of impeachment against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, issued by the Defendants on 13th December, 2005, is constitutional or valid within the meaning of Section 188(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria;

(2) Whether or not the Defendants purported service of Notice of the said Allegation of impeachment on Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, is valid or constitutional within the meaning of Section 188(2) of the 1999 Constitution of the Federal Republic of Nigeria;

(3) Whether or not the purported Notice of Allegation of Impeachment against Senator Rasheed Adewolu Ladoja, Governor of Oyo State, has been served on each member of 32 (Thirty-Two) members of the Oyo State House of Assembly as envisaged by Section 188(2) of the 1999 Constitution of the Federal Republic of Nigeria;

(4) Whether or not the Defendants herein complied with the provisions of Section 188(3) of the Constitution of the Federal Republic of Nigeria;

(5) Whether or not the Defendants herein have complied with the

provisions of Section 188(3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria vis-à-vis moving the motion that the so called allegation against the Governor, Senator Rasheed Adewolu Ladoja, be investigated and whether same as passed by the Defendants on 22nd December, 2005 was supported by the votes of not less than two thirds majority of all the members of Oyo State House of Assembly;

(6) Whether or not the purported passing of a motion for investigation of the allegation of misconduct against his Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State and the purported request by a non-existent Speaker of the Oyo State House of Assembly asking the Chief Judge of Oyo State to appoint a panel of 7 (Seven) persons to investigate the allegations against the Governor is valid and constitutional;

(7) Whether or not the purported suspension of the Rules of Oyo State House of Assembly, Draft Rules of 1999, purportedly made by the Defendants on 13th December, 2005, without the presence of the Speaker of the Oyo State House of Assembly was valid and constitutional within the meaning of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria and Rules 23(1) - (4) of the Draft Rules 1999, of the Oyo State House of Assembly;

(8) Whether or not the purported sitting of the Defendants at D’Rovans Hotel, which is outside the official and recognized venue of Oyo State House of Assembly on 13th December, 2005, during which the purported Notice of Allegation of Misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State was issued, is valid and constitutional.”

Upon the determination of these questions, the Plaintiffs claim the following reliefs from the Court -

“(i) A DECLARATION that the purported Notice of Allegation of Misconduct made against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, as a preparatory step to his impeachment by the defendants is unconstitutional, null and void, and of no effect whatsoever, having regard to the provisions of Section 188(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria.

(ii) A DECLARATION that the purported Notice of Allegation of Misconduct made by the Defendants against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, not having been received and/or served on each of the 32 (Thirty-Two) members of the Oyo State House of Assembly as envisaged by Section 188(2) of the 1999 Constitution of the Federal Republic of Nigeria is unconstitutional, null and void and of no effect whatsoever.

(iii) A DECLARATION that the motion passed by the Defendants on 22nd December, 2005 calling for the investigation of the allegation of misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State was in contravention of Section 188(3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria and to that extent, the said motion is unconstitutional, null and void, and of no effect whatsoever.

(iv) A DECLARATION that no valid Notice of Allegation of Misconduct has been issued by the Defendants, same not having been passed through the Clerk of the Oyo State House of Assembly, nor received formally by the Honourable Speaker of Oyo State House of Assembly is unconstitutional, valid, and contrary to the provisions of Sections 101 and 102 of the 1999 constitution and Rules 23(1) - (4) of the Draft Rules of the Oyo State House of Assembly.

(v) A DECLARATION that the purported sitting of the Defendants at the D'Rovans Hotel, Ring Road, Ibadan, where the purported Notice of Allegation of Misconduct was issued, and which is outside the designated official venue of the Oyo State House of Assembly is unconstitutional, invalid, null and void.

(vi) A DECLARATION that the purported service of the Notice of Allegation of Misconduct on His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, through piecemeal publication on the pages of the Nigerian Tribune Newspaper, which was not addresses to Senator Rasheed Adewolu Ladoja is no service on His Excellency, it is of no effect and it is a breach of his constitutional right to fair hearing contained in Section 36 of the 1999 Constitution of the Federal Republic of Nigeria.

(vii) *AN ORDER setting aside all the steps taken so far by the Defendants in relation to the issuance of the Notice of Allegation of Misconduct, passage of the motion to investigate same and the purported directive to the Honourable Chief Judge of Oyo State, the said steps having breached the provisions of Sections 36 and 188 and of the 1999 Constitution of Federal Republic of Nigeria.*

(viii) *AN ORDER of injunction restraining all the Defendants, their agents, servants, privies or through any person or persons however from taking any further steps, sitting, starting or continuing to inquire or deliberate on the investigation and impeachment proceeding of His Excellency, Senator Rasheed Adewolu Ladoja."*

The Originating Summons required the Defendants to enter appearance within 8 days of service of the summons on them. The Defendants failed to comply. The summons was supported by an affidavit of 17 paragraphs deposed to by one Sunday Aborishade alleging breaches of the 1999 Constitution of the Federal Republic of Nigeria by the Defendants. Paragraphs 2 - 15 of the affidavit which are vital in the proceedings read thus -

"2. *That I am familiar with the fact of this case.*

3. *That I have the instruction and the consent of the Plaintiffs to depose to this affidavit.*

4. *That except otherwise stated all the facts deposed to herein and within my personal knowledge, information and beliefs.*

5. *That I know as a fact that the 1st Plaintiff herein is the Honourable Speaker of the Oyo State House of Assembly while the 2nd Plaintiff is the Deputy Speaker and the House of Assembly respectively.*

6. *That the 1st and 2nd Plaintiffs herein informed me and I verily believe them that the Oyo State House of Assembly sat at the Assembly Complex Secretariat Ibadan on 13th December, 2005 while the Defendants chose to sit outside the official designated House Chamber located at the House of Assembly Complex instead they sat at D'Rovans Hotel Ring Road Ibadan.*

7. *That at the purported sitting of the Defendants herein at the D'Rovans Hotel Ring Road Ibadan, the Defendants purportedly sus-*

pended the draft rules of the Oyo State House of Assembly Rules and thereby compromised the interest of the Plaintiffs vis-à-vis their right as Legislators and also compromise the rules and regulation of the Oyo State House of Assembly.

8. That I was informed by 1st and 2nd Plaintiffs and I verily believe B them that the Defendants purportedly issue a notice of allegation of misconduct against the Governor of Oyo State Senator Rasheed Adewolu Ladoja with the purpose of commencing an impeachment proceedings against the latter.

9. That the Defendants further on 22nd December, 2005 without C following the laid down rules and regulations and the Constitution of the Federal Republic of Nigeria purportedly passed motion calling for the investigation of alleged allegations of misconduct against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State without the concurrent con- D sent approval of the two-third majority of the 32 (thirty-two) members House of Assembly.

10. That the issuance of the purported Notice of allegations of misconduct by the Defendants was also done not only outside the desig- E nated official venue of the Assembly but was done without the concurrent consent of the required members of the House of Assembly.

11. That I was informed by the 1st and 2nd Plaintiffs and I verily believe then that the required service of the purported notice of allega- F tions of misconducts against Governor Rasheed Adewolu Ladoja which the Defendants issued from D'Rovans Hotel was not served on each member of the House of Assembly of Oyo State.

12. That I was informed by the Plaintiffs herein and I verily be- G lieve them that the business of the House of Assembly of Oyo State is meant to be conducted within the House of Assembly Chambers and/or on the floor of the parliament.

13. That I know as a fact and by virtue of my profession that serious issues of law and the constitution have been raised in the origi- H nating summons.

14. That I know that this case involves the interpretation of law vis-à-vis the interpretation of the constitution of Nigeria 1999.

15. *That it is in the interest of justice and democracy to grant the reliefs in the originating summons."*

The Defendants upon being served with the Originating Summons rather than join issues on the merit of the action by filing a counter-B affidavit decided to file a Notice of Preliminary Objection in which they objected to the suit on the grounds that -

"1. *This Honourable Court lacks jurisdiction to entertain the suit.*

2. *The Plaintiffs herein lack the necessary locus standi to institute C the suit.*

3. *The Plaintiffs/Respondents claims disclose no reasonable cause of action against the Defendants/Applicants.*

4. *The Plaintiffs/Respondents suit is liable to dismissal.*

GROUND OF OBJECTION

D (a) *By virtue and under the Provisions of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Oyo State House of Assembly as represented by the Defendants who are in the majority, have power to regulate its own procedure including the procedure E for summoning and recess of the House.*

(b) *By the combined effects of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Defendants/Applicants herein who are in the majority may act notwithstanding any vacancy in the membership of the House. F*

(c) *By virtue of Section 188(10) of the 1999 Constitution of the Federal Republic of Nigeria, no Court of Law can entertain any issue relating to the proceedings or determination of a Panel or the House of G Assembly or any matter relating to impeachment proceedings.*

(d) *The 1st and 2nd Plaintiff have no necessary standing to institute this action in that the two of them are impostors. The 1st Plaintiff was removed from office as Speaker of the House of Assembly on 13th December, 2005 while the 2nd Plaintiff was never made the Deputy Speaker and H was indeed suspended member of the Oyo State House of Assembly.*

(e) *Rule 23 of the Draft rule of Oyo State House of Assembly made pursuant to Section 101 of the 1999 Constitution vested in the Defendants/Applicants herein the power to suspend any order of the House*

of Assembly and to wit suspend any member of the House. The 2nd Plaintiff/Respondent remains a suspended member of the Oyo State House of Assembly along side six others.

(f) Legislative Proceedings is neither subject to litigation nor justiciable.

(g) The claims of the Plaintiffs/Respondents herein neither discloses any reasonable cause of action against the Defendants/Applicants nor discloses the interest which the Plaintiffs/Respondents intends to protect which affect them directly.

(h) The suit of the Plaintiffs/Respondents is an abuse of the process of this Honourable Court.”

The Defendants once again did not file an affidavit in support of their Notice of Preliminary Objection just as they filed no counter-affidavit to oppose Plaintiffs’ Originating Summons. These omissions in my view are clearly fatal to their cause as will be seen later. The Preliminary Objection was taken or argued on 28th December, 2005 and a Ruling was delivered on the same day dismissing Plaintiffs’ suit for want of jurisdiction. The Ruling ended thus -

“I have carefully and painstakingly examined all the submissions and arguments of learned Counsel for both Parties. I have also carefully examined all the questions raised for determination as well as reliefs claimed by the Plaintiffs. Virtually all the 8 questions set out for determination on the Originating Summons as well as the 9 Declaratory Reliefs and Orders sought touch on the issue of impeachment. Section 188(10) of the Constitution of the Federal Republic of Nigeria Provides as follows:

“No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceeding or determination shall be entertained or questioned in any Court.”

When the House of Assembly is exercising its constitutional powers in relation to impeachment proceedings or any matter relating thereto, it is performing a quasi judicial function. Thus it is provided in subsection 11 of Section 188 of the 1999 Constitution that the power to determine what constitutes “gross misconduct” or a conduct that will

lead to impeachment proceeding lies with the House of Assembly and not in the Court.

By the combined effect of the above provisions therefore, and having regard to the nature of the reliefs claimed by the Plaintiffs, it is clear beyond argument that the jurisdiction of this Court is clearly ousted. Impeachment and related proceedings are purely political matters over which this Court cannot intervene. The action is not justiciable see Chief Enyi Abaribe vs. The Speaker Abia State House of Assembly & Ors. (2002) 14 N.W.L.R. (Pt. 788) p. 466 at p. 492. It is not part of the duty of this Court for forage into areas that ought to vest either directly or impliedly in the Legislature such as the issue of impeachment which is a matter that comes within the purely internal affairs of the House of Assembly.

The Court will therefore decline jurisdiction in this matter. The objection of learned Counsel for the Defendants/Respondents is upheld. The Originating Summons is accordingly dismissed.”

Thus the trial Court did not only find that it had no jurisdiction but proceeded to dismiss Plaintiffs’ claims. This is completely wrong (see for example DIN v. ATT. GEN. OF FEDERATION (1986) 1 N.W.L.R. (PT. 17) 417).

Dissatisfied with the Ruling of the trial Court, the Plaintiffs appealed to the Court of Appeal. In their brief of argument the Plaintiffs formulated two issues for determination by the Court of Appeal as follows -

“1. Having regard to the Originating Summons filed before the lower Court including the issues for determination and the reliefs sought therein, whether or not the lower Court was not in grave error to have declined jurisdiction to hear the Plaintiffs’ case and going ahead to dismiss same.

2. Whether the lower Court is precluded from looking into matters relating to non-compliance with the mandatory provisions of Section 188(1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Constitution of the Federal Republic of Nigeria, 1999 by virtue of Section 188(10) of the same Constitution.”

Senator Rasheed Adewolu Ladoja, The Interested Party who was joined by leave of the Court of Appeal also in his brief formulated one issue that -

“Whether the learned-trial judge • was right to have declined jurisdiction by relying on the provisions of Section 188(10) of the 1999 Constitution when there was no evidence of compliance by the Defendants with the provisions of subsections (1) - (9) of Section 188 of the said Constitution.”

The Defendants on the other hand formulated one issue for determination by the Court of Appeal. It reads -

“Whether the Court below was right in holding that the jurisdiction of the Court has been ousted by Section 188(10) of the Constitution of the Federal Republic of Nigeria 1999.”

In its judgment delivered on 1st November, 2006, the Court of Appeal in a well considered judgment allowed the appeal and set aside the Ruling of the trial High Court. It held that the trial Court had jurisdiction in the matter. The Court in exercise of its powers under Section 16 of the Court of Appeal Act, thereafter proceeded to consider the reliefs contained in the Originating Summons and gave judgment in favour of the Plaintiffs granting the reliefs sought.

Being aggrieved with the judgment of “the Court of Appeal, the Defendants have now appealed to this Court. In accordance with the Rules of Court the parties filed and exchanged briefs of argument. The briefs were, adopted by Counsel at the hearing and additional oral submission were also made.

The Defendants in their brief, have submitted three questions for determination as follows -

“1. Whether the Court of Appeal was right in its determination that the High Court has jurisdiction to entertain the question of impeachment of the Party Interested/Respondent as the Governor of Oyo State without:

(a) a decision of the lower Court as to whether or not there has been any non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria, 1999 and or

(b) *Proof of non-compliance with Section 188(1) - (9) of the Constitution of the Federal Republic of Nigeria? This issue is covered by ground 1 of the grounds of Appeal contained in the Amended Notice of Appeal dated 20th November, 2006 but filed on 21st day of November, 2006;*

2. *Whether the Court of Appeal was right in its determination that the High Court of Justice Oyo State has jurisdiction to entertain a question as to the impeachment of the Party Interested/Respondent as the Governor of Oyo State having regard to:*

(i) *the provision of Section 188(10) of the Constitution of the Federal Republic of Nigeria; and*

(ii) *the question of locus of the Plaintiffs? This issue is covered by grounds 9, 10 and 11 of the grounds of Appeal contained in the Amended Notice of Appeal aforesaid.*

3. *Whether the Court of Appeal was right in considering the merits of the Originating Summons and granting all the reliefs sought by the Plaintiffs/Respondents pursuant to Section 16 of the Court of Appeal Act and in the absence of the power in the High Court of Oyo State in granting those reliefs as at the stage of proceedings before it and also in not affording the Defendants/Appellants the opportunity to present their own defence (by way of Counter-Affidavit) to the action. This issue is covered by grounds 2, 3, 4, 5, 6, 7 and 8 of the grounds of appeal contained in the Amended Notice of Appeal aforesaid.”*

I have earlier on set out the issues formulated for determination in the Court of Appeal by all the parties. I have also reproduced above the Defendants’ Notice of Preliminary Objection in the High Court. On a careful perusal of the issues and the objections, it is abundantly clear to me that they are all related to the issue of jurisdiction of the trial Court to entertain the suit, as well as the issue of locus standi of the Plaintiffs to institute the action.

The only issue that has not been argued or flogged before now, is clearly the third issue pertaining to the exercise of the powers of the Court of Appeal under Section 16 of the Court of Appeal Act, 1976 in granting the reliefs claimed by the Plaintiffs. The three issues before us

will now be considered.

Issues (1) & (2) can easily be treated together. They are concerned with the jurisdiction of the Court under Section 188 of the Constitution as well as the locus standi of the Plaintiffs to sue.

Section 188 of the Constitution which falls to be interpreted in the appeal reads as follows - B

“188(1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly - C

(a) is presented to the Speaker of the House of Assembly of the State;

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly. D

(3) within fourteen days of the presentation of the notice of the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House Of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated. E

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two thirds majority of all the members of the House of Assembly. F

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, H

to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

B *(7) A panel appointed under this Section shall -*

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within three months of its appointment, report its findings to the House of Assembly.

C *(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.*

D *(9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.*

E *(10) No proceedings or determination or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any Court."*

F *(11) In this section – "gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct."*

G It must first of all be understood that the entire Section 188 subsections 1-11 must be read together. And a proper reading of the whole section will reveal that the ouster clause in subsection (10) can only be properly resorted to and invoked after due compliance with subsections H (1) - (9) that preceeded it (see for example ATT. GEN. OF BENDEL STATE v. ATT. GEN. OF FEDERATION (1981) ALL N.L.R. 86, JIMOH v. OLAWOYE (2003) 10 N.W.L.R. (PT. 828) 307, OKOYE v. SANTILLI (1990) 2 N.W.L.R. (pt. 131) 172. Subsection (11) makes it abundantly

clear that it is the House of Assembly that decides whether or not a conduct is gross misconduct to warrant the removal of a Governor or Deputy Governor. This must in my view depend on the facts and circumstances of each particular case. Failure to comply with any of provisions of subsections 1- 9 will mean that the ouster clause of subsection (10) cannot be invoked in favour of the House of Assembly. B

After reading the affidavit evidence and the authorities, my conclusion is that the High Court had the jurisdiction to try the case and that the Plaintiffs had the locus standi to institute the action when they did. On issues (1) & (2) above, the Court of Appeal in its lead judgment had C this to say-

“In interpreting the Constitution it is the duty of the Court to ensure that the words of the Constitution preserve the intendment of the Constitution (see the case of ABARIBE v. THE SPEAKER ABIA STATE HOUSE OF ASSEMBLY (2002) 14 N.W.L.R (PT. 788) 466. D

The question of whether or not the trial Court has jurisdiction to hear the Plaintiff's/Appellant's claim can only be determined on a thorough examination of Section 188 of the 1999 Constitution and the Originating Summons placed before the lower Court. The claim has already E been set out in this judgment. It is essentially a claim questioning the constitutionality of the action of 18 members of the Oyo State of Assembly who met outside the official Chambers in D'Rovans Hotel, Ibadan to initiate impeachment Proceedings against Senator Ladoja. The supporting F affidavit which has not been disputed is that the first and second Plaintiffs/Appellants were the Speaker and Deputy Speaker respectively of Oyo State House of Assembly as at the time the suit was instituted. While the State House of Assembly sat in the House of Assembly Complex G on the 13th of December 2005, the 18 Defendants/Respondents chose to sit outside the official chambers and went to sit at the D'Rovans Hotel, Ring Road, Ibadan. It was from that venue that they started the impeachment proceedings against Senator Ladoja without complying with the H provisions of Section 188 of the Constitution.....

It is my view that the trial Court had serious questions to consider before hastily throwing out the suit. For example it was alleged that 18

Defendants/Respondents met outside the Chambers of the House of Assembly in a hotel to commence impeachment proceedings, the Court had a duty to determine whether proceedings before such a group amounted to proceedings of Oyo State House of Assembly. It was also alleged that the House of Assembly in Oyo State had 32 Members and for the removal of a Governor which requires the resolution of two third majority of all members of the House, the Court had a duty to inquire whether a factional meeting of 18 members constituted the required two-third majority of all members. The Court also had to consider whether impeachment proceedings in which the Speaker of the House of Assembly is excluded from his leading role as provided for in Section 188 of the Constitution can amount to proper proceedings of impeachment.

For all I have said in this judgment, I have no hesitation in holding that the learned trial judge was wrong in declining jurisdiction. Indeed he had jurisdiction to examine the claim in the light of section 188 subsections 1 - 9 of the 1999 Constitution and if he was not satisfied that the impeachment proceedings were instituted in compliance thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process then what happened thereafter was the internal affairs of the House of Assembly and he would have no Jurisdiction to intervene.”

The judgment continued thus –

“The Plaintiffs/Appellants were the Speaker of the Oyo State House of Assembly when the Defendants/Respondents purported to start the impeachment proceedings against Senator Ladoja without any reference to them inspite of the fact that the Constitution itself gave prominent role to the Speaker of the House in the matter of the impeachment of a Governor or a Deputy Governor.

Clearly they have a locus to question the action of the Defendants/Respondents who purported to be acting on behalf of the whole House.”

I think the Court of Appeal was right. I agree with it. Clearly the trial Court had jurisdiction in the matter and the Plaintiffs had the locus standi to sue as vividly demonstrated above.

On issue (3), I am clearly of the view that Section 16 of the Court of Appeal Act confers wide powers on the Court to enable it make orders which the trial High Court would have made in the matter which in this case was to grant the reliefs claimed by the Plaintiffs. We ought to remember that the facts of the case which are not disputed in anyway B whatsoever, are before the Court to enable it grant the reliefs herein (see example JADESIMI v. OKOTIE-EBOH (1986) 1 N.W.L.R. (PT. 16) 264; OKOYE v. SANTILLI (supra), IGWESHI v. ATU (1993) 6 N.W.L.R. (PT. 300) 484, FALEYE v. OTAPO (1995) 3 N.W.L.R. (PT. 381) 1).

The Court of Appeal on this issue again had this to say – C

“Having held that the trial Court has jurisdiction to hear the Appellants’ originating summons, it is now for me to determine whether I should send the case back to the Oyo State High Court for fresh trial. The appellants have urged me to decide the case because it raises issue of D constitutional interpretation of Section 188 of the 1999 Constitution which this Court is in a position to decide by virtue of Section 16 of the Court of Appeal Act.

The learned Counsel for the Defendants/Respondents urged me E not to decide the originating summons because this appeal has arisen only from the preliminary objection on jurisdiction.

I have taken a look at the preliminary objection of the Defendants/Respondents in the Court below and the grounds thereof earlier F quoted in this judgment and I have also looked at the arguments of Counsel before the lower Court and the summary of the arguments in the ruling of the lower Court and it is my view that all that needs to be said on the merit of the claim has already been said in the record.

Since the facts of the case are not disputed and what is to be G decided is purely the interpretation of Section 188 of the 1999 Constitution, this is an appropriate case for us to resolve the entire case in this Court under Section 16 of the Court of Appeal Act. It is necessary for us to do so in view of the fact that the res of the dispute, that is who is the H rightful Governor of Oyo State before the tenure ends in May next year should be determined without further delay.”

The judgment continued thus -

B *“This is a proper case for this Court to exercise its powers under Section 16 of the Court of Appeal Act to determine the merit of the originating summons. The critical question to determine in the originating summons is whether or not the steps taken by the 18 members out of the 32 members of the House of Assembly of Oyo State in holding a meeting in a hotel outside the official Chambers of the House of Assembly in furtherance of impeachment proceedings under section 188 of the Constitution can be regarded as the proceedings of the Oyo State House of Assembly.....*

C *From the affidavit evidence accompanying the originating summons, it is clear that the Oyo State House of Assembly broke into two factions, one faction headed by the first Plaintiff/Appellant met on the 13th December at the Oyo State House of Assembly complex Ibadan while D a faction of the 18 Respondents met in D’Rovans Hotel Ring Road Ibadan.*

It is my view that no factional meeting of any members of a State House of Assembly can amount to a constitutional meeting of the whole House of Assembly as envisaged and provided for in the Constitution.
E *There was no counter-affidavit before the lower Court to prove that any member of the House of Assembly of Oyo State was suspended or that the Plaintiffs/Appellants were removed as Speaker and Deputy Speaker in accordance with the provisions of the Constitution.*

F *If follows therefore that all the Steps taken by the faction of the Defendants/Respondents purporting to initiate impeachment of Senator Ladoja as Governor of Oyo State were not actions of the Oyo State House of Assembly under section 188 of the 1999 Constitution.*

G *Consequently I allow the appeals of the Plaintiffs/Appellants and the interested/party Appellant and set aside the ruling of the trial Court declining jurisdiction. I hereby enter judgment for all the Appellants*

I think once again, the Court of Appeal was right and I agree with it.

H *On the subsidiary issue of fair hearing raised by the Defendants to the effect that the trial was yet to be concluded in the trial Court, because they had not filed a counter-affidavit or a defence to the Plaintiffs’ claims in the High Court, my simple answer is that this was an after-thought on*

the part of the Defendants as the record clearly showed that they abandoned their right to file any defence or counter affidavit, when they proceeded to do other irrelevant things such as challenging the jurisdiction of the Court when they had not yet even entered a formal appearance. They engaged themselves in filing multiplicity of motions all intended to B delay trial. They have themselves to blame (see for example IGBOKWE v. UDOBI (1992) 3 N.W.L.R. (PT. 228) 214, OYEYIPO v. OYINLOYE (1987) 1 N.W.L.R. (PT. 50) 356). In fact they had no defence.

All the three (3) issues are therefore resolved against the Defen- C dants/Appellants and the appeal consequently fails. This means that the Party Interested, Senator Rasheed Adewolu Ladoja remains the only legally, constitutionally and democratically elected Governor of Oyo State of Nigeria. It is for these reasons and those ably stated in the lead Reasons for Judgment by my learned brother Tobi, JSC that I dismissed the D appeal when I did. I make no order as to costs.

KATSINA-ALU JSC

E

On 7 December, 2006, I dismissed this appeal and indicated that I would give my reasons therefore on 12 January 2007. I now give my reasons.

This appeal essentially involves consideration of two questions. F The first question is whether the Court of Appeal was right in its decision that section 188 of the 1999 Constitution did not oust the jurisdiction of the trial High Court. If so, the second question is whether the Court of Appeal was right to determine the matter on its merits as per the claim of the Respondents in their originating summons pursuant to the powers G vested in that court under and by virtue of section 16 of the Court of Appeal Act.

With regard to the first question, it is necessary to have recourse to the proceedings and decision of the court of trial i.e. the High Court. H

This action as I have already indicated, was commenced by way of originating summons. This is a procedure which is used in cases where the facts are not in dispute or there is no likelihood of their being in

dispute. The rules demand that a defendant served with an originating summons must enter appearance. Such a defendant shall before he is heard enter appearance. This is more so if he wishes to contest the jurisdiction of the court. Where therefore the defendant wishes to contest the jurisdiction of the court, he shall enter a conditional appearance. When he has done so, he should promptly and without taking any further step in the proceedings, raise his objection against the jurisdiction of the trial court.

C In the present case, it is not in dispute that the Appellants as Defendants did not enter Appearance upon service of the originating summons on them. This is evident from the Record of Proceedings at the trial court. Learned counsel for the Respondents drew the attention of the Appellants to their failure to enter appearance. At page 37 of the Record
D learned counsel said:

“Order 13 Rule 1 of the Rules of this court states when defendant will enter an appearance. As at now defendants are not properly before the court as required by the Rules.”

E The Appellants’ reaction to this is at page 38 of the Record. Learned counsel for the Appellants submitted thus:

“On entry of appearance - refers to Order 13 R.5 - a defendant may appear at any time before judgment.”

F As I have stated earlier, in order for the defendants to be heard, they must first enter appearance. That being so, I am in complete agreement with learned counsel for the Plaintiffs that the Defendants were not properly before the court. This is neither here nor there now since there
G is no appeal in this regard.

I will now deal with the issue of the jurisdiction of the trial High Court. It was said for the Appellants that section 188(10) ousted the jurisdiction of the trial High Court.

H For the Respondents, it was argued that the trial court was wrong in interpreting section 188(10) in isolation from sub-sections 1-9. It was also said that before sub-section 10 can apply the court must satisfy itself that there was compliance by the State House of Assembly with sub-sections 1-9.

I shall now read Section 188 of the Constitution. It reads:

“188 (1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly-

(a) is presented to the Speaker of the House of Assembly of the State;

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified,

The Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) *A Panel appointed under this section shall -*

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within three months of its appointment, report its findings to the House of Assembly.

(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.

(11) In this section - "gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct."

The Court of Appeal per Ogebe JCA, after considering the submissions of counsel for the Parties with regard to the jurisdiction of the High Court held as follows:

"Indeed he had jurisdiction to examine the claim in the light of section 188 sub-sections 1 - 9 of the 1999 Constitution and if he was not satisfied that the impeachment proceedings were instituted in compliance thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process then what happened thereafter was the internal affairs of the House of Assembly and he would have no jurisdiction to intervene."

By a long line of decisions in this court and in the court below, this point or issue should now be elementary. If a law provides for the doing

of an act with conditions, it is an elementary principle of practice that the courts have a duty to look into the matter to ensure that the conditions are fulfilled. It is a fallacy therefore to argue that the conditions do not matter and can consequently be ignored.

Section 188 has an ouster clause. I think it is only right that in interpreting it, the whole section must be taken into account. Sub-sections 1 - 9 thereof state clearly what must be done before a Governor may be removed from office. It is only when these conditions are religiously fulfilled will a Governor be said to have been removed from office. When the Governor has been constitutionally removed, then and only then will sub-section 10 come into play - it ousts the jurisdiction of the court to question such valid removal from office.

In this case, the learned trial Judge glossed over sub-sections 1 - 9. He totally ignored them. I dare say that even at random sub-sections 2, 4 and 9 are nothing but cold comfort to the defendants-appellants. In the circumstances I am in complete agreement with the Court of Appeal that the trial High Court has jurisdiction to entertain this matter.

I turn now to question two which is whether the Court of Appeal was right to determine the matter on the merits pursuant to the powers vested in it by virtue of section 16 of the Court of Appeal Act. The Plaintiffs, by the originating summons sought the following reliefs:

i. **A DECLARATION** that the purported Notice of allegation of misconduct made against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State as a preparatory step to his impeachment by the defendants is unconstitutional, null and void, and of no effect whatsoever, having regard to the provisions of S.188 (1) and (2) of the 1999 constitution of the Federal Republic of Nigeria.

ii. **A DECLARATION** that the purported Notice of allegation of misconduct made by the defendants against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State not having being received and or served on each of the 32 (thirty two) members of the Oyo State House of Assembly as envisaged by S.188(2) of the 1999 Constitution of the Federal Republic of Nigeria, and to that extent, the said motion is unconstitutional, null, void and of no effect whatsoever.

iii. A DECLARATION that the motion passed by the defendants on 22nd December, 2005 calling for the investigation of the allegation of misconduct against His Excellency Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, of Assembly is in contravention of S.188 (3) B and (4) of the 1999 Constitution of the Federal Republic of Nigeria, and to that extent, the said motion is unconstitutional, null, void and of no effect whatsoever.

iv. A DECLARATION that no valid Notice of allegation of misconduct has been issued by the defendants, same not having been passed through the Clerk of the Oyo State House of Assembly, nor received formally by the Honourable Speaker of the Oyo State House of Assembly, Hon. Adeolu Adeleke in accordance with the provisions of S.188 (2) Para, (a) and (b) and S. 188 (3) of the Constitution of the Federal D Republic of Nigeria.

v. A DECLARATION that the purported suspension of the Draft Rules of the Oyo State House of Assembly 1999, by the defendants on 13th December, 2005 preparatory to the issuance of the Notice of allegation of misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the governor of Oyo State in the absence of the Honourable Speaker of the Oyo State House of Assembly, is unconstitutional, invalid and contrary to the provision and Rules 23(1) - (4) of the Draft Rules of F Oyo State House of Assembly.

(vi) A DECLARATION that the purported sitting of the defendants at the D'Rovans Hotel, Ring Road, Ibadan where the purported Notice of allegation of misconduct was issued, and which is outside the designated official venue of the Oyo State House of Assembly is unconstitutional, invalid null and void. G

(vii) A DECLARATION that the purported service of the Notice of allegation of misconduct on His Excellency, Senator Adewolu Ladoja, the governor of Oyo State through piece meal publication on the pages H of the Nigerian Tribune Newspaper which was not addressed to Senator Rasheed Adewolu Ladoja is no service on His Excellency, it is of no effect and it is a breach of his Constitutional right to fair hearing as contained in S.36 1999 Constitution of the Federal Republic of Nigeria.

(viii) *AN ORDER setting aside all the steps taken so far by the Defendants in relation to the issuance of Notice all allegation of misconduct, passage of motion to investigate same and the purported directive to the Honourable Chief Judge of Oyo State, the said steps having breached the provisions of SS.36 and 188 of the 1999 Constitution of the Federal Republic of Nigeria.* B

(ix) *AN ORDER of injunction restraining all the Defendants, their agents, servants, privies or through any person or persons however from taking any further steps sitting, starting, or continuing to inquire or deliberate on the investigation and impeachment proceeding of His Excellency Senator Rasheed Adewolu Ladoja.* C

The plaintiffs brought their claim by way of an originating summons supported by a 17 paragraph affidavit. One of the allegations is that the 18 defendants met outside the Chambers of the House of Assembly in a hotel to commence impeachment proceedings. It was also alleged that the House of Assembly in Oyo State had 32 members and that for the removal of the Governor there must be a resolution of the House supported by not less than two-thirds majority of all its members. D E

The defendants did not file a counter-affidavit. The court was urged to hold that the facts deposed to in the further Affidavit were deemed admitted. In this regard the learned trial Judge ruled as follows:

“Having listened to the arguments of learned counsel on both sides, I am of the view that the facts and circumstances of the Nzeribe’s case relied upon by Mr. Akintola are clearly distinguishable from the present case. The originating summons in Nzeribe’s case was on determination as to membership whereas all the issues for determination in the originating summons in this case are basically on points of law in which no affidavit evidence is required.” F G

One point to remember in this case is that impeachment proceedings are sui generis. They are in a class of their own. Time is of the essence. H

Before it proceeded to hear this matter on the merits, the Court of Appeal said:

"Having held that the trial court has jurisdiction to hear the ap-

pellants’ originating summons, it is now for me to determine whether I should send the case back to the Oyo State High Court for fresh trial. The appellants have urged me to decide the case because it raises issue of constitutional interpretation of section 188 of the 1999 Constitution which
B this court is in a position to decide by virtue of section 16 of the Court of Appeal Act.

The learned counsel for the defendants/respondents urged me not to decide the originating summons because this appeal has arisen only
C from the preliminary objection on jurisdiction.

.....
as it is my view that all that needs be said on the merit of the claim has already been said in the record. Since the facts of the case are not disputed and what is to be decided is purely the interpretation of section
D 188 of the 1999 constitution, this is an appropriate case for us to resolve the entire case in this court under section 16 of the Court of Appeal Act. It is necessary for us to do so in view of the fact that the rem of the dispute, that is who is the rightful Governor of Oyo State before the
E tenure ends in May next year should be determined without further delay.”

I hardly see how this view can be faulted. It is not in dispute that the defendants did not file a counter-affidavit to rebut the facts in the
F supporting affidavit to the originating summons. In effect, all the depositions in the supporting affidavit were deemed admitted. *See Ejide v. Ogunyemi (1990) 3 NWLR (Pt. 141) 758; Niger Construction Ltd. v. Okugbeni (1987) 4 NWLR (Pt.67) 787.* What do the defendants gain by having the case sent back to Oyo State High Court having regard to the
G facts and circumstances of this case? I think the goal of the defendants was merely to delay the hearing of this matter until the lifespan of the present regime expires in May, 2007. The defendants have no facts to place before the trial court which would counter the facts which were
H deemed admitted. Would they deny that they were only 18 members out of 32? I think not. In the course of the trial Mr. Lana learned counsel for the defendants said:

“We believe 14 out of 32 who sued are in the minor-

From the foregoing, counsel clearly admitted that there are 32 members in the House of Assembly; that 14 members did not participate in the impeachment proceedings. That leaves 18 members who participated and were consequently sued in these proceedings. Simple arithmetic will show that 18 does not constitute $\frac{2}{3}$ of 32. Or would they deny that they conducted the impeachment proceedings outside the Assembly Complex? These alone render the proceedings unconstitutional, null and void. B

In the second place, the defendants cannot in clear conscience now contend that the case be remitted to the High Court. The trial court ruled that this case is “basically on points of law in which no affidavit evidence is required. They did not appeal against this ruling. The Court of Appeal was in a position therefore to deal with the points of law raised in the originating summons. The point made here is that the ruling of the trial court shut out the defendants from ever raising the issue in the light of their failure to appeal against it. In any event all that the defendants needed to say is already on record. It is therefore not correct to say that they were denied the opportunity to be heard by the Court of Appeal. D E

In my judgment, the Court of Appeal was right to determine the matter on its merits. Sending the case back to the High Court would have been so needlessly cruel in view of the time constraint. F

It was for these reasons and the fuller reasons given by my learned brother NIKI TOBI JSC., that I dismissed the appeal on 7/12/06.

G

MUSDAPHER JSC

On the 7th of December, 2006, I dismissed this appeal and I indicated that I will give my reasons today, the 12th day of January, 2007. I have seen and read the reasons for judgment of my Lord Tobi JSC just delivered with which I am entirely in agreement. In the aforesaid reasons for judgment, my lord has in a lengthy judgment, lucidly and meticulously dealt with all the issues arising for the determination of the appeal. H

I respectfully adopt as mine the reasons for the judgment. I only want to briefly offer my views on some of the issues merely for the sake of emphasis.

Section 101 of the 1999 Constitution provides:

B *“Subject to the provisions of this constitution, a House of Assembly shall have power to regulate its own procedure, including the procedure of summoning and recess of the House.”*

A corresponding provision in section 60 empowers the National Assembly to regulate their own procedure. The question has however arisen as to whether the courts have the jurisdiction and the competence to interfere with the internal proceedings of any of the Legislatures in the federation. This court in the case ATTORNEY-GENERAL OF BENDEL STATE vs. ATTORNEY-GENERAL OF THE FEDERATION AND 22 OTHERS (1982) 3 NCLR 1 at 156, laid down the powers of the courts:-

“If the Constitution makes provisions as to how the legislature should conduct its internal affairs or as to the mode of exercising its legislative powers, then the court is duty bound to exercise its jurisdiction to ensure that the legislature comply with constitutional requirement.”

Earlier at page 71 the court said:-

“This court is not called on to pronounce and is not pronouncing on the validity of the internal proceedings of the National Assembly [Oyo State Legislature in this case]. That, in my opinion, (is) a political question requiring a political solution.”

In my humble opinion the law is that provided the legislature in its legislative exercise does not breach any constitutional provision or a statute, a court cannot adjudicate in any matter arising from the legislature, because such disputes are non-justiciable and are political. See EZEKE v. MAKARFI (1982) 3 NCLR 663. Where the Constitution has made a specific provision as to any particular procedure or mode of exercising any legislative function, if there is breach of such provisions, the courts will assume jurisdiction as the guardians of the Constitution, to intervene and to ensure compliance with the provisions of the Constitution. There is no doubt that the removal of an elected public officer by impeachment involves serious political considerations, but the entire considerations may

not be purely political. They may involve legal questions. This was precisely the opinion of the Supreme Court of Malaysia in the case of *MUSTAPHA v. MOHAMMED AND ANOR.* (1987) LRC (const) 16. When it stated thus:-

“As to whether the issues (i.e. the purported removal of the Prime Minister by the Head of State) are political in nature, one would be naive, in my view, not to regard them as partly political, but in my opinion, they are not wholly political in nature, their trial and decision thereon would involve construction of the Federal and State Constitutions and consideration of legal principles, and the legal issues of misrepresentation, conspiracy, fraud and duress, all of which fall within the jurisdiction and function of the court. The main issues of appointment and dismissal and the other issues mentioned in the foregoing paragraph are, in my view, legal matters, although in the circumstances, some of them may smack of political flavour, but this factor alone, in my view, does not have the effect of ousting the jurisdiction of the court.”

As mentioned above, impeachment or removal of an elected public officer is a very serious and weighty business. Through out the history of the United States of America there were only about 14 impeachments and attempted impeachments most of them concerned judicial office holders, there was a senator in 1798, and the impeachment of President Andrew Johnson is well known. In recent times there was the unsuccessful impeachment of President Bill Clinton.

The plaintiffs in the court of trial filed this action claiming in the first relief:-

“A declaration that the purported Notice of Allegation of Misconduct made against his Excellency, Senator Rasheed Adewolu Ladoja, governor of Oyo State as a preparatory step to his impeachment by the Defendants is unconstitutional, null and void, and of no effect whatsoever, having regard to the provisions of section 188 (1) and (2) of the 1999 Constitution of the Federal Republic.”

Thus the fundamental question raised in the action is whether the preparatory steps taken by the defendants in removing governor Ladoja from office have breached section 188 of the Constitution or not. In this

regard, it is my view, that the court has the jurisdiction to look into the matter and to decide whether any constitutional provision has been breached or not.

Section 188 (10) of the Constitution cannot apply to oust the jurisdiction of the courts in a situation in which the Assembly acted in breach of fundamental provisions such as those provisions under sections S. 95, S. 96, S. 97, S. 98 and S. 103 of the Constitution. Where there is any breach of such provisions, the courts will have the jurisdiction to intervene. S. 188 (10) does not empower the Assembly to do what it likes regardless of other provisions of the Constitution.

I accordingly agree, that the courts have the jurisdiction and the competence to ensure that the legislature, in the exercise of its legislative functions, acts in complete harmony with the constitutional provisions.

As mentioned above, the kernel of the case of the respondents before the trial court was that in the preparation to remove Senator Ladoja from his elective post of Governor of Oyo State, the House of Assembly breached a number of constitutional provisions including the mandatory ones under S. 188 dealing with the removal of an elected Governor or Deputy Governor.

In the first declaratory relief recited above, the plaintiffs, respondents herein, complained that the “preparatory” steps taken to “impeach”, Senator Ladoja, the Governor of Oyo State was unconstitutional null and void. Impeachment here means removal of an elected officer, as a matter of fact, the word “impeachment” does not appear in S. 188 of the Constitution but there is no need to split hairs, removal means impeachment. Black’s Law Dictionary defines impeachment thus:-

“A criminal proceedings against a public officer, before a quasi-political tribunal instituted by a written accusation called articles of impeachment; for example a written accusation of the House of representatives of United States to the Senate of the United States against the President, Vice President, or an officer of the United States, including Federal Judges.”

But Section 188 of our Constitution is not worded like that, the allegation under S. 188 is that the officer is alleged to have conducted

himself in a perverse and delinquent manner amounting to gross misconduct “in the performance of the functions of his office.” Gross misconduct has been defined under subsection (2) of section 188 thus:-

“gross misconduct means a grave violation or breach of the provisions of this constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.”

For articles of impeachment to be relevant, the misconduct must be gross, gross here means glaringly noticeable, because of obvious inexcusable badness, or objection ableness or a conduct in breach of the constitution. Accordingly it is not every misconduct that will attract impeachment. Although, it appears that the legislature has the discretionary power to determine what amounts to “gross misconduct”, it is clearly supposed to be apparent to all and sundry that the misconduct is clearly and immediately apparent.

The principle of separation of powers under the Constitution is meant to guarantee good governance and development and to prevent abuse of power. A writer, Montesquieu once said, “political liberty is to be found only when there is no abuse of power. But constant experience shows every man invested with powers is liable to abuse it, and carry his authority as far as it will go.” In this wise impeachment has come to be recognized as one of the legitimate means by which a governor or deputy governor, president or vice president can be removed from office for an impeachable offence. The meaning of “gross misconduct” as contained in the Constitution in relation to impeachment proceedings is whatever the legislature deems “gross misconduct”. This clearly, is very nebulous, fluid and subject to potentially gross abuse and is also potentially dangerous at this point of our national or political life. That is why, the legislature should strictly comply with all the other provisions as contained under section 188. Failure to comply with any one of them will render the whole exercise unconstitutional null and void and any purported impeachment or removal will be declared improper by the courts.

As mentioned above, whether “gross misconduct” is sufficient to warrant the removal of a governor is apparently a political question and what tantamount to it, is within the discretion of the legislature. In their

legislative functions, including deciding whether a conduct amounts to an impeachable offence, the legislature is bound by the other provisions of the Constitution. In my view, the legislature must act in a responsible and civilized manner, when ever, it considers whether a conduct amounts
B to “gross misconduct”. The offending conduct must be in my view at least breach of the Code of Conduct contained in the Constitution. It is not every conduct that the legislature deems impeachable that is impeachable, the courts have the jurisdiction to examine whether a conduct
C amounts to gross misconduct or there is indeed a breach of the Constitution.

In any event, even if one concedes that the question of what is tantamount to “gross misconduct”, and whether such “gross misconduct” is sufficient to warrant the removal of an elected governor or deputy
D governor, is “a political” question, because the constitution expressly commits to the legislature the prerogative of determining that question, all the same, this does not justify complete denial of judicial review in respect of the entire impeachment or removal process. As one writer puts it:-

E *“The doctrine of political question does not justify the total and absolute preclusion of judicial review and it would be more rejectable as a basis for lack of judicial review when, as it seems to be the case more in Nigeria than elsewhere, impeachment is utilized as a political weapon to*
F *intimidate and subjugate the executive branch to the dictates of a legislature hostile to it. Save for certain aspects of impeachment xxxxx court review of impeachment determination is a potential national conflict deto-*
nator.”

G In a situation where there has been a clear breach of the constitutional provisions taken by the legislature when there has been no clear allegation of any misconduct against the provisions of the Constitution or in a case where the requirement under section 188(2) which stipulates that the Notice of allegation of misconduct against the elected office
H holder must be signed by not less than 1/3 of all the members of the House of Assembly, should the Chief Judge of the State set up the seven-men investigation panel pursuant to the requirement of section 188(5), when the requirement of section 188(2) has not been met? In my view,

any Chief Judge worth his salt should not proceed, under the circumstances to set up the panel in accordance with the provisions of section 188(5). The court will have the jurisdiction and the competence to intervene whenever the House of Assembly adopting the report of the seven member panel is less than 2/3 of the members of the House Assembly. B Whenever politicians begin to engage in self destruction, bastardizing the rule of law and the flagrant abuse and disregard of the Constitutional provisions, the courts have the duty as the guardians of the constitution to intervene and appropriately pronounce on the legality of the legislative function be it impeachment or otherwise. C

In the instant case, I am in complete agreement with the opinion of Ogebe J. C. A who wrote the lead judgment in the court below, when he stated at pages 485 and 486 of the printed record:-

“It is my view that the trial court had serious questions to consider D before hastily throwing out the suit. For example it was alleged that 18 defendants/respondents met outside the Chambers of the House of Assembly in a hotel to commence impeachment proceedings, the court had a duty to determine whether proceedings before such a group amounted to E proceedings of the Oyo State House of Assembly. It was also alleged that the House of Assembly of Oyo State had 32 members and for the removal of a governor which requires the Resolution of 2/3 majority of all the members of the House, the court had a duty to inquire whether a factional meeting of 18 members constituted the required 2/3 majority of all F the members. The court also had to consider whether impeachment proceeding in which the Speaker of the House of Assembly is excluded from his leading role as provided for in section 188 of the constitution can amount to a proper proceedings of impeachment. For all I have said in G this judgment I have no hesitation in holding that the learned trial judge was wrong in declining jurisdiction to examine the claim in the light of section 188 subsection 1- 9 of the 1999 Constitution and if he was not satisfied that the impeachment proceedings were instituted in compliance H thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process then what happened thereafter was the internal affairs of the House of Assem-

bly and he would have no jurisdiction to intervene.”

I respectfully agree, under the Constitution particularly under section 188 thereof, it is wrong to assert that a House of Assembly or even the National Assembly is the sole and only tribunal in matters of impeachment and that the decision of the legislature is always final. Even in the United States of America congressional legislative function is not an end in itself, it must be related to and in furtherance of a legitimate task of the Congress. Investigation or any other legislative function conducted solely for the personal aggrandizement or politics are indefensible. See JOHN T. WATKINS vs. UNITED STATES OF AMERICA 354 vs 178 I led 2nd 1273 or 77 S Ct 1173.

In my view, it cannot be assumed that every exercise of legislative function is justified merely by the public need or political expediency, the mere semblance, of a legislative purpose will not justify a legislative function in the face of a breach of a constitutional provision. Thus the power of the House of Assembly in relation to impeachment or the removal of an elected public officer such as a governor is clearly limited. And clearly the courts have the jurisdiction to ensure strict compliance with the constitutional provisions.

In the instant case, the respondents claim some violations of the provisions of section 188 of the Constitution viz:-

1. The holding of the meeting of the appellants at D’Rovans Hotel Ring Road, instead of the floor of the House of Assembly.
2. The failure to serve the 3rd respondent/party interested with the Notice of the allegation of gross misconduct.
3. The failure to obtain the Constitutionally required 2/3 majority of all the members of the House of Assembly for the removal of Governor Ladoja.
- “4. The non-involvement of the Speaker in the proceedings leading to the removal or impeachment of Governor Ladoja.
5. The unconstitutional procedure adopted in the illegal Application of Rule 23 of the Draft Rules of Oyo State House of Assembly etc. etc.

As mentioned above, these are glaring breaches of the constitu-

tional provisions committed by the appellants in their attempt to exercise their powers to remove Governor Ladoja. The evidence offered was not controverted and the trial judge was clearly in error to have declined jurisdiction and then proceed to dismiss the claims of the respondents.

It is also my considered view, that a Chief Judge who has the responsibility of appointing the 7man panel to try the Articles of Impeachment will have to make a decision whether all the proper steps have been taken by the legislature before embarking on the appointment of the 7man panel. For example the allegation of “gross misconduct” must be in writing and signed by not less than 1/3 of the members of the House of Assembly and is presented to the Speaker of the House of Assembly and it shall be the Speaker who shall request the Chief Judge to appoint the panel. The Chief Judge in all of the mentioned matters has the duty to ensure that all the constitutional provisions relating to the action of removal or impeachment are strictly complied with. The failure to comply with any of the provisions entitles the Chief Judge to refuse to appoint the panel. So under the undoubted facts of this case, when it was not the Speaker who requested the Chief Judge to set up the Seven Man Panel, the Chief judge ought to have refused to appoint the 7man panel.

From all indications the Court of Appeal acted rightly in setting aside the decision of the trial court and in invoking the provisions of S. 16 of Court of Appeal Act and determining the case on the basis of the unchallenged and uncontradicted evidence of the various infractions with the provisions of the Constitution by the legislature in the purported removal or impeachment of Governor Ladoja.

It is for the above and the fuller Reasons for Judgment contained in the aforesaid Reasons for Judgment of my lord Tobi JSC, that I too, dismissed the appeal and affirmed the decision of the Court of Appeal. For the avoidance of any doubt, I grant the respondents’/plaintiffs’ reliefs claimed in the light of which, the party interested 3rd respondent herein, Senator Ladoja remains legally and constitutionally the Governor of Oyo State. I make no order as to costs.

AKINTANJSC

This appeal came up for hearing on 7th December, 2006. After taking submissions from Learned Counsel for the parties in the case, we delivered a verdict dismissing the appeal as lacking any merit and we also affirmed the judgment and orders made by the Court of Appeal in the case. We then indicated that full reasons for our decision would be given on 12th January, 2007. The following are therefore my reasons for dismissing the appeal.

The 1st and 2nd respondents, who were respectively the speaker and Deputy Speaker of the Oyo State House of Assembly, commenced this action was commenced by way of an originating summons dated 22nd December, 2005 as Suit No. 1/1050/05. They sought from the court the determination of eight questions, seven declarations and two mandatory orders, details of which I will set out later in this judgment. The opening and closing paragraphs of the originating summons respectively set out what was required of the defendants by the rules of the court upon service on them of the summons and the implication of their failure to comply with the directives. The opening paragraph reads, **inter alia**, as follows:-

“Let all the respondents of the Oyo State House of Assembly within eight days after the service of this summons on them, inclusive of the day of such service, cause an appearance to be entered for each of them to this summons which is issued upon the application of the plaintiffs whose address within jurisdiction is c/o Oyo State House of Assembly Complex, Secretariat, Ibadan who claim to be entitled to the determination of the questions hereinafter set out and the relief thereafter appearing —”

The closing passage of the summons reads as follows:-

“Note: If any of the defendants does not enter an appearance within the time and at the place above mentioned, such order would be made and proceeding may be taken as the Judge thinks just and appropriate.”

An affidavit of 16 paragraphs setting out the facts relied on in support of the claim was filed along with the claim.

The appellants, as defendants, were duly served with the pro-

cesses and instead of entering an appearance as required of them, they immediately filed a notice of preliminary objection. Their objection as set out in their said notice was premised on the following four grounds:

“(i) *This Honourable Court lacks jurisdiction to entertain the suit.*

(ii) *The plaintiffs herein lack the necessary locus standi to institute the suit* B

(iii) *The Plaintiffs/Respondents claims disclose no reasonable cause of action against the defendants/applicants.*

(iv) *The plaintiffs/respondents suit is liable to dismissal.”* C

There was no affidavit filed along with the notice of preliminary objection but eight grounds were set out as the grounds upon which the objections were founded.

When the case came up on 28th December, 2005 before Ige, J., the learned trial Judge decided to take submissions from Counsel for the parties only in respect of the preliminary objection to jurisdiction despite a request from Learned Counsel for the plaintiffs that the court should also take submissions in respect of the substantive claim. At the end of the submissions of Counsel in respect of the preliminary objection, the learned trial Judge adjourned his ruling till 5 p.m on the same day. D E

The ruling was delivered on the said date by the learned Judge as he had earlier indicated. In the said ruling, the learned Judge held that there was merit in the preliminary objection. The learned trial Judge held, inter alia, as follows in the concluding portion of his said ruling: F

“I have carefully and painstakingly examined all the submissions and arguments of learned Counsel for both parties. I have also carefully examined all the questions raised for determination as well as reliefs claimed by the plaintiffs. Virtually all the 8 questions set out for determination on the Originating Summons as well as the 9 declaratory reliefs and orders sought, touch on the issue of impeachment. Section 188(10) of the Constitution of the Federal Republic of Nigeria provides as follows: G H

‘No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceeding or determination shall be entertained or questioned in any court.’

When the House of Assembly is exercising its constitutional powers in relation to impeachment proceedings or any matter relating thereto, it is performing a quasi judicial function. Thus it is provided in sub-section 11 of section 188 of the 1999 Constitution that the power to determine what constitutes “grass misconduct” or a conduct that will lead to impeachment proceedings lies with the House of Assembly and not in the court.

By the combined effect of the above provisions therefore and having regard to the nature of the reliefs claimed by the plaintiffs, it is clear beyond argument that the jurisdiction of this court is clearly ousted. Impeachment and related proceedings are purely political matters over which this court cannot intervene. The action is not justiciable——It is not part of the duty of the Court to forage into areas that ought to vest either directly or impliedly in the Legislature such as the issue of impeachment which is a matter that comes within the purely internal affairs of the House of Assembly.

The court will therefore decline jurisdiction in the matter. The objection of learned Counsel for the defendants/respondents is upheld. The originating summons is accordingly dismissed.”

The plaintiffs were dissatisfied with the above ruling of the trial court. They appealed against it to the Court of Appeal (hereinafter referred to as the lower court). The lower court allowed their appeal and, exercising its powers under section 16 of the Court of Appeal Act, proceeded to decide the plaintiffs’ claim on the merit and thereby granted all the reliefs claimed by the plaintiffs. The present appeal is from the decision of that court.

It may be mentioned that while the appeal was pending at the lower court, the 3rd respondent, who was the elected Governor of Oyo State, sought and was granted leave to be joined as an interested party.

The appellants filed an appellants’ brief and a reply brief. A brief was filed on behalf of the 1st and 2nd respondents while one was filed on behalf of the 3rd respondent. The appellants formulated the following three issues as arising for determination in the appeal:

“1. Whether the Court of Appeal was right in its determination

that the High Court has jurisdiction to entertain the question of impeachment of the Party Interested/Respondent as the Governor of Oyo State without:

(a) a decision of Lower Court as to whether or not there has been any non-compliance with Section 188 (1) - (9) of the Constitution of the Federal Republic of Nigeria, 1999 and or B

(b) proof of non-compliance with Section 188 (1) - (9) of the Constitution of the Federal Republic of Nigeria?

2. Whether the Court of Appeal was right in its determination that the High Court of Justice Oyo State has jurisdiction to entertain a question as to the impeachment of the Party Interested/Respondent as the Governor of Oyo State having regard to: C

(i) the provision of Section 188 (10) of the constitution of the Federal Republic of Nigeria; and D

(ii) the question of locus of the Plaintiffs?

3. Whether the Court of Appeal was right in considering the merits or the Originating Summons and granting all the reliefs sought by the Plaintiffs/Respondents pursuant to Section 16 of the Court of Appeal Act and in the absence of the power in the High Court of Oyo State in granting those reliefs as at the stage of proceedings before it and also in not affording the Defendants/Appellants the opportunity to present their own defence (by way of Counter-Affidavit) to the action.” E

The 1st and 2nd respondents, on the other hand, formulated four F issues in their brief. The four issues are a mere recasting of the above three issues formulated in the appellants’ brief. I therefore need not reproduce them. Similarly, the three issues formulated in the 3rd respondent’s brief are similar to those formulated by the appellants and as such I also G need not to reproduce them.

As already stated earlier above, the plaintiffs, now 1st and 2nd respondents, commenced the action by way of an Originating Summons. The facts they relied on in support of their case are set out in a 16 paragraph affidavit deposed to by Sunday Aborisade, a Legal Practitioner. Paragraphs 5 to 12 of the affidavit aptly set out the relevant facts. The said paragraphs 5 to 12 read as follows:- H

“5. That I know as a fact that the 1st Plaintiff herein is the Honourable Speaker of the Oyo State House of Assembly while the 2nd Plaintiff is the deputy speaker of the House of Assembly respectively.

6. That the 1st and 2nd Plaintiffs herein informed me and I verily believe them that the Oyo State House of Assembly sat at the Assembly Complex Secretariat Ibadan on 13th December 2005 while the Defendants chose to sit outside the official designated House Chambers located at the House of Assembly Complex instead they sat at D’Rovans Hotel Ring Road Ibadan.

7. That at the purported sitting of the Defendants herein at the D’Rovans Hotel Ring Road Ibadan, the Defendants purportedly suspended the draft rules of the Oyo State House of Assembly Rules and thereby compromised the interest of the Plaintiffs vis-à-vis their right as legislators and also compromised the rules and regulation of the Oyo State House of Assembly.

8. That I was informed by 1st and 2nd Plaintiffs and I verily believe them that the Defendants purportedly issue a notice of allegation of misconduct against the governor of Oyo State, Senator Rasheed Adewolu Ladoja, with the purpose of commencing an impeachment proceedings against the latter.

9. That the Defendants further on 22nd December, 2005 without following the laid down rule and regulations and the constitution of the Federal Republic of Nigeria purported passed a motion calling for the investigation of the alleged allegations of misconduct against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, without the concurrent consent approval of the two-third majority of the 32 (thirty two) members House of Assembly.

10. That the issues of the purported notice of allegations of misconduct by the Defendants was also done not only outside the designated official venue of the Assembly but was done without the concurrent consent of the required members of the House of Assembly.

11. That I was informed by the 1st and 2nd Plaintiffs and I verily believe them that the required service of the purported notice of allegations of misconducts against Governor Rasheed Adewolu Ladoja which

the Defendants issued from D'Rovan Hotel was not served on each member of the House of Assembly of Oyo State.

12. *That I was informed by the Plaintiffs herein and I verily believe them that the business of the House of Assembly of Oyo State is meant to be conducted within the House of Assembly Chambers and/or on the floor of the parliament"*

The brief facts of the case are that the 3rd respondent was the elected Governor of Oyo State. His four years term of office, which started in May 2003, would end in May 2007. The 1st and 2nd respondents were respectively the Speaker and Deputy Speaker of the Oyo State House of Assembly while the 18 appellants were members of the Oyo State House of Assembly. Towards the end of 2005, the members of the Oyo State House of Assembly became polarized as a result of some political disagreement among them. The 32 member House was divided into two factions. The 18 appellants belonged to a faction while the two respondents and the remaining 12 members of the House were in the second faction. The 18 legislations were opposed to the 3rd respondent while the remaining 14 were in his support.

On 13th December, 2005, the 18 legislators opposed to the 3rd respondent met and sat at D'Rovans Hotel Ring Road, Ibadan. They raised a notice of allegations of gross misconduct against the 3rd respondent. They did this without the involvement of the 1st and 2nd respondents who are the Speaker and Deputy Speaker respectively. The service of the notice on the 3rd respondent was done by the group through a newspaper advertisement. Thereafter, they went ahead by requesting the Acting Chief Judge of Oyo State to set up and inaugurate a seven member panel to investigate the allegations of gross misconduct they had drawn up against the 3rd respondent.

The Acting Chief Judge empanelled and inaugurated the panel on 4th January, 2006 to investigate the alleged acts of gross misconduct against the 3rd respondent. The panel sat for two days and without taking oral evidence from anybody, eventually submitted its report to the 18 member faction early on 12th January, 2006. The factional group of 18 members in turn passed a resolution by which they impeached the 3rd respondent.

It may be mentioned that as at the 12th January, 2006 when the group held its meeting to impeach the 3rd respondent, there was an action filed by the 3rd respondent challenging his impending impeachment and there was also a motion for injunction to restrain the 18 member faction from proceeding with the impeachment plan.

The 1st and 2nd respondents reacted to the action taken by the 18 member faction by commencing this action by Originating Summons against the appellants. The reaction of the appellants was that upon service of the processes on them, they filed their notice of preliminary objection, the ruling on which is the basis of this appeal.

The decision of the lower court that the learned trial Judge had jurisdiction to examine the claim in the light of section 188 sub-sections 1 - 9 of the 1999 Constitution is the subject of attack in the first issue in the appellants' brief. It is submitted that once the learned Judge took that stand, he ought to have remitted the case back to the trial court for determination of whether or not there had been any breach of the provisions of the subsections 1 - 9 of the said section 188 of the Constitution. The lower court is also said to have failed to come to a decision on the question of non-compliance. It is further submitted that if the lower court had properly examined the materials, qua the affidavit in support of the Originating Summons, it would have come to the irresistible conclusion that, even on the showing of the plaintiffs, their case did not warrant the calling on the defendants to enter a defence.

Reference is made to the provisions of section 113 (c) of the Evidence Act which provides, inter alia, that:

"113- The following public documents may be proved as follows
(c) *The proceeding of the State House of Assembly by the minutes of that body or by published Laws or by copies purported to be printed by the Order of Government."*

It is submitted that the averments in the supporting affidavit relating to non-compliance with the provisions of section 188 (1) - (9) fail to meet the requirement of how the proceedings of a State House of Assembly has to be proved as prescribed in section 113 (c) of the Evidence Act.

The point canvassed in the appellants' Issue 2 relates to the juris-

diction of the trial High Court to entertain the case of the plaintiffs before the court. The appellants' attack is premised on two grounds: (a) the issue of locus standi of the plaintiffs to institute the action; and (b) the justiciability of a suit founded upon an impeachment proceedings.

It is the contention of the appellants that the two plaintiffs had no locus standi to institute the action. It is submitted that for a person to have locus standi to institute an action, he has to show that he has special interest and that the interest is not vague or intangible, supposed or speculative or that it is not an interest he shared with other members of the society. He must also show that such interest has been adversely affected by the act or omission which he seeks to challenge. The decisions *In Re: Ijelu* (1992) 9 NWLR (Pt. 266) 414 at 422; and *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669 are cited in support of the above submissions. It is further argued that an examination of the complaints of the plaintiffs in their claim shows that all their grievances affect the personal rights of Senator Rasheed Adewolu Ladoja (3rd respondent). It is therefore submitted that the plaintiffs are busy bodies who are fighting the cause of the said Senator Ladoja. In addition, the plaintiffs are said to constitute only a minority of the members of the House of Assembly and they did not say that they were acting for and on behalf of the House of Assembly. It is submitted that since the court is not expected to speculate that the plaintiffs were acting on behalf of all the members of the House of Assembly, they should be treated as busy bodies who have no locus standi to commence the action.

On the non-justiciability of a suit founded upon an impeachment proceedings, reference is made to the provisions of section 188 of the 1999 Constitution and the need to understand the history and development of impeachment process under the American Presidential Constitution from where the idea was adopted into our 1979 and 1999 Constitutions. It is argued that the impeachment process has been used periodically in the United States since 1789. The decision of the Supreme Court in *Ritter v. U. S.* 84 Ct.Cl. 293 (1936) where that court held that "*the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its body*

against the plaintiff and its decision is final.” It is contended that the United States Supreme Court bars judicial review of impeachment under the political question doctrine. Similarly, it is submitted that any section of our Constitution containing an ouster clause is excluded from the jurisdiction of the court in Nigeria and that one of such provisions of the Constitution is Section 188.

Reference is made to the ouster clause provision in Section 188 (10) of the Constitution. It is finally submitted that by that provision, the proceedings of the House for the purpose of removing the Governor which begins in Section 188 (2) with the issuance of the notice of allegation and end with the adoption by the House of the report of the panel in section 188 (9), the courts are barred from entertaining or questioning any aspect thereof. All the reliefs sought by the plaintiff are said to come within the scope and as such, the trial court’s jurisdiction is ousted.

The contention of the appellants in their 3rd Issue is that the lower court, having upheld the appeal of the plaintiffs against the decision of the High Court dismissing their case and setting the decision aside, it had no jurisdiction to proceed to consider the merit of the substantive case and grant all the reliefs claimed in the action. Reference is made to the provisions of the 1999 Constitution which confer jurisdiction on the lower court to entertain appeals from the High Court in Sections 241 to 246 and particularly section 241 (1) which provides, inter alia, that:

“An appeal shall lie from the decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases:

(a) Final decisions in any civil or criminal Proceeding before the Federal High Court or a High Court sitting at first instance.”

It is then submitted that appeals can only lie from decisions of the lower courts and ipso facto appeals can never lie from or in respect of issues raised in that court which the court did not decide. As the decision of the High Court to the lower court dealt solely with the preliminary objection raised by the defendants against the jurisdiction of the trial court to entertain the case, the lower court is said to have acted wrongly when it decided the substantive claim of the plaintiffs which the trial court did not decide.

The decision of the lower court to embark on deciding the merit of the plaintiffs' claim under the powers conferred on the court in section 16 of the Court of Appeal Act is there said to be erroneous and a misapplication of the provisions of that section. It is submitted that the power conferred on the lower court in that section is not at large but restricted only to the remedies or reliefs which are open to or available to the trial court. The decision in *Garuba v. K. I. C. Ltd* (2005) 5 NWLR (Pt. 917) 160 at 180 is cited in support of this contention. The reliance by the lower court on the decision in *Attorney-General of Anambra State v. Okeke* (2002) 12 NWLR (Pt. 782) 572 is said to be erroneous and constitutes a misapplication of the principles enunciated in that case.

It is submitted in reply in the briefs filed by the two sets of respondents on the scope and application of section 188 of the Constitution, that the trial court totally misapplied the provisions of that section of the Constitution. It is submitted that the entire section should have been read together and not in isolation as the learned trial Judge did. The actions taken under the provisions of section 188 of the Constitution can only be valid after full compliance with the mandatory provisions of the subsection of the said section 188 of the Constitution. In the instant case, all the steps taken by the appellants in their bid to impeach the 3rd respondent are said to be not as prescribed by the provisions of the section. They are therefore said to be null and void.

In reply to the allegation that the plaintiffs (now 1st and 2nd respondents) had no locus standi to institute the action, reference is made to the positions of the two men as speaker and deputy speaker respectively. It is then submitted that since the steps taken by the defendants encroached on their roles under the Constitution, they could therefore not be regarded as busy bodies when they instituted the action.

Finally, it is submitted in reply on the application of section 16 of the Court of Appeal Act that the fundamental conditions that are necessary for the invocation of the powers conferred on the lower court under section 16 of the Court of Appeal Act, as set out in judicial decisions, were available in the instant case and as such the lower court rightly applied the provisions of the said section 16.

As already stated earlier above, the appellants, as defendants, did not enter an appearance after they had been served with the court processes. They also did not file any counter-affidavit in reply to the averments contained in the affidavit in support of the plaintiffs originating
B summons. All they did was to file the notice of preliminary objection, portions of the ruling on which I have already set out above in this judgment. The position of the law is that the memorandum of appearance is simply to indicate that the suit will be contested. If, therefore, the defendant fails to enter an appearance, the suit will be treated as undefended
C and the plaintiff may proceed to ask for judgment to be entered in his favour or for the case to be set down for hearing: see *British American Insurance Co Ltd. v. Edema-Sillo* (1993) 2 NWLR (Pt. 277) 567; and *Ita v. Nyong* (1994) 1 NWLR (Pt. 318) 56. When a defendant intends to
D object to the regularity of the proceedings by which the plaintiff seeks to compel his appearance, he may by leave of the court enter a conditional appearance or an appearance under protest and then apply to the court to set aside the plaintiffs proceedings or he may, without entering an appearance, move the court to set aside the service of the writ effected on
E him. See *Adewumi v. Attorney-General of Ondo State* (1996) 8 NWLR (pt. 464) 73.

In the instant case, the appellants did not enter an appearance after the writ had been served on them. Neither did they enter a conditional
F appearance. They also did not move the court to set aside the service of the writ effected on them. What they did was to file a notice of preliminary objection in which they prayed the court to dismiss the claim on the ground that the court lacked jurisdiction to entertain the claim. The step
G they took is therefore not in compliance with the requirement of the law as declared above.

The merits of the originating summons lie in the fact that proceedings commenced thereby are very expeditiously dealt with. This is so
H because pleadings are not filed and consequently witnesses are rarely called and examined. Rather, affidavit, evidence is mostly used and relied upon. Proceeding for which it is used therefore usually involve questions of law rather than disputed issues of facts. Where it is otherwise, a proper

initiating process should be adopted. An originating summons should therefore not be adopted if the proceedings are hostile proceedings, that is, proceedings in which the facts are apparently disputable: See *Doherty v. Doherty* (1969) NMLR 24; *Nwadialo, Civil Procedure in Nigeria*, 2nd edition 2000, page 237; *National Bank v. Alakija* (1978) 9 and 10 SC. 59; *Aguda, Practice & Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria*, 2nd edition 1995, page 51-52; and *Famfa Oil Ltd. v. Attorney-General of the Federation* (2003) 18 NWLR (Pt. 852) 453. B

The Implications of failure of the appellants to enter an appearance and file a counter-affidavit to controvert the averments in the affidavit filed in support of the originating summons are: (1) by filing and relying on preliminary objection rather than filing a counter affidavit to the merit of the case, they have demurred, contrary to the provisions of Order 24 of the Oyo State High Court (Civil Procedure Rules which abolished demurrer; and (2) it means that the appellants have admitted the facts deposed to in the affidavit filed in supported of the originating summons. They cannot therefore complain that they were not allowed to file a counter affidavit since they have admitted the facts in the said affidavit in support. They can also not complain that they were denied fair hearing since they had the opportunity of putting their defence across, if any, but chose not to avail themselves of that opportunity: See *Igbokwe v. Udobi* (1992) 3 NWLR (Pt. 228) 214; *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356; and *Omo v. JSC Delta State* (2000) 12 NWLR (Pt. 682) 444. C E F

On the question whether the plaintiffs had the locus standi to institute the action, it is necessary to examine the legal position at this stage. The term 'locus standi' denotes legal capacity to institute proceedings in a court of law: see *Thomas v. Olufosoye*, *supra*, at 685; *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt. 67) 797; and *Bolaji v. Bamgbose* (1986) 4 NWLR (Pt. 67) 632. According to the uncontroverted facts deposed to in paragraphs 5, 6, 7, 8, and 9 of the affidavit in support of the originating summons, the 1st and 2nd plaintiffs (now respondents) are respectively the Speaker and Deputy Speaker of the Oyo State House of Assembly. On G H

13th December, 2005 while the House of Assembly presided over by them was holding its session at the Parliament Building Ibadan, the defendants/appellants decided to hold a rival session at D’Rovans Hotel, Ibadan, a place outside the Parliament Building and a meeting not presided over by either the 1st or 2nd respondent. At the said meeting at D’Rovans Hotel, the appellants took decisions by which, among others, they suspended the draft rules of the Oyo State House and thereby compromised the interest of the plaintiffs vis-à-vis their right as legislators. With those disclosures in the said paragraphs of the affidavit, it will be totally out of place for any court or impartial tribunal to hold that the plaintiffs had no interest to protect or that they were mere busy bodies.

My above view is strengthened having regard to the importance attached to the office of the Speaker of the State House of Assembly in Section 95 of the 1999 Constitution by which the Speaker is mandatorily required to preside at any sitting of a House of Assembly. And in his absence, the Deputy Speaker “shall preside.” The two officials are therefore entitled to preserve the rights attached to their office as long as they have not been removed from office by a resolution of the House of Assembly passed by the votes of not less two-third majority of the members of the House as prescribed in section 92 (2) (c) of the said Constitution. There is therefore totally no merit in the allegation that the plaintiffs lacked the locus standi to institute the action.

On the question whether the provisions of section 188 of the 1999 Constitution was correctly interpreted by the lower court, it is necessary, for a full consideration of the provisions, to first set out the entire section. The said section 188 reads as follows:

“188. (1) *The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.*

(2) *Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly-*

(a) *is presented to the Speaker of the House of Assembly of the State;*

(b) *stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particu-*

lars of which shall be specified.

The speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder or the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall -

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and

(b) within three months of its appointment, report its findings to the House of Assembly.

(8) where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(9) Where the report of the Panel is that the allegation against the

holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-third majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.

(11) In this Section -

“gross misconduct” means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.”

It is not in doubt that section 188(10) creates an ouster clause in that rights of an aggrieved person to challenge actions carried out under such provisions are expressly taken away by the provision. The attitude of the courts to such provisions is that they are regarded as an aberration, outrageous provision and one that should be treated with extreme caution since they are regarded as unwarranted affront and unnecessary challenge to the jurisdiction of the courts which the courts guard jealously. Where, therefore, a person’s right of access to court is taken away or restricted by either the Constitution or any statute, the language of any such provision is usually construed very cautiously and strictly. In the course of interpreting such provisions, the languages of any such statute or provision will not be extended beyond its least onerous meaning unless clear words are used to justify such extension. This is mainly because it is the practice of the courts to guard its jurisdiction jealously: *See Barclays Bank Nig. Ltd. V. Central Bank of Nigeria (1976) 1 ALL NLR 409; Agwuna v. Attorney-General of Federation (1995) 5 NWLR (Pt. 396) 418; Osadebey v. Attorney-General of Bendel State (1991) 1 NWLR (Pt. 169) 525; Attorney-General of Bendel State v. Agbofodoh (1999) 2 NWLR (Pt. 592) 476; and Attorney-General of Federation v. Sode (1990) 1 NWLR (Pt. 128) 500.*

Thus when interpreting the provision of an ouster clause in a stat-

ute, including that of the Constitution, the courts usually scrutinize every aspect of such provision with a view to ensuring that every thing done under such statute is done strictly in compliance with the provisions of the statute. This is because where the court finds that there is a failure to strictly comply with what the statute provides for, such act purported to be done under the statute would be ultra vires, and would be declared null and void as such action would be regarded not to have been carried out under the said provisions of the statute or Constitution; See *Ekpe v. Calabar Local Government* (1993) 3 NWLR (Pt. 281) 324. B

The stand of the court in this respect is well explained in the *Ekpo v. Calabar Local Government* case, supra. It was clearly stated in the said case that in interpreting any ouster provision in a statute, the whole section of the statute must be taken into account as doing so would assist in understanding the circumstances in which the ouster clause comes into play. It was also clearly stated in the same case that the remedy of ouster clause in a statute does not prevent a court from investigating if the conditions prescribed are fulfilled and that if there is a failure to comply with any of the conditions, the court would intervene. See also *Taylor v. National Assistance Board* (1951) P. 101 at 111, per Denning, M.R. C D E

Applying the law as declared above to the present case, the court is entitled to investigate if the conditions prescribed in the entire section 188 of the Constitution were met. This is because it is after all the said conditions are fully met that the ouster clause in section 188 (10) could apply. In carrying out this assignment recourse will have to be made to the facts deposed to in the affidavit filed in support of the originating summons. F

In the instant case, the requirement under section 188 (2) is to the effect that a notice of any allegation of gross misconduct by the Governor in writing signed by not less than one-third of the members of the House of Assembly is to be presented to the Speaker (1st respondent). The averment in the affidavit is to the effect that the provision was not complied with since no such was presented to the 1st respondent. Secondly, all the steps the Speaker has to take upon presentation of such notice to him were not complied with. The meeting of the House where G H

the said resolution was passed was not held in the prescribed place and presided over by the Speaker or the Deputy Speaker, where the Speaker was not available, as prescribed by the Constitution. Apart from the fact that the meeting of the House was not properly constituted, the required
B two-thirds majority of the entire 32 member House did not pass the resolution since only the aggrieved 18 member faction took part at the meeting held at D’Rovans Hotel, Ring Road, Ibadan instead of the House of Assembly where the normal meeting of the House presided over by the
C Speaker also took place on the same day. None compliance with any one of these pre-conditions is enough to warrant setting aside the entire process taken by the appellants.

It is clear from the above that the appellants did not follow the conditions prescribed by the Constitution before they could avail them-
D selves of the protection in section 188 (10) of the Constitution. The trial High Court was therefore totally wrong when it held that it had no jurisdiction to entertain the claim before it.

The remaining point to be considered is whether the lower court
E wrongly applied the provisions of section 16 of the Court of Appeal Act. The said section 16 reads thus:

*“The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal,
F and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fits to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct
G any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court
H below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court’s appellate jurisdiction, order the case*

to be re-heard by a court of competent jurisdiction.”

The section sets out the general powers of the court when dealing with appeals before it. There is no doubt that the appellants’ attack in this case is directed at the lower court’s exercise of its power in the portion of the section which states, inter alia, that the court “*shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the court of Appeal as a court of first instance and may rehear the case in whole or in part—*”

The appellants contend that the lower court, after holding that the trial court has jurisdiction to entertain the action, the appropriate order would have been an order remitting the case back to the High Court for hearing on the merit. It is true that that was one of the options open to the lower court in the matter. But the lower court has a duty to carefully consider and weigh the implications and consequences of all the options open to it before making a choice. Thus, from the facts available before the court in this case, the 3rd respondent was elected by the people of Oyo State as their Governor in 2003. He was to serve in that capacity for four years which is due to expire in May 2007. Then towards the end of 2005, a faction of members of the State of House of Assembly embarked on an unconstitutional way of removing the duly elected Governor.

The method adopted by them was such that the whole process was nothing but a complete ridicule of the provisions of the Constitution which the said factional group swore to uphold as members of the State House of Assembly. As a result of their unconstitutional acts, they replaced the Governor elected by the people of Oyo State and imposed someone else on the people. The impostor illegally took over power in the State and was in control for almost a year out of the four year term of the Governor elected by the people of Oyo State. As at the time the lower court gave its judgment in the case on 1st November, 2005, the remaining term of the elected Governor was about seven months. It follows therefore that sending the case back to the High Court for hearing on the merit would have amounted to nothing but judicial scandal. It would have exposed our entire judicial system to complete ridicule, odium and disgrace. It would also have amounted to crowning the illegal and unconsti-

tutional acts of a gang of rascals or “area boys” with the success they totally did not deserve. This is so because, from the way our judicial system now operates, the trial de novo could be probably not commence at the High Court by the time the term of the elected Governor runs out in May, 2007.

It is settled law that the Court of Appeal is conferred with full jurisdiction under the said section 16 of the Court of Appeal Act, over the whole proceedings in an appeal before it. And such powers are equal to the powers of the court before which the suit was instituted or the court from where the appeal emanated: See *Jadesinmi v. Okotie-Eboh* (1986) 1 NWLR (Pt. 16) 264; *Yusuf v. Obasanjo* (2003) 16 NWLR (Pt. 847) 554; and *Adeyemi v. Y.R.S. Ike-Oluwa & Sons Ltd.* (1993) 8 NWLR (Pt. 309) 27.

However, it must be mentioned that the court does not exercise the power to rehear in every occasion and that it is expected to do so only where the justice of the case before it demands that the power should be exercised. Similarly, certain fundamental conditionlities must be met before the court could exercise the very wide powers conferred by the section. Such conditions that must exist include: (a) availability of the necessary materials to consider and adjudicate in the matter; (b) the length of time between the disposal of the action at the trial court and the hearing of the appeal; and (c) the interest of justice by eliminating further delay that would arise in the event of remitting the case back to the trial court for rehearing and the hardship such an order would cause on either or both parties in the case. See *Adeyemi v. Y.R.S Ike-Oluwa & Sons Ltd.*, *Supra*; *In RE Adewunmi* (1988) 3 NWLR (Pt. 83) 483 at 501; *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1) 156; and *Jadesinmi v. Okotie-Eboh*, *supra*.

It is clear from the facts of this case and the surrounding circumstances, some of which I have set out above, and the fact that the conditions that must exist before the lower court could exercise the powers conferred on it in section 16 of the Court of Appeal Act were met in this case, I have no doubt in holding that the lower court rightly exercised its power to take the decisions it took in the case. I also hold that the said

decisions taken by which it rightly and expeditiously disposed of the case on its merit, was most appropriate as it saved our entire judicial system from gross embarrassment that would have arisen had the alternative option of sending the case back for trial de novo would have caused.

In conclusion, the above are my reasons for dismissing the appeal on 7th December, 2006 and affirming the judgment and orders made therein by the lower court. I have also read the reasons given by my learned brother, Niki Tobi, JSC in the lead judgment prepared by him. I agree with his conclusions and I also make no order on costs.

C

OGBUAGU JSC

On 7th December, 2006 when this appeal was heard, I dismissed it as unmeritorious and stated that I will give my reason for so dismissing the appeal to day - 12th January, 2007. I hereby do so. Afterwards, the latin maxim is, *Interest Republicae ut sit finis litium* - there must in the public interest be an end to litigation.

This is an appeal against the decision of the Court of Appeal, Ibadan Division (hereinafter called “the court below”) delivered on 1st November, 2006 in favour of the Respondents who were the Plaintiffs in the trial court. Dissatisfied with the said decision, the Appellants who were the defendants in the trial court, have appealed to this Court.

I note that the 3rd Respondent had applied to the court below for leave to appeal against the Ruling of Ige, J. of the High Court of Oyo State delivered on 28th December, 2005 “*as an interested party or party having interest in the matter*”. The application was granted. I note also that the 1st and 2nd Respondents, were the Speaker and Deputy Speaker respectively in the Oyo State House of Assembly which had a membership of thirty-two (32) legislators. From the Records, sometime in December, 2005, the House of Assembly, fractionalized into two groups. One group with eighteen (18) legislators, - i.e. the Appellants were against the 3rd Respondent, while the other group with fourteen (14) legislators, were supporters of the 3rd Respondent. On 13th December, 2005, the Appellants, after a meeting in a Hotel known as and called “D Rovans” at

Ring Road, Ibadan, caused to be published as an advert, Notice of allegation of gross misconduct against the 3rd Respondent. They later, requested the Acting Chief Judge of the Oyo State High Court, to set up and inaugurate a panel to investigate the said allegation of gross misconduct. I note that the panel submitted its report to the Appellants on the morning of 12th January, 2006. The Appellants thereafter, passed a resolution impeaching the 3rd Respondent.

In my respectful view, the real issues for determination, are anchored on the interpretation of Section 188 of the Constitution of the Federal Republic of Nigeria, 1999 in order to find out and determine, whether the said impeachment of the 3rd Respondent, was regular, proper and constitutional. Also, having regard to the fact that the suit challenging the said impeachment, was initiated by an Originating Summons, what an originating summons is and the procedure to be adopted. Thirdly, whether in all the circumstances, the Appellants, were given a fair hearing and finally, the propriety of the court below, applying and relying on Section 16 of the Court of Appeal Act, in granting the specific reliefs sought by the Respondents. These issues, in my humble and respective view, are covered by the issues formulated in the parties' respective Briefs.

Before going into the merits of this appeal, I note that the learned leading counsel for the 1st and 2nd Respondents - Chief Olanipekun (SAN), filed a Notice of Preliminary Objection praying the Court, to strike out grounds 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the Notice of Appeal dated 10th November, 2006. The grounds for the objection, read as follows:

“(i) Grounds 1, 2, 3, 4, 5, 6, 7, 9 and 11 are at the very best, grounds of mixed law and facts.

(ii) The judgment of the lower court appealed against was given pursuant to an appeal lodged to that court from the decision of the High Court of Oyo State, given on 28th December, 2005.

(iii) There have been two decisions of two lower courts in respect of this present appeal.

(iv) No leave of either the lower court or this court has been sought and obtained pursuant to section 233(3) of the Constitution of the Federal Republic of Nigeria, 1993, before filing the said grounds of appeal.

(v) *Arising from (i), (ii), (iii), (iv) (supra), grounds 1, 2, 3, 4, 5, 6, 7, 8, 9 and 11 are incompetent and should be struck out*".

I also note that on 4th December, 2006, Ayanlaja, Esqr, (SAN) - one of the learned counsel for the Appellants, filed a motion seeking the following orders:

"1. *AN ORDER granting leave to the Appellants/Applicants to appeal against the decision of the Court of Appeal delivered on 1st November, 2006 on ground other than that of law alone.*

2. *AN ORDER deeming the Appellants' Amended Notice of Appeal dated 20th November but filed on 21st November, 2006 as properly filed and served.*

3. *AN ORDER deeming the Appellants' brief of argument based on the grounds contained in the Amended Notice of Appeal dated 20th day of November, 2006 but filed on 21st day of November, 2006 as properly filed and served*".

The grounds for the application are stated in the said motion. Although, this application was opposed by Chief Olanipekun (SAN) at the hearing of this appeal and this application, and in my respectful view, the application, was intended to overreach, the Court, in its discretion, granted the same. I say overreach because, from paragraphs 15, 16 and 17 of the affidavit in support of the motion, the deponent of the affidavit - O. Popoola, Esqr. - a legal practitioner in the Chambers of Lateef O. Fagbemi at paragraph 17 thereof, conceded as it were, that the only ground they all as counsel for the Appellants in a conference they all held on Tuesday 28th November, 2006; were sure that is a ground of law, is Ground 10 of the grounds of appeal. He averred as follows in the said paragraphs:

"15. *That at the conference aforesaid counsel representing the Appellants could not agree on whether all the grounds of appeal as filed and contained in the Amended Notice of Appeal dated 20th November, 2006 and filed on 21st of November, 2006 are grounds of law.*

16. *That counsel are in doubt as to whether all the grounds of appeal particularly grounds 1, 2, 3, and 4 of the Notice of Appeal filed on 6th November, 2006 that is "Exhibit D" and grounds 1, 2, 3, 4 and 5 of the Amended Notice of Appeal that is "Exhibit E" are grounds of law*

simpliciter or grounds bordering on mixed law and fact.

17. That Appellants' counsel have decided to file this application to seek leave to appeal on grounds 1 - 9 and 11 of "Exhibit E" to clear any doubt relating to the itemized grounds of appeal".

B [the underlining mine]

Let me add quickly that even if the learned counsel for the Appellants, had relied on ground 10 of the grounds of appeal, on the authorities, the appeal, could be sustained, if the Court was satisfied that it is meritorious. However, that ground, relates to the facts of the instant case
C leading to this appeal and the facts of previous cases - which boil down to the conclusion, that the ground, is that of mixed law and facts for which leave of this Court must be sought. So, as it stood, there was no competent appeal before the Court; but *ex abundanti cautela*, and in
D order to avoid any delay in the hearing of the appeal, the Court granted the application as I stated earlier.

Now, to the merits of the appeal. In the said Originating Summons, the Respondents, sought some declaratory reliefs and in addition,
E two (2) specific, orders. Then, they raised questions for determination premised thus:

"Having regard to the clear provisions of the 1999 Constitution with, particular reference to the powers conferred on the Oyo State House
F of Assembly to wit; initiate and carry out impeachment proceedings against the Governor or the Deputy Governor of a State and particularly S.188(1), (2), (3), (4) and (5) thereof of the 1999 Constitution of the Federal Republic of Nigeria is not to be read in isolation and complete
G exclusion of other sections of the Constitution relating to the legislative powers of the House of Assembly".

For the avoidance of doubt, I will, reproduce some of the relevant provisions of Section 188. The side heading/title is "*Removal of Governor or Deputy Governor from office*".

H "188 -(1) *The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this Section.*

(2) *Whenever a Notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly –*

(a) is presented to the Speaker of the House of Assembly of the State.

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the function of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall within seven days of the receipt of the notice cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall, not be declared as having been passed unless It is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose, conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall -

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and
(b) within three months of its appointment, report its findings to the House of Assembly.

(8) Where the Panel reports to the House of Assembly that the

allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(9) *Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.*”.

C [the underlining mine)

It can be seen that the draftsmen, were alert in respect of the seriousness or magnitude of the removal of a Governor or his Deputy. They chose their words and every word in this section or provisions, is D weighty and material. Therefore, in the removal of such officers, the procedure clearly specified, must be followed and strictly complied with before such removal becomes valid and constitutional. Any breach of any of the said provisions, surely and certainly, renders such removal E ineffective, null and void and of no effect. It is now settled firstly, that where a statute or Constitution, prescribes a procedure for seeking a remedy or the doing of anything or act and the language used, is clear and unambiguous, (as in the above section) that is the only procedure open to the parties concerned and any departure therefrom, will be an F exercise in futility. See the case of *System Applications Products Nig. Ltd. v. Central Bank of Nigeria (2004) 15 NWLR (Pt.897) 655 @ 687.*

Secondly, the courts are bound to enforce the mandatory provisions of a substantive law (and I will add, Constitution). It is the duty of G all courts, to give effect to legislation. Parties, cannot by consent or acquiescence or failure to object, nullify the effect of a statute or Constitution. In other words, it is the duty of a court, to enforce mandatory provisions of an enactment. See the case of *Adedeji v. National Bank of H Nigeria Ltd. & anor. (1999) 1 NWLR (Pt.96) 212 @ 222 - per- Akpata, JCA (as he then was).* The word “SHALL” has been interpreted in the cases of *Chief Ifezue v. Mbadugha & anor. (1984) 5 S.C. 79; (1984) 15 NSCC 314; (1984) 1 SCNLR 427 @ 456-457; Captain Amadi v. NNPC*

(2000) 10 NWLR (Pt. 674) 76 @ 97-98; (2000) 6 SCNJ. 1 @ 16 & 17 (2000) 6 S.C. (Pt.1) 66; (2000) FWLR (Pt.9) 1527 and (2000) 5 WRN, or SNRN 47 and recently, *Broad Bank of Nig. Ltd. v. Alhaji Olayiwola & Sons Ltd. & anor.* (2005) 1 S.C. (Pt. II) 1; (2005) 1 SCNJ. 51, 60 - 64.

From these clear and unambiguous provisions of Section 188 of the said Constitution, it is not in doubt that, it is after the full and complete compliance with the same, that the Chief Judge of a State, will appoint a panel of seven to investigate the allegation. It need be emphasized by me, that the said Chief Judge, will or shall, set up the panel, at the request of the Speaker of the Assembly. It did not say or provide that it shall be anybody else. Also to be borne in mind, is that under subsections 2 and 3 of Section 188, the functions to be performed, are confined or restricted to the said Speaker.

In summary, in my respectful and firm view, it is only when the provisions of Section 188 (1) - (9) which I hold are conditions precedent, are complied with, that sub-section 10 thereof, will be relevant and can be invoked and be relied on. A subsection of a section, is only a part of that Section and it cannot be read in isolation. See the cases of *Nafiu Rabi v. The State* (1981) 2 NCLR 293 and *Aqua Ltd. v. Ondo State Sports Council* (1988) 10-11 SCNJ. 26; (1988) 4 NWLR. (Pt.91) 622 @ 641-642. Now, from the uncontroverted affidavit evidence of the 1st and 2nd Respondents, the question I or one may ask is, were the said mandatory provisions of Section 188 of the said Constitution complied with, in order to validate the purported impeachment of the 3rd Respondent? I think not. My answer is in the negative.

In spite of the said mandatory provisions of the said Section 188 of the said Constitution, the learned trial Judge, without any justification whatsoever, threw out the suit and even proceeded to dismiss the same notwithstanding that he held, that he had no jurisdiction to entertain the same. Either His Lordship with respect, had no patience to go into the merits of the case or like the proverbial ostrich, burying its head on the sand/ground, oblivious of what was happening at its back, he had nothing to do with the merits of the suit.

In fact, I note that in the case of *The Senate President* of the

Federal Republic of Nigeria & anor. V. Senator Nzeribe (2004) 9 NWLR (Pt.878) 251 @ 274, my learned brother Oguntade, JCA, (as he then was), stated inter alia, as follows:

B *“..... In a case brought by originating summons where the whole of the evidence required to determine the merit is in the form of affidavit evidence already before the court, it may be prudent to hear together the arguments as to jurisdiction and the merits of the case.....”*

C His Lordship stated the advantage of doing so. See also the case of *Okoh v. Ibiam (2002) 10 NWLR (Pt. 776) 453 @ 470.*

The court below, at page 485 of the Records, - per Ogebe, JCA, had this to say, inter alia:

D *“It is my view that the trial court had serious questions to consider before hastily throwing out the suit. For example it was alleged that 18 defendants/respondents met outside the chambers of the House of Assembly in a hotel to commence impeachment proceedings, the court had a duty to determine whether proceedings before such a group amounted to proceedings of Oyo State House of Assembly. It was also alleged that the E House of Assembly in Oyo State had 32 members and for the removal of a Governor which requires the resolution of two third majority of all members of the House, the court had a duty to inquire whether a factional meeting of 18 members constituted the required two-third majority of all members. The court also had to consider whether impeachment proceedings in which me Speaker of the House is excluded from his leading role as provided for in Section 188 of the Constitution can amount to proper proceedings of Impeachment”.*

G [the underlining mine]

H It held that the learned trial Judge, was wrong in declining jurisdiction, it also held that the 1st and 2nd Respondents, have locus to question the action of the Defendants/Appellants who “purported to be acting on behalf of the whole House”. I cannot fault these holdings. Some of the infractions of Section 188 of the 1999 Constitution from the Records, in my respectful view, are;

(i) Out of the thirty-two (32) members of the said State House of Assembly, Eighteen (18) members carried out the purported impeach-

ment of the 3rd Respondent instead of twenty-two (22) members which constitute two thirds (2/3) of the membership.

(ii) *The appointment of the seven (7) persons by the then Chief Judge of the Oyo State High Court to investigate the alleged misconduct, was not at the instance of the Speaker of the Assembly (i.e.) the 1st Respondent.) contrary to Section 188(5).*

(iii) *The purported impeachment was done in a Room or Hall of a Private Hotel - D'Rovans and not in the Assembly, or official House Chamber where legislative business of the legislature usually take place and was available for use. I have seen no reason in the Records why the Appellants chose to sit in a Hotel*".

I will pause here to observe that one of the most ridiculous submissions that I have read in the Records at page 236 appear as follows:

".....It is submitted that having regard to the provisions of the Constitution, in particular. Section 90 - 96, a House of Assembly does not mean a building but the members constituting the House. Thus, we submit a House of Assembly can sit anywhere to perform its legislative duties, for otherwise, we submit respectfully can only lead to absurdity".

If anything leads to a ridiculous absurdity, it is the above submission. So, if the members of the House of Assembly sit in the lead learned counsel's house to perform its legislative duties, his house will be the House of Assembly of the State! That cannot be so by any stretch of imagination. Were it to be so, then a Governor, who by Section 108(1) of the 1999 Constitution, can attend the meeting of the House of Assembly either to deliver an address to the members on State Affairs or to make such statement on the policy of government as he may consider to be of importance to the State, in the sitting room of the house of any of the members/or in a Hotel. Frankly speaking, any such idea or suggestion, will be unacceptable to me, as it is not only nauseating to me, but will amount to the greatest absurdity of all times and a violence to sheer commonsense. This submission shows again, how low, undignified, some H "learned counsel" can go or descend in the name of advocacy.

Having made the above observation, it need be stressed that by virtue of Section 1(3) of the 1999 Constitution, any infraction of the said

Constitution that is inconsistent with its provisions, will be unconstitutional, null and void. See the case of *Anisminic Ltd. v. Foreign Communication Commission (1969) 2 A.C. 147*. I therefore, render my answers to Issues 1 and 2 of the Appellants, in the affirmative.

B This should have been the end of this appeal, but since much weather has been made as regards denial of fair hearing, I will later in this Judgment, deal briefly with the issue. This brings me to what an Originating Summons is all about. It is used whenever the law so provides and it is used when the sole or principal question in issue is or is likely to be one of the construction of a written law or any instrument or of any deed. Will, contract or other document or other question of law or in a circumstance where there is not likely to be in dispute as to the facts. In general terms, it is used for non-contentious actions - i.e. those actions D where facts are not likely to be in dispute. It is important to stress that when proceedings are commenced by originating summons, pleadings are not used rather, affidavit evidence is used. See *Director State Security Service & anor. v. Agbakoba (1999) 3 NWLR (Pt.595) 425; (1999) 3 E SCNJ. 1*. See also "Introduction to Civil Procedure by Ernest Ojukwu & Chudi N. Ojukwu pages 105 to 107 and Civil Procedure in Nigeria 2nd Edition by Fidelis Nwadialo pages 237, 285 and 292 and Principles and Procedure in civil actions in the High Courts of Nigeria by Dr. T. Aguda F at page 81.

In the instant case leading to this appeal, the Appellants were given eight (8) days after the service of the Summons on them inclusive of the day of such service, to "*cause an appearance to be entered for each of them to this summons*". I have painstakingly, perused the entire Record of G proceedings in this matter, I have not seen where the Appellants, entered appearance or caused an appearance to be entered for them either conditionally or unconditionally. Now, the steps which a defendant should take after he has been served with an originating process, is to "*enter an H appearance*" in court. It is said that the purpose of the step, is to prevent judgment being entered against the defendant for default of appearance. I also believe that the learned counsel for the Appellants, know or was/is aware of this fact. As I have shown and as appears in the originating

summons of the 1st and 2nd Respondents, the Appellants, were commanded by the summons, to enter appearance within eight (8) days upon service of the same on each of them. Failure to do so would result in the court allowing the Plaintiff or plaintiffs, to proceed to judgment and execution. Entry of an appearance, is said to be a formal step taken by a defendant to an action after he has been served. See *Adegoke Motors Ltd. v. Dr. Adesanya & anor.* (1989) 3 NWLR (Pt.109) 250 @ 292, 296; (1989) 5 SCNJ. 80 @ 90 where it was held that entering of an appearance, is a technical expression and a formal step taken by a defendant in civil proceedings. Therefore, a defendant, shall before he is heard, enter appearance and if he fails to do so, he is not entitled to be heard by the court. I so hold.

So, on this ground alone, I hold that the court below was right and justified in law to proceed to enter judgment in favour of the Respondents for the failure of the Appellants to enter an appearance whether conditional or unconditional.

Now, I will therefore proceed to deal with the issue of an alleged denial of fair hearing forcefully raised and canvassed by the Appellants in their Brief. It must be borne in mind that the merits of an originating summons, is said to lie in the fact that proceedings commenced thereby, are very expeditiously dealt with. I believe that the learned counsel for the Appellants, are aware of this fact. It need be stressed that there being no facts in dispute, such proceedings like application for interrogatories, and settlement of issues, which normally precede trials of actions begun by writ of summons, do not feature in trial of actions commenced by originating summons.

The learned counsel for the Appellants I believe, knew that time was of essence in respect of the suit. Yet, no appearance was entered for the Appellants and there was no application by them, for an extension of time supported by an affidavit giving reasons for their failure to so enter within the eight day period specified in the originating summons. I have held that the Appellants, for their failure to enter an appearance conditional or unconditional, were not entitled to be heard or granted audience by the court below. If that is the position, the question or issue of denial

of fair hearing, becomes an academic exercise and therefore, is of no moment in my respectful view.

I note at page 37 of the Records, that Akintola, Esqr. (SAN), referred to Order 13 Rule 1 of the Rules of the Oyo State High Court and told that court, *“Order 13 Rule 1 of the Rules of this Court states when defendant will enter an appearance. As at now (i.e. on 28th December, 2005) defendants are not properly before the Court as required by the Rules”*.

C [the underlining mine]

I also note that Latinwo, Esq. Appearing with some other counsel for the Appellants, was present in that court and his appearance with the said other learned counsel, was duly recorded by that court. In opposition to the application for an adjournment in respect of the Preliminary D Objection the Appellants had filed in respect of the suit, Mr. Latinwo referred to Order 13 Rule 5 and stated, thus:

“a defendant may appear at anytime before judgment”.

But most conveniently, he did not add that, the law is that, if a E defendant appears at any time after the time mentioned in the suit or summons, he will not, unless the court or a Judge in Chambers orders otherwise, be entitled to any further time to be granted audience.

I have noted in this Judgment, that the Appellants did not enter any F appearance to the suit nor did they ask for an extension of time to do so after the expiration of the eight day period stated in the Summons. So, they lost their opportunity to be heard. In spite of this fact, they did not file any counter-affidavit in opposition to the Summons. Of course, they did so deliberately. I say deliberately because, on their admission - by G their learned counsel - Lana, Esq., while arguing their Notice of Preliminary Objection, he made specific references to many of the paragraphs of the affidavit in support of the Summons. Mr. Lana at page 40 of the Records and not page 210 as appears at paragraph 4.13 of the 1st and 2nd H Respondents' Brief, had referred to paragraph 9 of the said affidavit in support of the objection, and stated inter alia, as follows:

“We believe 14 out of 32 who sued are the in (sic) (meaning are in the) minority and therefore the use of the name of House of Assembly is

a misconception and must therefore be struck out”.

He also at Page 41 of the Records, stated inter alia, as follows:

“..... all the reliefs are challenging the steps taken or adopted by majority members towards impeachment of the Governor.....”.

What am I saying? One may ask. Mr. Lana, having admitted in effect, that it was eighteen (18) out of the thirty-two (32) members of the House of Assembly who purportedly impeached the 3rd Respondent, this is exactly the complaint of the respondents that the impeachment, was contrary to the provisions of Section 188 of the 1999 Constitution. There is also the averment in the said affidavit in support of the Summons, that the decision or resolution, was taken in a Hotel and not at the House of Assembly. It is obvious to me that the Appellants and their learned counsel, refused to file and were unwilling to file any counter-affidavit to the weighty averments in the affidavit in support of the suit because, there was nothing to controvert therein: B C D

However, it is settled that the question is, whether a party entitled to be heard, has been given the opportunity of being heard. See the cases of *Kotoye v. Central Bank of Nigeria (1989)1 NWLR (Pt. 98) 419 @ 448; (1989) 12 SCNJ. 31* - per Nnaemeka-Agu, JSC and *Ota v. Udonwa (2000) 13 NWLR (Pt.683) 157 C.A.* In its nature, a party who has or had every opportunity to present his case before the court and who fails to do so, cannot be heard to complain of breach of his right of fair hearing. See also the case of *Ekiyor & anor. v. Chief Bomor & anor. (1997) 9 NWLR (Pt.519) 1 @ 12, 14 – 15; (1997) 7 SCNJ. 479 @ 485; (1997) 52 LRCN 2274*. It is said that fair hearing is like a sacred cow, but it cannot be invoked, where a litigant is just crying wolf where in fact, there is none (as in the instant case leading to this appeal). E F G

Of course, and this is also settled, a party who has failed or neglected to submit his case for consideration, cannot complain of a denial of fair hearing. See the cases of *Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt.50) 356; (1987) 2 SCNJ. 53* - per Karibi-Whyte, JSC, and recently, *Alhaji Darma v. Oceanic Bank International Nig. Ltd. (2005) 4 NWLR (Pt.915) 391 @ 409*. In the recent case of *Magna Maritime Services Ltd. & anor. v. Oteju & anor. (2005) 5 SCNJ. 100 @ 117*, - per Tobi,

JSC, and 118 - 119 - per Edozie, JSC who referred to the case of Okoye & ors, v. *Nigerian Construction & Furniture Co. Ltd. & ors. (1991) 6 NWLR (Pt. 199) 501 @ 541; (1991) 7 SCNJ. 365*, (it is also reported in (2005) *All FWL (Pt. 270) 1995*) my two learned brothers, dealt with the issue of fair hearing. Therefore, a party or parties given an opportunity to be heard and who is/was aware of proceedings going on in the court and not taking any steps required by law or the Rules of that court, cannot be heard to complain of denial of fair hearing. No party has the right, it must be stressed, to hold a court of law to ransom. There are too many decided authorities on this issue including those cited and relied on in the Respective Briefs of the Respondents.

I regret to say that the reliance on Section 33 of the 1999 Constitution, has been thoroughly abused by litigants and especially by many learned counsel who cling or hang on a straw like a drowning man wanting to save his life. This Section has been blown out of proportion by many learned counsel who stand, with respect, on quick sand. I will however, as many times as possible, where the circumstances call for its reliance, by me, refer to the pronouncement of Achike, JCA (as he then was) in the case of *Kaduna Textile Ltd. v. Umar (1994) 1 NWLR (Pt.317) 143 @ 159 C.A.* said His Lordship (of blessed memory), inter-alia, as follows:

“The question is, is it fair and just to the other party or parties, as well as the court that a recalcitrant and defaulting party should hold the court and the other parties to ransom? Should the business of the court be dictated by the whims and caprices of any party? I think not. It goes without saying that ‘justice must be even handled, for the law is no respecter of persons’”.

If a plaintiff files his Statement of Claim or as in the instant case, the plaintiffs filed their affidavit in support of the Originating Summons and the defendant or defendants, refused, failed or neglected to file a Statement of defence or here a counter-affidavit, he or they, will be deemed to have admitted either the Statement of Claim or the affidavit in support thus leaving the court seized with the matter, with the authority to pre-emptorily enter judgment for the plaintiff or plaintiffs without either hear-

ing evidence or without the counter-affidavit in a case initiated by an originating summons. See the case of *Oke & ors. v. Aiyedun* (1986) 2 NWLR (Pt.23) 548. The effect of where a party or parties like the Appellants, failed to make use of the opportunity to be heard, he or they, cannot be heard to complain of denial of fair hearing. See also the cases of *Ndubuka v. Kolomo* (2005) 4 NWLR (Pt.915) 411 and *Zaboley International Ltd. v. Omogbehin* (2005) 17 NWLR (Pt.953) 200 @ 223-224 C.A.

As a matter of fact, from the submissions of Ayanlaja, Esq., in respect of their Issue I in paragraphs 4.3 and 4.4 of their Brief, it is clear/plain to me that by the said submissions, the Appellants, refused to file a counter-affidavit to the originating summons, because according to learned counsel, the averments in the affidavit in support, were inadmissible evidence and therefore, it was a waste of time for the Appellants to respond to the same. Fine! By this submission and stance, any complaint by the Appellants of denial of fair hearing, can by no stretch of imagination, be sustained by me. If anything, it confirms without any equivocation, that the Appellants, had the opportunity to file a counter-affidavit, but they voluntarily, decided not to do so because for them, it was a useless exercise to do so and anybody expecting them to so file, was wasting his time. Period! On this ground again, I dismiss the said complaint as being most frivolous and grossly misconceived more so, when the learned counsel, made a U-turn by stating that the Appellants were still within time to enter appearance and file 3 counter-affidavit in reaction to the same affidavit in support of the originating summons which he had declared to be inadmissible. Indeed, he urged the Court in the alternative of dismissing the suit for lack of jurisdiction, to remit the case to the trial court, where, according to him, the Appellants, will be free to file their counter-affidavit. This request, amounts with respect, to blowing hot and cold at the same time.

Let me pause here to make it abundantly clear as this is settled, that where a court holds that it has no jurisdiction to entertain a matter, it does not dismiss the suit, but merely strikes it out. See *NEPA v. Mr. Adegbero & 15 ors.* (2002) 18 NWLR (Pt.798) 79; (2002) 12 SCNJ.

488 Inakoju v. Adeleke (2007) 1 KLR Ogbuagu JSC
173; *KLM Royal Dutch Airlines v. Mr. Kumzhi* (2004) 8 NWLR (Pt.875)
231 and *Chief Lakanmi v. Adene & 3 ors.* (2003) 4 SCNJ. 248 @ 355
just to mention but a few.

B I will conclude this issue by referring to the caution stated in the
case of *Orugbo & anor. v. Bulara Uma & 10 ors.* (2002) 9 SCNJ. 12 @
34; (2002) 9-10 S.C. 61 it is that where the facts of a case, do not
support the application of the provisions of Section 33 of the 1999 Con-
stitution, parties and particularly or especially learned counsel, should not
urge the Court to invoke the said provision, and even if so urged, the
C Court should not succumb to the pressure.

I will finally deal with the intendment of Section 16 of the Court of
Appeal Act (hereinafter called “the Act”) or the powers of the court be-
low, pursuant to the provisions of Sections 16 of its Act. I have stated
D earlier in this Judgment that the interpretation of Section 188 of the 1999
Constitution, is one of the critical issues to be determined in this appeal.
I have also stated what the nature of a suit brought under an Originating
Summons is. The reliefs sought in the said suit, are clear and unambigu-
E ous. Let me now go on memory lane, in the 1940’s - i.e. in the cases of
Adalela v. Agama & ors. (1940) 5 WACA 28 and *Darko v. Agyakwa*
(1943) 9 WACA 154 cited and relied on in the 3rd Respondent’s Brief. In
both cases, the provisions of Section 82(2) of the Native Administration
F Ordinances Cap. 76 which is similar to Sections 16 of the Court of Ap-
peal, Act, 1976, were interpreted. In the latter case, it was held that the
Section gives an Appellate Court, the power to hear and determine an
appeal which has not been heard on its merit in the Provincial Commis-
sioners’ court because of its lack of jurisdiction in that court to entertain
G the case - i.e. that although hearing in the trial court, was not on the
merits, the Court of Appeal, had jurisdiction to hear the appeal.

In the 1980s this Court in the case of *Jadesinmi v. Okotie-Eboh*
(1986) 1 NSCC (Pt.1) (1986) 1 183 NWLR (Pt. 16) 264 @ 276 - per
H Karibi-Whyte, JSC, cited and relied on in the Respondents’ Briefs, held
that the general purport of Section 16 of the Act, is to enable the court
below to exercise *all the* powers of a trial court or court of first instance
with respect to the appeal before it, That “rehearing” in the said Section,

means an examination of the case as a whole. It could be seen that in such circumstances, the court below, can make any order or orders or give such judgment or judgments which a trial court or court of first instance, could or ought to give. See also the cases of *Chief Ejiwhomu v. Edok - Eter Mandilas Ltd.* (1926) 5 NWLR (Pt.39) 1 and *Chief Ekpa & 2 ors. v. Chief Utong & 2 ors.* (1991) 6 NWLR (Pt.197) 258 @ 275; (1991) 7 SCNJ. 170. B

In the case of *Oshotoba v. Alhaji Amuda & 2 ors.* (1992) 6 NWLR (Pt.250) 690 @ 708; (1992) 7 SCNJ. 317 - Uwais, JSC. (as he then was) stated that there is no doubt that Section 16 of the Act, has given the Court of Appeal amplitude of power to deal with any case before it on appeal. That the power, includes the jurisdiction of a court of first instance such as the High Court. C

In *Chief Imonikhe & anor. v. The Attorney-General of Bendel State & ors.* (1992) 6 NWLR (Pt.248) 396 @ 410, (1992) 7 SCNJ. 197 - per Nnaemeka-Agu, JSC, cited and relied on in the Respondent's Brief, it is stated that the Court of Appeal, is empowered to re-hear the case on the evidence on the Record of Appeal and to make any order which the trial court is entitled to make in order to determine on the merits, the real issue in controversy between the parties. See also the cases of *Captain Amadi v. NNPC* (Supra) and *Attorney-General of Anambra State & ors. v. Okeke & ors.* (2002) 12 NWLR (Pt.782) 575 @ 606-607; (2002) 5 SCNJ. 318., - per Ayoola, JSC. In the case of *Cappa & D'Alberto Ltd. v. Akintilo* (2003) 9 NWLR (pt.824) 49 @ 72; (2003) 4 SCNJ. 328 @ 343, this Court - per Tobi, JSC, referred to *Oshoboja v. Alhaji Amuda & ors.* and held that the Court of Appeal has the power to re-evaluate the evidence before a trial court by virtue of Order 1 rule 20 (4) of the Court of Appeal Rules and Section 16 of the Act. D E F G

The court below, conscious of the enormous powers conferred on it by Section 16 of the Act, and taking into consideration, the entire circumstances in the case and giving its reason for its stance of not sending the case back to the High Court for a fresh trial, stated at page 487 of the Records inter alia, as follows:

"Since the facts of the case are not disputed and what is to be

decided is purely the interpretation of Section 188 of the 1999 Constitution, this is an appropriate case for us to resolve the entire case in this court under Section 16 of the Court of Appeal Act.

It is necessary for us to do so in view of the fact that the res of the dispute, that is who is the rightful Governor of Oyo State before the tenure ends in May next Year should be determined without further delay”.

I cannot fault the above.

I will now deal with what is known as consequential order. This is because, the grant of the orders or reliefs sought by the Respondents in the originating summons, were in effect or could also be described as consequential orders. A consequential order, is one giving effect to a Judgment or order or it is one directly traceable to or flows from that other judgment or order duly prayed for. See *Obayegbona v. Obazee* (1970) & 5 S.C. 247; - per Nnaemeka-Agu, JSC.; *Odofin v. Agu* (1992) 3 NWLR (Pt.229) 350 @ 372; (1992) 3 SCNJ. 161 and restated in the case of *Funduk Engineering Ltd. v. James Mcarthur & 4 ors.* (1996) 7 SCNJ. 64 @ 76-77 - per Uwais, CJN; *Ezeonwu v. Chief Onyechi & 2 ors.* (1996) 2 SCNJ. 250 @ 269; and *Ifeadì v. Atedze* (1998) 13 NWLR (Pt.581) 205.

It is firmly established that it is essentially, one which would make the principal order effectual and effective or which necessarily follows as being incidental to the principal order. See *Atoyebi v. Bello* (1997) 11 NWLR (Pt.528) 268 @ 297 and *SCOA (Nig.) PLC v. Alhaji Mohammed & anor.* (2004) 3 NWLR (Pt.862) 20 @ 41 C.A. In order words, it is one which has a bearing with the main relief or reliefs brought by a party. It is thus usually granted or made, to give meaning and effect to the main relief or reliefs, sought by a party. It need be emphasized that a consequential order can only relate to matters adjudicated upon. See the cases of *Akinbobola v. Plisson Fisko Nig. Ltd.* (1991) 1 NWLR (Pt. 167) 270 @ 279, 285; (1991) 1 SCNJ. 129. and *Dr. Liman v. Alhaji Shehu Mohammed* (1999) 6 SCNJ. 142- per Ogundare, JSC, just to mention but a few.

It is apposite for me to state at this stage, that the reliance by the

Appellants of the ouster clause in Section 188 (10) of the 1999 Constitution, is with respect, grossly misconceived. In the case of *Attorney-General, Bendel State v. Attorney-General of the Federation & ors.* (1981) All NLR 86 @ 127, 133, this Court - per Fatayi-Williams (CJN of blessed memory) held that it is the duty of the courts to see to it, that there is no infraction of the exercise of legislative power whether substantive or procedural as laid down in the relevant provisions of the Constitution. That if there is any such infraction, the courts will declare any legislation passed (and I will add impeachment) pursuant to it, unconstitutional and invalid. This, again, is my reason for voiding the purported impeachment of the 3rd Respondent by the antagonists. I affirm therefore, the decision of the court below. I will add however, that in the case of *Captain Amadi v. NNPC* (supra) Karibi-Whyte, JSC, stated at page 110 of the NWLR, inter alia, as follows:

“..... Courts guard the words of statutory provisions depriving them of the exercise of their Constitutional jurisdiction jealously. Hence the language of such provisions will be watched and will not be extended beyond their least onerous meaning. See *Sode v. Attorney-General* (1986) 2 NWLR (Pt.24) 586”.

(the underlining mine)

In concluding this Judgment, since Section 188 of the 1999 Constitution must be interpreted as a whole - i.e. conjunctively and not disjunctively and therefore, to be read together and the words therein, given its proper ordinary or liberal interpretation, I hold that the court below, having taken the proper stance, was correct and justified in its said interpretation of Section 188 of the 1999 Constitution. I also hold that the complaint of the Appellants of being denied fair hearing, is bogus and it is done in very bad faith and not honestly. I therefore, reject and dismiss the same. I also hold and agree with the learned SAN for the 3rd Respondent in their Brief, that remitting the case to the court of first instance, will surely and certainly, lapse by effluxion of time in May, 2007 and this is what the Appellants have been wanting - i.e. to play for time, hence they adopted all sorts of delaying tactics in the court below and attempted to do so in this Court by filing their various applications. To remit the case

to the High for trial by another Judge, will, as in the words of Chukwuma-Eneh, JCA (as he then was) at page 534 of the Records, be “anachronistic”. More importantly, and this is by way of emphasis, the office of the Governor in this dispensation, is expiring in a couple of months from now. (i.e. 29th May, 2007). It is bound to defeat the course of justice and will inflict more hardship, mentally, physically and financially, on the parties. If I must stretch the matter, I also hold that by dismissing the Respondents’ said suit by the learned trial Judge, then, there is nothing to be remitted to the trial court for trial de novo.

This appeal, is palpably very unmeritorious. It is from the foregoing and the fuller reasons given in the lead judgment of my learned brother, Tobi JSC, that I too, dismissed the appeal on 7th December, 2006 without costs.

D

OGUNTADE JSC (Dissenting)

This appeal arose out of a dispute between two sets of legislators of the Oyo State House of Assembly. The respondents representing 13 legislators of the House brought their suit by originating summons, wherein they contended that the present appellants, eighteen legislators of the same House of Assembly did not conform with the provision of section 188 of the 1999 Constitution in the manner the 3rd respondent Senator Rasheed Adewolu Ladoja was removed from office as the Governor of Oyo State. The suit was filed at the Ibadan High Court of Oyo State on 23/12/05. An originating summons is one of the processes recognized by law to commence an action where it is envisaged that there will be no seriously disputed issues of fact. It is usually faster than the procedure of commencing a suit by a writ of summons.

In the originating summons filed by the 13 legislators (hereinafter referred to as ‘the plaintiffs’) they asked the High Court, Ibadan to provide answers to the following questions:

“1. Whether or not the purported Notice of Allegation of Impeachment against His Excellency, Senator Rasheed Adewolu Ladoja the Governor of Oyo State issued by the Defendants on 13th December, 2005 is

constitutional or valid within the meaning of S. 188(1) & (2) of the 1999 Constitution of the Federal Republic of Nigeria.

2. *Whether or not the defendants' purported service of Notice of the said allegation of Impeachment on Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, is valid or constitutional within the meaning of S.188(2) of the Federal Republic of Nigeria.* B

3. *Whether or not the purported Notice of allegation of impeachment against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State, has been served on the each member of the 32 (thirty-two) members of the Oyo State House of Assembly as envisaged by S.188(2) of the 1999 Constitution.* C

4. *Whether or not the defendants herein complied with the provisions of S.188(3) of the 1999 Constitution, Federal Republic of Nigeria.*

5. *Whether or not the defendants herein have complied with the provisions of S.188(3) & (4) of the 1999 Constitution Federal Republic of Nigeria vis-à-vis moving the motion that the so called allegation against the Governor, Senator Rasheed Adewolu Ladoja be investigated and whether same as passed by the Defendants on 22nd December, 2005 was supported by the votes 'of not less than two-third majority of all the members of the Oyo State House of Assembly.* E

6. *Whether or not the purported passing of a motion for the investigation of the allegations of misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State and the purported request by a non-existent Speaker of the Oyo State House of Assembly asking the Chief Judge of Oyo State to appoint a panel of 7 (seven) persons to investigate the allegation against the Governor is valid and constitutional.* F G

7. *Whether or not the purported suspension of the Rules of the Oyo State House of Assembly Draft Rules of 1999 purportedly made by the defendants on 13th December, 2005 without the presence of the Speaker of the Oyo State House of Assembly was valid and constitutional within the meaning of SS.101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria and Rule 23(1) - (4) of the Draft Rules 1999 of the Oyo State House of Assembly.* H

8. *Whether or not the purported sitting of the defendants at D’Rovans Hotel which is outside the official and recognized venue of the Oyo State House of Assembly on 13th December, 2005 during which the purported Notice of the allegations of misconduct against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State was issued, is valid and constitutional*”

They sought against the 18 legislators, now appellants, (but hereinafter referred to as ‘the defendants’) the following reliefs:

“i. A DECLARATION that the purported Notice of allegation of misconduct made against His Excellency, Senator Rasheed Adewolu Ladoja, the Governor of Oyo State as a preparatory step to his impeachment by the defendants is unconstitutional, null and void and of no effect whatsoever, having regard to the provisions of S.188(1) and (2) of the 1999 Constitution of the Federal Republic of Nigeria.

ii. A DECLARATION that the purported Notice of allegation of misconduct made by the defendants against Senator Rasheed Adewolu Ladoja, the Governor of Oyo State not having being received and or served on each of the 32 (thirty-two) members of the Oyo State House of Assembly as envisaged by S.188(2) of the 1999 Constitution of the Federal Republic of Nigeria is unconstitutional, null and void and of no effect whatsoever.

iii. A DECLARATION that the motion passed by the defendants on 22nd December, 2005 calling for the investigation of the allegation of Misconduct against His Excellency Senator Rasheed Adewolu Ladoja, the Governor of Oyo State is in contravention of S.188(3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria, and to that extent, the said motion is unconstitutional, null and void and of no effect whatsoever.

iv. A DECLARATION that no valid Notice of allegation of misconduct has been issued by the defendants, same not having been passed through the Clerk of the Oyo State House of Assembly, Hon. Adeolu Adeleke in accordance with the provisions of S. 188(2) Para (a) and (b) and S. 188(3) of the Constitution of the Federal Republic of Nigeria.

v. A DECLARATION that the purported suspension of the Draft

Rules of the Oyo State House of Assembly 1999, by the defendants on 13th December, 2005 preparatory to the issuance of the Notice of allegation of misconduct against His Excellency Senator Rasheed Adewolu Ladoja, the Governor of Oyo State in the absence of the Honourable Speaker of the Oyo State House of Assembly, is unconstitutional, invalid and contrary to the provision of SS.101 and 102 of the 1999 Constitution and rule 23(1)-(4) of the Draft Rules of Oyo State House of Assembly. B

vi. A DECLARATION that the purported sitting of the defendants at the D'Rovans Hotel Ring Road, Ibadan where the purported Notice of allegation of misconduct was issued, and which is outside the designated official venue of the Oyo State House of Assembly is unconstitutional, invalid, null and void. C

vii. A DECLARATION that the purported service of the Notice of allegation of misconduct on His Excellency Senator Adewolu Ladoja, the Governor of Oyo State through piece meal publication on pages of the Nigerian Tribunal Newspaper which was not addressed to Senator Rasheed Adewolu Ladoja is no service on His Excellency, it is of no effect and it is a breach of his Constitutional right to fair hearing as contained in S.36 1999 Constitution of the Federal Republic of Nigeria. D E

viii. AN ORDER setting aside all the steps taken so far by the Defendants in relation to the issuance of Notice of allegation of misconduct, passage of motion to investigate same and the purported directive to the Honourable Chief Judge of Oyo State, the said steps having breached the provisions of SS.36 and 188 of the 1999 Constitution of the Federal Republic of Nigeria. F

ix. AN ORDER of injunction restraining all the defendants, their agents, servants, privies or through any person or persons however from taking any further steps, sitting starting, or continuing to inquire or deliberate on the investigation and impeachment proceeding of His Excellency Senator Rasheed Adewolu Ladoja." G

The defendants, in reaction to the originating summons to which H was annexed an affidavit (as is required by court Rules) filed a Notice of Preliminary Objection contending that by reason of section 188(10) of the 1999 Constitution, the court had no jurisdiction to entertain disputes

on matters arising from the proceedings of a House of Assembly. The grounds relied upon in the said Notice of Preliminary objection are these:

B “(a) By virtue and under the Provisions of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Oyo State House of Assembly as represented by the Defendants who are in the majority, have power to regulate its own procedure including the procedure for summoning and recess of the House.

C (b) By the combined effects of Sections 101 and 102 of the 1999 Constitution of the Federal Republic of Nigeria, the Defendants/Applicants herein who are in the majority may act notwithstanding any vacancy in the membership of the House.

D (c) By virtue of Section 188(10) of the 1999 Constitution of the Federal Republic of Nigeria, no court of law can entertain any issue relating to the proceedings or determination of a Panel or the House of Assembly or any matter relating to impeachment proceedings.

E (d) The 1st and 2nd Plaintiffs have no necessary standing to institute this action in that the two of them are impostors. The 1st Plaintiff was removed from office as Speaker of the House of Assembly on 13th December 2005 while the 2nd Plaintiff was never made the Deputy Speaker and was indeed suspended member of the Oyo State House of Assembly.

F (e) Rule 23 of the Draft Rule of Oyo State House of Assembly made pursuant to Section 101 of the 1999 Constitution vested in the Defendants/Applicants herein the power to suspend any order of the House of Assembly and to wit suspend any member of the House. The 2nd Plaintiff/Respondent remains a suspended member of the Oyo State House of Assembly along side six others.

G (f) Legislative Proceedings is neither subject to Litigation nor justiciable.

H (g) The claims of the Plaintiffs/Respondents herein neither disclose(s) (sic) any reasonable cause of action against the Defendants/Applicants nor disclose(s) (sic) the interest which the Plaintiffs/Respondents intend to protect which affect them directly.

(h) The suit of the Plaintiffs/Respondents is an abuse of the process of this Honourable Court.”

Arguments were on 28/12/05 (a mere five days after the filing of the originating summons) heard by Ige J. on the Notice of Preliminary Objection. On the same day Ige J. delivered his ruling and held that the High Court had no jurisdiction to entertain the plaintiffs' suit. The plaintiffs were dissatisfied with the ruling by Ige J. They brought an appeal before the Court of Appeal, Ibadan (coram Ogebe, Akaahs, Chukwema-Eneh, Ogunbiyi and Mika'ilu JJ.CA). The Court of Appeal, Ibadan (hereinafter referred to as 'the court below') heard arguments on the appeal on 26-9-06. B

On 1/11/06, the court below in a unanimous judgment allowed the appeal on jurisdiction. It then proceeded to determine the merits of the substantive suit filed by the plaintiffs and gave judgment in favour of the plaintiffs. The defendants were dissatisfied with the judgment of the court below. They have brought a final appeal before us. In their Amended Notice of Appeal, they raised eleven grounds of appeal. They then formulated three issues out of their grounds of appeal for the determination of this Court. The said issues read: C D

"1. Whether the Court of Appeal was right in its determination that the High Court has jurisdiction to entertain the question of impeachment of the Party Interested/Respondent as the Governor of Oyo State without. E

(a) a decision of the Lower Court as to whether or not there has been any non-compliance with Section 188(1)-(9) of the Constitution of the Federal Republic of Nigeria, 1999 and or F

(b) proof of non-compliance with Section 188(1)-(9) of the Constitution of the Federal Republic of Nigeria? This issue is covered by ground 1 of the grounds of Appeal contained in the Amended Notice of Appeal dated 20th November, 2006 but filed on 21st day of November, 2006. G

2. Whether the Court of Appeal was right in its determination that the High Court of Justice Oyo State has jurisdiction to entertain a question as to the impeachment of the Party Interested/Respondent as the Governor of Oyo State having regard to: H

(i) provision of Section 188(10) of the constitution of the Federal Republic of Nigeria; and

(ii) *the question of locus of the Plaintiffs.*

This issue is covered by grounds 9, 10 and 11 of the grounds of Appeal contained in the Amended Notice of Appeal aforesaid.”

3. *Whether the Court of Appeal was right in considering the merits of the Originating Summons and granting all the reliefs sought by the Plaintiff/Respondents pursuant to Section 16 of the Court of Appeal Act and in the absence of the power in the High Court of Oyo State in granting those reliefs as at the stage of proceedings before it and also in not affording the Defendants/Appellants the opportunity to present their own defence (by way of Counter-Affidavit) to the action. This issue is covered by grounds 2, 3, 4, 5, 6, 7 and 8 of the grounds of appeal contained in the Amended Notice of Appeal aforesaid.”*

The 1st and 2nd plaintiffs (i.e. respondents before this Court) formulated four issues for the determination of this court, namely:

“(i) *Having regard to the circumstances of this case and a specific relief claimed by the Respondents praying the lower court to give them judgment as per the claims in their originating summons, whether or not the lower court did not act rightly in acceding to the Respondents’ prayers pursuant to the powers vested in that court under and by virtue of section 16 of the Court of Appeal Act - grounds 3, 4, 5, 6, 7 and 8.*

(ii) *Whether by the decision of the lower court, Appellants were denied the opportunity to controvert the claims of the Plaintiffs - ground 2.*

(iii) *Whether the Respondents have the locus standi to institute this action - ground 9.*

(iv) *Whether the lower court was not right in its decision to the effect that section 188(10) of the 1999 Constitution could only oust the jurisdiction of the trial High Court if sub-sections (1)-(9) of the said section have been complied with - grounds 1, 10 and 11.”*

The 3rd respondent, Senator Ladoja, formulated for determination the following issues:

“1. Whether the Court of Appeal was not right in its construction and interpretation of the provisions of Section 188 of the 1999 Constitution and in coming to the conclusion that the Ouster Clause in Section

188(10) of the same Constitution cannot avail the Appellants having regard to the peculiar facts and circumstances of this case.

2. Whether the Court of Appeal was not right, having regard to the peculiar circumstances of this case in invoking the provisions of Section 16 of the Court of Appeal Act in giving judgment in favour of the Respondents and whether the right to fair hearing of the Appellants was thereby breached. B

3. Whether the court below was not right to have held that the 1st and 2nd Respondents had the locus standi to institute the case that culminated into this appeal.” C

It is my view that the issues formulated by the appellants (i.e. the defendants) adequately cover the issues raised by the plaintiffs. I shall be guided in this judgment by the defendants' issues. I do not intend to make this judgment unnecessarily long lest the important matters to be discussed are lost in needless verbiage. I shall therefore not reproduce the details of the arguments of counsel in their respective written briefs. The counsel concerned Mr. Tunji Ayanlaja, S.A.N for the appellants, Chief Wole Olanipekun S.A.N for the 1st/2nd respondents and Mr. Yusuf Alli S.A.N. E for the 3rd respondent have filed very thorough and comprehensive briefs. In the adroitness with which their arguments were marshaled and presented before us, they lived up to the standard of their rank as silks. I thank them for their assistance. F

On 7-12-06, we heard arguments in the appeal. My six other colleagues insisted that we give the decision the same day. They dismissed the appeal. I indicated that I would react to the arguments of counsel in my judgment which I now deliver. I now present my dissenting opinion which discusses mainly issues of Law. G

I proceed to a consideration of the issues for determination. I have earlier reproduced the question which the plaintiffs wanted the court below to answer and the reliefs based on such answers. From the reliefs sought by the plaintiffs, it is apparent that the dispute arose out of the manner by which Senator R. A. Ladoja was removed from office as the Governor of Oyo State. Paragraphs 5-16 of the affidavit filed in support of the originating summons by the plaintiffs fully explain the background

of their claims. The said paragraphs read:

“5. That I know as a fact that the 1st plaintiff herein is the Honourable Speaker of the Oyo State House Assembly while the 2ⁿ Plaintiff is the Deputy Speaker and (sic), the House of Assembly respectively.

B 6. That the 1st and 2nd Plaintiffs herein informed me and I verily believe them that the Oyo State House of Assembly sat at the Assembly Complex Secretariat Ibadan on 13th December, 2005 while the Defendants chose to sit outside the official designated House Chamber located
C at the House of Assembly Complex instead they sat at D’Rovans Hotel Ring Road, Ibadan.

D 7. That at the purported sitting of the Defendants herein at the D’Rovans Hotel Ring Road Ibadan, the Defendants purportedly suspended the draft rules of the Oyo State House of Assembly Rules and thereby compromised the interest of the Plaintiffs vis-à-vis their rights as legislators and also compromised the rules and regulation of the Oyo State House of Assembly.

E 8. That I was informed by 1st and 2nd Plaintiffs and I verily believe them that the Defendants purportedly issues a notice of allegation of misconduct against the Governor of Oyo State Senator Rasheed Adewolu Ladoja with the purpose of commencing an impeachment proceedings against the latter.

F 9. That the Defendants further on 22nd December, 2005 without following the laid down rules and regulations and the Constitution of the Federal Republic of Nigeria purportedly passed motion calling for the Investigation of the alleged allegations of misconduct against Senator
G Rasheed Adewolu Ladoja, the Governor of Oyo State without the concurrent consent approval of the two-third majority of the 32 (thirty-two) members House of Assembly.

H 10. That the issuance of the purported notice of allegations of misconduct by the Defendants was also done not only outside the designated official venue of the Assembly but was done without the concurrent consent of the required members of the House of Assembly.

11. That I was informed by the 1st and 2nd Plaintiffs and I verily believe them that the required service of the purported notice of allega-

tions of misconduct against Governor Rasheed Adewolu Ladoja which the Defendants issued from D’Rovans Hotel was not served on each members of the House of Assembly of Oyo State.

12. *That I was informed by the Plaintiffs herein and I verily believe them that the business of the House of Assembly of Oyo State is meant to be conducted within the House of Assembly Chambers and/or on the floor of the parliament.*

13. *That I know as a fact and by virtue of my profession that serious issues of law and the Constitution have been raised in the originating summons.*

14. *That I know that this case involves the interpretation of law vis-à-vis the interpretation of the Constitution of Nigeria 1999.*

15. *That it is in the interest of justice and democracy to grant the reliefs in the originating summons.*

16. *That the Defendant will not be prejudiced in any way if the reliefs in the originating summons are granted.”*

Section 188 of the 1999 Constitution which the plaintiffs alleged the defendants did not follow in the removal from office of Senator Ladoja reads as follows:

“188.-(1) *The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section*

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly -

(a) is presented to the speaker of the House of Assembly of the State;

(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

(3) Within fourteen days of the presentation of the notice to the

Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

B (4) *A motion of the House of Assembly that the allegation be investigation shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.*

C (5) *Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party,*
D *to investigate the allegation as provided in this section.*

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

E (7) *A Panel appointed under this section shall - (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and*

(b) within three months of its appointment, report its findings to
F *the House of Assembly*

(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

G (9) *Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted,*
H *then the holder of the office shall stand removed from office as from the date of the adoption of the report.*

(10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination

shall be entertained or questioned in any court.

(11) In this section –

“gross misconduct’ means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.” B

At the High Court, Ibadan, Ige J. following the objection to the jurisdiction of the High Court said in his ruling on 28/12/05:

“By the combined effect of the above provisions therefore, and having regard to the nature of the reliefs claimed by the Plaintiffs, it is clear beyond argument that the jurisdiction of this Court is clearly ousted. Impeachment and related proceedings are purely political matters over which this Court cannot intervene. The action is not justiciable. See Chief Enyi Abaribe v. The Speaker Abia State House of Assembly & Ors. {2002} 14 NWLR (Pt.788) p. 466 at p. 492. It is not part of the duty of the Court to forage into areas that ought to vest either directly or impliedly in the Legislature such as the issue of impeachment which is a matter that comes within the purely internal affairs of the House of Assembly. C D

The Court will therefore decline jurisdiction in this matter. The objection of learned counsel for the Defendants/Respondents is upheld. The Originating Summons is accordingly dismissed.” E

The plaintiffs were dissatisfied with the above ruling of the High Court. They brought an appeal before the court below. It is of cardinal importance for me to observe here that at the time the High Court, Ibadan gave the above ruling, the defendants had neither entered an appearance to the suit nor filed a defence thereto in the form of a counter-affidavit. By not doing so, they did not and could not incur any liability. This is because, under the Oyo State High Court Rules, the defendants had eight days from the date of service of the originating summons upon them to enter an appearance to the suit; and they had 30 days from the date of such service to file a defence or counter-affidavit to the suit by the plaintiffs. I have stated this here now and underlined it because it is the crucial fact which the court below in its judgment and the majority judgment of this Court failed to bear in mind. F G H

(underlining mine)

Now, in the Notice of Appeal filed by the plaintiffs to the court below, their only complaint was that the High Court was wrong to have held that it had no jurisdiction to entertain their claim. The plaintiffs formulated two issues out of their grounds of appeal for the determination of the court below. The said two issues read:

"i. Having regards to the originating summons filed before the lower court, including the issues for determination and the reliefs sought therein, whether or not the lower court was not in grave error to have declined jurisdiction to hear the plaintiffs' case and going ahead to dismiss same.

ii. Whether the lower court is precluded from looking into matters relating to non-compliance with the mandatory provision of to (sic) section 188(1), (2), (3), (4), (5), (6), (7), (8) and (9) of the Constitution of the Federal Republic of Nigeria, 1999 by virtue of section 188(10) of the same Constitution."

The court below in deciding the only issue of jurisdiction brought before it said at pages 485 - 486 of the record:

"It is my view that the trial court had serious questions to consider before hastily throwing out the suit. For example it was alleged that 18 defendants/respondents met outside the chambers of the House of Assembly in a hotel to commence impeachment proceedings, the court had a duty to determine whether proceedings before such a group amounted to proceedings of Oyo State House of Assembly. It was also alleged that the House of Assembly in Oyo State had 32 members and for the removal of the Governor which requires the resolution of two third majority of all members of the House, the court had a duty to inquire whether a factional meeting of 18 members constituted the required two-third majority of all members. The court also had to consider whether impeachment proceedings in which the Speaker of the House of Assembly is excluded from his leading role as provided for in Section 188 of the Constitution can amount to proper proceedings of impeachment.

For all I have said in this judgment I have no hesitation in holding that the learned trial judge was wrong in declining jurisdiction. Indeed he had jurisdiction to examine the claim in the light of section 188

subsections 1-9 of the 1999 Constitution and if he was not satisfied that the impeachment proceedings were instituted in compliance thereof, he has jurisdiction to intervene to ensure compliance. If on the other hand there was compliance with the pre-impeachment process then what happened thereafter was the internal affairs of the House of Assembly and he would have no jurisdiction to intervene.” B

In the passage reproduced above the court below had not categorically said that the High Court had jurisdiction to entertain the suit. What the court below said was that the High Court needed first to determine certain issues of fact before concluding as to whether or not its jurisdiction was ousted by section 188(10) of the 1999 Constitution. For the sake of clarity, I should itemize those issues of fact which the court below wanted the High Court to determine before reaching a conclusion as to jurisdiction. They are: D

1. Whether or not the 18 defendants met outside the chambers of the House of Assembly in a hotel room.

2. Whether if the 18 defendants met outside the chambers of the House of Assembly, the proceedings amounted to that of Oyo State House of Assembly. E

3. Whether the Oyo State House of Assembly had 32 members and whether a factional meeting of 18 members would amount to two third majority of all members. F

4. Whether the Speaker of the House of Assembly was excluded from his leading role as provided for in Section 188 of the Constitution. F

The next question is - How was the High Court to determine the answers to these questions of fact? There is no doubt in my mind that the only way it could be done was to allow the defendants to file their defence or counter-affidavit to enable the High Court determine whether indeed the defendants met outside the chambers in a hotel room and whether the Speaker of the House of Assembly was unconstitutionally excluded. Some of these questions which seem on their face to be issues of fact also raise serious issues of law which necessitate legal arguments. For instance there was the need to factually decide if the Speaker was excluded; and to decide as a matter of law, if the presence of the H

Speaker could be dispensed with or if the Speaker could be validly removed.

I observed earlier that the defendants had not filed their counter-affidavit as at 28/12/05 when the High Court by its ruling terminated the case. At the conclusion of the proceedings in the High Court, the defendants still had 25 days to file a defence. Once however, the suit was dismissed on 25/12/05, the defendants no longer had an obligation to file a defence to a suit which no longer existed. In the same way, the defendants had no obligation to enter an appearance to a suit that had been dismissed.

The argument that the defendants had failed to enter appearance to the suit does not in my view take cognizance of the Oyo State High Court rules, as to failure to file appearance and the consequences arising therefrom. These have been well set out. Order 13 rule 5 of Oyo State High Court Rules provides:

“5. A defendant may appear at any time before judgment. If he appears at any time after the time limited by the writ for appearance, he shall not, unless the court or a Judge in chambers shall otherwise order, be entitled to any further time for delivering his defence, or for any purpose, than if he had appeared according to the writer other originating process.”

And Order 14 rule 7 of the same High Court Rules dealing with default of appearance provides:

“7. Where a defendant or respondent to an originating summons to which an appearance is required to be entered fails to appear within the time limit, the plaintiff or applicant may apply to the Court or a Judge in Chambers for an appointment for the hearing of such summons and upon a certificate that no appearance has been entered, the Court or Judge shall appoint a time for the hearing of such summons, upon such conditions (if any) as it or he shall think fit.”

I observed earlier that the periods specified for the defendants to enter appearance and file their counter-affidavit had not expired as at 28/12/05 when the High Court delivered its ruling. I have only made the point because arguments have been addressed to us that the defendants

had failed to file a defence. I am not aware of any procedure of law which allows a person to be penalized when he is not in breach of the applicable court Rules.

The court below gave its judgment on 1/11/06. It was the said judgment which resurrected the plaintiffs' suit which had been dismissed B by the High Court. It was only from that date i.e. 1/11/06 that the defendants' period to file an appearance and counter-affidavit could be calculated.

The court below having made postulations as to what needed to C be done to determine whether or not the High Court had jurisdiction then said:

"Having held that the trial court has jurisdiction to hear the appellants' originating summons, it is now for me to determine whether I D should send the case back to the Oyo State High Court for fresh trial. The appellants have urged me to decide the case because it raises issue of constitutional interpretation of section 188 of the 1999 Constitution which this court is in a position to decide by virtue of Section 16 of the Court of Appeal Act. E

The learned counsel for the defendants/respondents urged me not to decide the originating summons because this appeal has arisen only from the preliminary objection on jurisdiction.

I have taken a look at the preliminary objection of the defendants/ F respondents in the court below and the grounds thereof earlier quoted in this judgment and I have also looked at the arguments of counsel before the lower court and the summary of the arguments in the ruling of the lower court and it is my view that all that needs to be said on the merit of G the claim has already been said in the record.

Since the facts of the case are not disputed and what is to be decided is purely the interpretation of Section 188 of the 1999 Constitu- H tion, this is an appropriate case for us to resolve the entire case in this court under Section 16 of the Court of Appeal. It is necessary for us to do so in view of the fact that the *rem* of the dispute, that is who is the rightful Governor of Oyo State before the tenure ends in May next year should be determined without further delay.

On the case of *Attorney-General of Anambra State v. Okeke* (2002) 12 NWLR (Part 782) page 575 the Supreme Court per Ayoola JSC at pages 606-607 had this to say:

‘This appeal brings once again into question the true scope of powers of “full jurisdiction” given to the Court of Appeal under section 16 of the Court of Appeal Act. Counsel for the plaintiffs referred to instances in which the Court of Appeal had usefully exercised such powers. Since none of the cases he cited, except *Okotie-Eboh & Ors. V. Okotie-Eboh & Ors.* (1986) 1 NWLR (Pt. 16) 264, (1986) 1 NSCC (Pt.1) 183, comes near the circumstances of this case, no useful purpose is served by discussing those cases.

It is not disputed that the Court of Appeal has ample powers under section 16. However, no one will suggest that those powers are unlimited? The question is what are the limits of those powers? Such limits are to be determined case by case and not by a priori general propositions.’

This is a proper case for this Court to exercise its powers under Section 16 of the Court of Appeal Act to determine the merit of the originating summons. The critical question to determine in the originating summons is whether or not the steps taken by the 18 members out of the 32 members of the House of Assembly of Oyo State in holding a meeting in a hotel outside the official chambers of the House of Assembly in furtherance of impeachment proceedings under section 188 of the Constitution can be regarded as the proceedings of the Oyo State House of Assembly.”

(underlining mine)

And at pages 488-489 the court below said:

“It is clear from the constitutional provisions that the House of Assembly of a State is comprised of all the elected members of the House sitting in an official capacity in its designated chambers as the House of Assembly of a State with the Speaker or Deputy Speaker presiding. Its legislative functions including impeachment of a Governor or even a Speaker must be carried out in its plenary session open to all members in an atmosphere that is free from fear, intimidation and violence.

It follows therefore that a faction of a House even if it is the

majority sitting in an unauthorized location without the principal officers of the House cannot amount to a sitting of a State House of Assembly. In other words, the factional meeting of the 18 members of the Oyo State House of Assembly in a hotel room could not amount to a constitutional meeting of a House of Assembly for the purpose of any valid business of the House. B

From the affidavit evidence accompanying the originating summons, it is clear that the Oyo State House of Assembly broke into two factions, one faction headed by the first plaintiff/appellant met on the 13th December at the Oyo State House of Assembly complex Ibadan while a faction of the 18 respondents met in D'Rowan Hotel Ring Road. C

It is my view that no factional meeting of any member of a State of House of Assembly can amount to a constitutional meeting of the whole House of Assembly as envisaged and provided for in the Constitution. There was no counter-affidavit before the lower court to prove that any members of the House of Assembly of Oyo State was suspended or that the plaintiffs/appellants were removed as Speaker and Deputy Speaker in accordance with the provisions of the Constitution. D E

It follows therefore that all the steps taken by the faction of the defendants/respondents purporting to initiate impeachment of Senator Ladoja as Governor of Oyo State were not actions of the Oyo State House of Assembly under Section 188 of the 199 Constitution. F

Consequently I allow the appeals of the plaintiffs/appellants and the interested party/appellant and set aside the ruling of the trial court declining jurisdiction. I hereby enter judgment for all appellants and grant the following reliefs:" G

(underlining mine)

The lead judgment by Ogebe JCA relied on Section 16 of the Court of Appeal Act and *Attorney-General of Anambra State v. Okeke* [2002] 12 NWLR (Pt. 782) page 575 at pp. 606-607 for its decision to proceed, consider and give judgment on a matter in respect of which there was no appeal before it. Indeed there was no judgment or decision on the substantive suit by the High Court. I shall shortly show that the case relied upon by the court below - *A-G Anambra State v. Okeke (supra)* could H

not be authority for what the court below did. The case in fact contradicts the approach of the court below.

Section 16 of the Court of Appeal Act provides:

“The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in appeal and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such rehearing or may give such other direction as to the manner in which the court below shall deal with the case in accordance with the powers of that court or in the case of an appeal from the court below in that court’s appellate jurisdiction order the case to be re-heard by a court of competent jurisdiction.”

There has been a lot of misconception about Section 16 above. In some cases, it has been relied upon as giving the Court of Appeal in an interlocutory appeal, the jurisdiction to do anything it pleases in respect of the substantive case before the High Court on which no decision has yet been made and even when there has been no appeal filed before it. This notion, if correct, means that the Court of Appeal now has an all-purpose jurisdiction which it could invoke in an interlocutory appeal to decide any matter in the substantive appeal. Let me give some examples of how it may work.

1. ‘A’ sues ‘B’ in respect of ownership of a piece of land and brings a motion before the High Court for an injunction to restrain ‘B’ from committing further acts of trespass. The High Court refuses to grant the injunction. ‘A’ appeals against the refusal to the Court of Appeal. The Court of Appeal grants an injunction and proceeds to decide the ownership of the land even when pleadings had not been concluded.

OR

2. 'A' and 'B' are husband and wife. 'A' brings a petition against wife 'B' for divorce. 'B' asks from the High Court alimony *pendente lite*. The High Court grants her alimony. 'A' brings an interlocutory appeal. The Court of Appeal relies on Section 16 and not only decides on alimony but proceeds to grant divorce when an answer to the petition had not been filed. B

The above two examples represent graphically what had happened in this case.

Now the Court of Appeal Act No. 43 of 1976 is an "existing law" as defined under Section 315 of the 1999 Constitution of Nigeria. Section 315(3) of the said Constitution provides: C

"(3) Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say- D

(a) any other existing law;

(b) a law of a House of Assembly

(c) an act of the National Assembly; or E

(d) any provision of this Constitution;"

Under Section 315(3) above, if any of the provisions of the Court of Appeal Act No.43 of 1976 is inconsistent with the provisions of the 1999 Constitution, such provisions will be void to the extent of such inconsistency. The language employed under Section 16 is very wide and it has been so widely construed in some cases. F

The said cases include *Okotie-Eboh v. Okotie-Eboh & Ors.* [1986] 1 N.S.C.C 183, *University of Lagos & Ors. v. C.L.O. Olaniyan* [1985] N.W.L.R. (Pt.1) 156, *Laibru Ltd. v. Building and Civil Engineering Contracts* [1962] 1 All NLR (Part 3) 387. G

It is however, my view that Section 16 has to be approached with extreme caution. It cannot be construed in a manner as would bring it in conflict with the 1999 Constitution. Section 16 in my humble view only gives seemingly wide powers to enable the court exhaust finally all the issues arising out of the particular appeal brought before it as revealed in the Notice of Appeal by which the appeal was brought and the issues H

arising therefrom for determination. Section 16 does not create an omnibus Notice of Appeal which enables the Court of Appeal to look into matters not agitated in the relevant Notice of Appeal. Section 16 does not create a new appellate jurisdiction. It merely states the general powers to be exercised in particular appeals. In all appeals, the extent of the power to be exercised is circumscribed by the grounds of appeal as contained in the Notice of Appeal.

It is erroneous to construe Section 16 of the Court of Appeal Act as giving a new original jurisdiction to the Court of Appeal. To do so will render it inconsistent with the 1999 Constitution and render it void. The Court of Appeal Act, 1976 is subordinate to the 1999 Constitution. Any provision therein is therefore bound to be pronounced invalid to the extent to which it is inconsistent with the 1999 Constitution. The correct view to take is that Section 16 does not confer on the Court of Appeal the original jurisdiction which has been ascribed to it.

It is settled law that the exercise of a right of appeal is entirely statutory. See *Adili v. State* [1989] 2 NWLR (Part 103) 305 at 324; *Nabham v. Nabham* (1967) N.M.L.R. 192. The exercise of the right is circumscribed within the scope of the statute which grants the right. - See *Aroyewun v. Adebajji* [1976] 11 SC. 33. It is equally necessary for all appellants to comply with the provisions of the Constitution when appealing otherwise they will sooner or later realize that their appeal lacks the competence to invoke the jurisdiction of the court to hear and determine it. See *Adili v. State (supra)* at page 317.

In an appeal, only issues formulated within the parameters and context of the grounds of appeal and raising issues determined in the judgment appealed against can come within the purview of issues to be determined: See *Oniah v. Onyia* [1989] 1 NWLR (Pt.99) 514 at 527; *Attorney-General, Anambra State v. Onuselogu Enterprises Ltd.* [1987] 4 NWLR (Pt.66) 547.

This Court in *The Federation v. Imo State* [1982] 12 SC.274 at 316-317 also warned on the necessity to restrict appellate courts to their appellate jurisdiction. Bello JSC (as he then was) said on the point:

“The Constitution established the Supreme Court, the Federal Court

of Appeal, the Federal High Court, the High Court for each State of the Federation, the Sharia Court of Appeal and the Customary Court of Appeal for any State that requires either. See sections 210, 217, 228, 224, 240 and 245 of the Constitution. Only the High Courts of the States were conferred with unlimited original jurisdiction under Sections 236 and 237. This Court and the Federal High Court were also given special and restrictive original jurisdiction in the matters specified under Section 212 and 230 respectively. The Constitution did not confer any original jurisdiction on the other courts. They are purely courts of appellate jurisdiction. Under the circumstances, section 212(1) should be interpreted to give effect to the restrictive original jurisdiction of the court. The section ought not be interpreted to enlarge its scope.”

That aside, this Court in *University of Ibadan v. Adamolekun* [1967] 1 All NLR 213 at 224 per Ademola CJN decided that a section of a statute should not be read in isolation thereby rendering other relevant sections ineffective or unnecessary. If section 16 of the Court of Appeal Act is construed as giving a right of appeal without the necessity of filing a notice of appeal it would render section 25 of the same Act which provides that a party intending to appeal shall file a Notice of Appeal superfluous, ineffective or unnecessary. The said Section 25(1) provides:

“25(1) Where a person desires to appeal to the Court of Appeal, he shall give Notice of Appeal or Notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this Section that is applicable to the case.”

If Section 16 of the Court of Appeal Act is taken as an omnibus right of appeal, what then is the time limit for bringing such appeal?

Further on the point, this Court in *Uwaifo v. A-G* [1982] 7 S.C. 124 at 187-188 recognized that marginal notes and explanatory notes in a statute may be used to ascertain the general purpose of a statute. Idigbe J.S.C. said:

“In the words of UpJohn L.J. which I gratefully adopt and with which I am in respectful agreement, while the marginal note to a section (and I would add, the side or explanatory note to an enactment) cannot

control the language used in the section, it is at least permissible to approach a consideration of its general purpose and the mischief at which it is aimed with the note in mine. [See: Stephen v. Cuckfield Rural District Council (1960) 2 Q.B 373 at 383; also Sir Rupert Cross on Statutory Interpretation 1st ed. (1981 Reprint) page 113]".

The side notes to Section 16 of the Court of Appeal Act are: "General powers of Court of Appeal". They are not 'jurisdiction of the Court of Appeal.' Section 16 is clearly incapable of conferring a new original jurisdiction on the Court of Appeal. It only states the power which the Court of Appeal can exercise in accordance with the Right of appeal under the Constitution of Nigeria. As no Notice of Appeal was filed on the substantive case before the High Court, the court below could not exercise the powers under Section 16 in relation to the substantive case before the High Court when no 'decision' had been made in it.

I observe earlier in this judgment that what Section 16 of the Court of Appeal Act donated to the Court of Appeal are powers not jurisdiction.

Regrettably, it seems that the court below did not appreciate the distinction between both. I take it upon myself to give an example which may serve to illustrate this:

In hearing an Admiralty matter, the Federal High Court may award damages. Similarly in hearing offences related to customs matter, the Federal High Court may sentence culprits to imprisonment. Similarly, the State High Court may award damages in land matters. It could also impose terms of imprisonment in criminal offences committed within the State. Although both High Courts have common power to award damages and sentence culprits to prison, that fact does not give each interchangeable jurisdiction. The Federal High Court has no jurisdiction in matters committed to a State High Court under the Constitution and reciprocally the State High Court does not possess the jurisdiction given to the Federal High Court by the Constitution. This is notwithstanding that both courts possess similar powers. To exercise power even if wide and extensive, a court must first possess jurisdiction. Without jurisdiction, a court cannot exercise any power.

In Ejowhomu v. Edok-Eter Ltd. [1986] 5 NWLR (Pt.39) 1 at 30

this Court per Obaseki JSC said concerning a Notice of Appeal-

“A trial court may have committed grave errors in its judgment in a matter in a manner which stirs the informed mind of the appeal court Judges for correction, but it is settled law that if the parties to the matter are satisfied with the judgment, there is nothing the Justices of the Court of Appeal can do. The Justices can only maintain studied silence or observe that there was no appeal before them on the point. If one of the parties is aggrieved and decides to appeal on grounds which do not raise the grave errors observed as issues to be debated and determined the Justices are still powerless and hamstrung in tackling the errors. But if the party adversely affected by the errors through careful reading, wisdom and vigilance, spots the errors and takes the matter on appeal on grounds complaining of those errors, it is only then and then only that the Court of Appeal under our law can deal with the issue. Generally, appeal courts without statutory provisions, have no jurisdiction to disturb settled issues not properly brought as well as those not brought before them. The Court of Appeal sought to support its action by relying on dicta of the Supreme Court cited from:

(1) Akibu v. Opaleye & Ors. (1974) 1 All NLR (Part II) 344

(2) Fatoyinbo v. Williams (1956) 1 FSC. 87 at p.89 and

(3) Thomas or Watt v. Thomas (1947) AC. 484, 487, 488.

I find these dicta totally inapplicable and lacking in support for the action of the court in proceeding to re-evaluate evidence and reverse a finding of fact on issues which have not been brought on appeal before it.”

Aniagolu JSC at pages 34-35 of the report had this to say:

“That ordinarily should be the end of my contribution in this judgment were it not that I consider it necessary to re-emphasize my support for the often repeated principle, laid down by this Court in a number of cases, namely, that the Appeal Court is not an avant-garde with powers of review of cases decided at the High Court, like an ombudsman, going about raking up, suo motu, decisions of that Court, and looking for mistakes, supposedly made by that Court, with or without applications made to it by a complainant. Such is not among ‘the wide powers’ given

to that Court by Section 16 of the Court of Appeal Act 1976.

The jurisdiction of the Court of Appeal is founded upon an appeal lodged to it by a complainant otherwise called an appellant. The Court of Appeal is not a Court of first instance and even though it possesses the powers of a Court of first instance when determining an appeal, it only embarks upon that determination when proceedings are initiated by a complaint lodged to it by an appellant. Until it is awakened into action from its sleep by such a complaint, it remains a contented tiger sleeping in its lair.

I agree that, in the instant appeal, the Court of Appeal had no jurisdiction to hold, as it held, that the defendant was not liable in nuisance, there being no appeal lodged to it by any of the parties on that issue. See: *Chief Frank Ebba v. Chief Warri Ogoto & Anor.* (1984) 4 SC. 84 at 122.”

(underlining mine)

Coker JSC emphasizing the limits of the power of the Court of Appeal under section 16 of the Court of Appeal Act said at pages 38-39:

“The power which an Appeal Court, indeed any Court has is restricted to issues or matters brought before it for determination.

Section 16 of the Court of Appeal Act gives the Court that power.

It reads:-

“16. The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine, before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as Court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case

in accordance with the powers of that court, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a Court of competent jurisdiction.'

The power to make any of the orders under the section must be related to the appeal before it and necessary for determining the real question in controversy. It must be a controversy raised by a party to the appeal in accordance with the Rules and Practice of the Court. That power must be exercised in accordance with the Act establishing the Court and the Rules of Court, its practice and procedure.

The only matter and dispute in the appeal was the refusal of the trial judge to assess and award damages which the plaintiff claimed.

The defendant did not dispute the finding that what it did was actionable public nuisance. It was therefore not the business of the court to raise the issue. The function of the Court (be it a court of original jurisdiction or appellate) is to adjudicate on disputes properly submitted in accordance with the rules or practice of the Court. It is not its function to create dispute for the parties. The system of our justice is not inquisitorial.

Similarly, an appeal court is concerned only with issues and matters properly raised by either of the parties in accordance with the rules of court, its practice and procedure. See *Chief Ebba v. Chief Ogodo & Anor. (1984) 4 SC 84. Shitta-Bey v. The Federal Public Service Commission (1981) 1 SC 40 59* cited with approval by Obaseki JSC in *Overseas Construction Ltd. v. Creek Enterprises Ltd. & Anor. (1985) 3 NWLR 407, at p. 420 & p. 423.*

The fundamental principle is that in an adversary system of trial, the judge or Court must keep a detached posture and should not only remain but appear to be an impartial arbiter between the contesting parties. I have come to the decision therefore that in the absence of any dispute between the parties the Court below was in error in re-examining the evidence and the findings of the trial court.

The lower court should have confined itself to the issue before it, namely whether the trial court was right in refusing to award damages to the plaintiff on the basis of its finding that the defendant committed a

wrongful act of public nuisance.”

(underlining mine)

Sections 241(1) and 242(1) describe the nature of the appellate jurisdiction of the Court of Appeal with these opening words concerning an appeal as of right and an appeal with leave respectively.

“24(1) *An appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal as of right in the following cases-*

.....
242-(1) *Subject to the provisions of Section 241 of this Constitution, an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that of High Court or the Court of Appeal.*”

(underlining mine)

It is seen above from the opening Sections of 241 and 242 of the 1999 Constitution that the right of appeal with or without leave only lies from the ‘decision’ of the Federal High Court or a High Court of a State. Section 318 of the 1999 Constitution defines “decision” as meaning “*in relation to a court, any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation.*”

That being the position, a right of appeal does not exist where a court has not made a decision. See *Deduwa & Ors. v. Emmanuel Okorodudu & Ors. [1976] Vol. 10 N.S.C.C. 499 at 504-505; The Automatic Telephone and Electric Co. Ltd. v. the Federal Military Government of the Republic of Nigeria [1968] 1 All N.L.R. 429 at 432*. The attempt to read into Section 16 of the Court of Appeal Act a jurisdiction to determine appeals even in cases where no decision has been rendered is therefore clearly misguided. The Court of Appeal is a creation of Statute and as is the case with all courts created by statute the jurisdiction of the Court of Appeal is limited by the statute which creates it, in this case the 1999 Constitution of Nigeria.

Another Section of the 1999 Constitution to be borne in mind in the appreciation of the limits of Section 16 is 240. This is the section that allows the National Assembly to extend the appellate jurisdiction of the

Court of Appeal to bodies other than those stated under Section 240. It provides:

“240. Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Federal high Court, B the High Court of the Federal Capital Territory, Abuja, High Court of a State, Sharia Court of Appeal of the Federal Capital Territory, Abuja, Sharia Court of Appeal of a State, Customary Court of Appeal of the Federal Capital Territory, Abuja, Customary Court of Appeal of a State C and from decisions of a court martial or other tribunals as may be pre- scribed by an Act of the National Assembly.”

(underlining mine)

Section 240 above does not give power to the National Assembly D to create a new original or appellate jurisdiction for the Court of Appeal. It only enables the National Assembly to bring in other public bodies or institutions into the fold of the specifically mentioned persons to enjoy the same jurisdiction granted to the Court of Appeal under the Constitu- E tion. It is therefore plainly erroneous to rely on section 16 of the Court of Appeal Act as granting to the Court of Appeal a new jurisdiction in the form of poaching suits which had not even been decided by the High Court from the strong rooms of the High Courts when there is no appeal in such cases. F

It is in recognition of this situation that a number of immutable principles of law have emerged concerning a Notice of Appeal. In *Adebayo Alao v. Attorney-General of Oyo State* [1990] 7 NWLR 448, it was de- G cided that in order to activate the appellate jurisdiction of the Court of Appeal, there must be a proper Notice of Appeal. Further, if a Notice of Appeal was filed out of time and no extension of time was obtained, the appeal is liable to be struck out - See *Chukwu v. State* [1984] 7 SC. 8. Similarly if all the grounds of appeal in a Notice of Appeal are found H incompetent; the Notice of Appeal is a nullity: See *Nsirim v. Nsirim* [1990] 3 NWLR (Pt. 138) 285 and *Ambrose Akuche v. Maria Nwamede* [1992] 8 NWLR (Pt. 258) 214. These are all principles of law with which we are very familiar in this Court and which we have regularly applied from time

to time.

The major error affecting the judgment which the court below gave on 1/11/06 was that it delved into a matter in respect of which it has no shred of jurisdiction. It's want of jurisdiction derives from two causes.

B First, there was no decision made by the High Court on the substantive suit in respect of which any person could have appealed to the court below. Second, there was in any case no Notice of Appeal in respect of the substantive suit before, the court below. The only appeal before the
C court below was as to whether or not the High Court had jurisdiction to determine plaintiffs' suit. The court below only needed to decide the issue of jurisdiction and after that send the case to the High Court, Oyo State for determination of the substantive suit. When an appellate court comes to the conclusion that a trial court had erred in coming to a particular decision, the appellate court could only make the same decision
D which the trial court could have made had it not made the error. See *Garuba v. R.I. C. Ltd.* [2005] 5 NWLR (Pt.917) 2 NWLR (Pt.379) 516 at 528 and *Faleye v. Otapo* [1995] 3 NWLR (Pt. 381) 1 at 33. The court
E below should have borne in mind that if the High Court had held that it had jurisdiction to hear plaintiff's case, it could only have proceeded with the trial by calling on the defendants to file a defence or counter-affidavit.

It was a serious error on the part of the court below to have proceeded to
F give judgment against the defendants on the substantive suit when there was no decision in existence on the suit and when in any case there was no appeal on it before the court below. I know of only one instance in which the Court of Appeal is granted original jurisdiction. This is under
G Section 239 of the 1999 Constitution which provides:

"239.-(1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether

H (a) any person has been validly elected to the office of President or Vice-President under this Constitution; or

(b) the term of office of the President or Vice-President has ceased;

or

(c) the office of President or Vice-President has become vacant;
 (2) In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal.”

One of the justices of the court below who was a member of the panel that heard this appeal (Akaahs J.C.A.) had in *United Bank for Africa v. Ajileye* [1999] 13 NWLR (Pt.633) 116 at 120 acknowledged that the court below has no original jurisdiction except under Section 239 above. He said:

“----the only instance the Court of Appeal is allowed to assume original jurisdiction to adjudicate on a matter is under section 239(1) of the 1999 Constitution and no more. Therefore, where there is conflict in affidavits before it which can be resolved only through calling of oral evidence, the Court of Appeal cannot embark upon such resolution because of its statutory limitation.”

The High Court on the other hand is under the 1999 Constitution the court granted general original jurisdiction.

It is my firm view that the court below acted without jurisdiction in the manner it gave judgment in the substantive suit in respect of which no one had appealed and no decision made. In *Onyema v. Oputa* [1987] 3 NWLR (Pt.60) 259, this Court emphasized the importance of jurisdiction in court proceedings. Jurisdiction is not just a procedural matter. It is a substantive issue in litigation.

It is settled law that where a court has no jurisdiction to decide a matter and proceeds to decide it, the decision is a nullity. In *Management Enterprises Ltd. v. Olusanya* [1987] 2NWLR (Pt.55) 179 at 188, this Court per Oputa JSC said that if there is any defect in the competence of a court, the proceedings will be a nullity and it does not matter how well conducted and how well decided the suit was. See *Madukolu & Ors. v. Nkemdilim* [1962] 1 All N.L.R. 587 at 595. See also *Ojokobo v. Alamu* [1987] 3 NWLR (Pt.61) 377 and *A-G. Lagos State v. Dosunmu* [1989] NWLR (Pt.111) 552.

The result of what I have been saying is that the judgment given

by the court below on the merits of the substantive suit, being one given without jurisdiction, is a nullity and has no effect whatsoever.

The judgment of the court below on the merits of the case is also impaired by another fundamental vice rendering it a nullity. In paragraphs B 6.36 to 6.41 of the Appellants' brief counsel argued thus:

"6.36. If the Defendants had had a chance to file a defence to the action via a counter-affidavit, they would have been able to depose to the facts from which the court could determine, inter alia:

C *(1) Whether some members were validly suspended from membership of the House of Assembly;*

(2) Whether the Defendants met in the House of Assembly or at D'Rovans Hotel as alleged by the Plaintiff;

D *(3) Whether or not the Notice of Impeachment was served on the Governor and all members of the House of Assembly contrary to the allegations in the affidavit in support of the Originating Summons; and*

(4) Whether or not the Notice of Allegation of Misconduct was passed through the Clerk of the House of Assembly.

E *6.37 By determining the case on the basis that the Defendants never offered any defence to the action when indeed there was no opportunity for the Defendants to file a Counter-Affidavit, since they could not have filed it even within time after the action had been dismissed, the*
F *court of Appeal had shut the appellants out and denied them the opportunity to present their case and have the issues resolved on the merits.*

6.38 The Supreme Court has held that a hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a
G *hearing. If one of the parties is refused a hearing or not given an opportunity to be heard, the hearing cannot qualify as fair hearing. See Ndukanba v. Kolomu (2005) 4 NWLR (Pt. 915) 411 at 429.*

6.39 It may well be that the Court of Appeal was anxious that the issue whether the party having an interest was properly removed be
H *determined as early as possible. But it has been held that to ensure that each party is fairly heard, there should be no over-speeding or stampeding in order to enable the court to arrive at a just decision although justice delayed is justice denied, justice rushed may result in justice crushed. See*

Governor of Ekiti State v. Osayomi (2005) 2 NWLR (Pt. 909) 67 at 90;
Unongo v. Aku (1983) 2 S.C.N.L.R. 332 at 352.

6.40 *In the case of Alsthom S. A. v. Saraki* (2005) 3 NWLR (Pt. 911) 208 at 228-229, the Supreme Court held that fair hearing envisages that both parties to a case are given an opportunity of presenting their respective cases without let or hindrance from the beginning to the end. B

6.41 *On the effect of denial of fair hearing, it is trite that the principle of fair hearing is fundamental to all court procedures and proceedings and, like jurisdiction, the absence of it vitiates the proceedings, however well conducted. See Okike v. L.D.D.C.* (2005) 15 NWLR (Pt. C 949) 531/532.”

The arguments above are founded on the complaint that the defendants were denied a right to fair hearing by the procedure which the Court of Appeal adopted to decide the case on the merits. I said earlier in this judgment that the defendants, at the time the High Court dismissed the suit following the objection on jurisdiction, still had 25 days within which to file their counter-affidavit. They still had 3 days within which to enter appearance. Following the dismissal of the suit, the necessity to enter appearance and to file a counter-affidavit no longer existed. However, the judgment of the court below on 1/11/06 that the High Court had jurisdiction, resuscitated the suit and with that a fresh obligation of the defendants to file an appearance and a counter-affidavit arose. But rather than grant the defendants the opportunity to enter appearance and file a defence to defend the suit on the merit, the court below on 1/11/06, in the same judgment which granted jurisdiction to the High Court also the gave judgment now the subject of this appeal in favour of the plaintiffs. The implication of this strange procedure is that this case was decided solely on plaintiffs’ originating summons and affidavit. The defendants were not afforded the opportunity of saying one word. This I must confess is one of the most bizarre occurrences in a court of law that I have ever seen. D E F G H

At page 477, Ogebe J.C.A. presiding in his lead judgment said:

“The supporting affidavit which has not been disputed is that the first and second plaintiffs/appellants were the Speaker and Deputy Speaker

respectively of Oyo State House of Assembly as at the time the suit was instituted. While the State House of Assembly sat in the House of Assembly Complex on the 13th of December 2005, the 18 defendants/respondents chose to sit outside the official chambers and went to sit at the B D’Rovans Hotel, Ring Road, Ibadan. It was from that venue that they started the impeachment proceedings against Senator Ladoja without complying with the provisions of section 188 of the Constitution.”

And at page 487, the said learned Justice of the Court of Appeal C said:

“The learned counsel for the defendants/ respondents urged me not to decide the originating summons because this appeal has arisen only from the preliminary objection on jurisdiction.

D I have taken a look at the preliminary objection of the defendants/ respondents in the court below and the grounds thereof earlier quoted in this judgment and I have also looked at the arguments in the ruling of the lower court and it is my view that all that needs be said on the merit of the claim has already been said in the record.

E Since the facts of the case are not disputed and what is to be decided is purely the interpretation of section 188 of the 1999 Constitution, this is an appropriate case for us to resolve the entire case in this court under section 16 of the Court of Appeal Act.”

F It is with profound respect that I express my inability to agree with the reasoning of the court below and the majority judgment of this Court. Section 36(1) of the Nigerian Constitution affords to every citizen of this country the right to fair hearing. That translates to this: no citizen of this country may be allowed to suffer any deprivation in a court of law G without being given the opportunity to contest the allegation against him. A litigant facing a civil suit in court is allowed to present his case, alternatively. He is permitted to argue that an affidavit before the court contains facts which amount to hearsay. If the court rules that such affidavit is in H fact admissible not being hearsay, the door is then thrown open to a defendant to decide-whether or not he wishes to file a counter-affidavit. I need to stress that the defendants’ time to file a counter-affidavit had not expired. I ought not to over-looked the fact that since his period to

file a counter-affidavit had not expired, he could, given what we said that the affidavit evidence is admissible, still file a counter-affidavit.

As for the court below, how does a court of law conclude that the facts of a case are not disputed, when the defendants still had time to file a defence or counter-affidavit?

It has been argued that the defendants had deliberately delayed the hearing of this case in order to gain an advantage. I do not see the action of the defendants in that light. This case had lasted only 5 days at the High Court and about one month in this Court. Much time however, about 10 months was taken by the court below to conclude the case. The suggestion that the defendants should have taken less than the 45 days allowed them under the Rules of court to file their brief of argument is untenable. The Rules of the Court of Appeal permit the abridgement of time to file briefs and for accelerated hearing. We used similar Rules available to this Court to speed up the hearing. It is unfair to blame the defendants for enjoying the indulgence which the Rules of court and the court below granted them. There is no reason to say that the defendants would not have filed their brief within a lesser time if the court below had so ordered them. In *Fawehinmi v. Akilu* [1987] 4 NWLR (Part 67) 797 at 843, this Court per Eso JSC said:

“There is no valid procedure of law that makes a court of law a mere rubberstamp. A judge is certainly not a robot nor an automation who once he is fed with data, produces an automatic answer. In every action before this Court, in every step taken by a Judge, his discretion is called into play, whether in interpreting the law or in deciding an action one way or the other. If it is otherwise, giving effect to the rule of law would amount to dexterity in manipulating data which are to be fed into the machine called judex.”

The conclusions of the court below on the matter in my view is rather strange and unsupportable. Whether or not a litigant has been deliberately wasting time to delay the hearing of a case in court is to be viewed from the angle whether or not he has failed to comply with the requirements of the Rules of court and the stipulation as to time for taking some procedural steps. I am not aware that the defendants have

failed to file any of the necessary processes within the period limited by the Rules. In any case, a litigant by himself has no power to delay the expeditious disposal of a case when the court is alert to its responsibilities. It is not a litigant that adjourns a case, it is the court.

B It was the court below that by its judgment prevented the defendants from filing a counter-affidavit at a time when their time to do so had not expired. The same court in its judgment turned round to say that the defendants could not possibly have a defence to plaintiffs' suit. How
C could a court of law know that a counter-affidavit still to be filed by the defendants would, if filed, not disclose a defence to plaintiffs' case? In *Mallam Sadau of Kunya v. Abdul Kadir of Fagge [1956] 1 F.S.C. 39, 41* Jibowu F.J. (as he then was) said:

D *"It is a fundamental principle of the administration of natural justice that a defendant and his witnesses should be heard before the case against him is determined, and it is my view, a denial of justice to refuse to hear a defendant's witness."*

E It seems to me that it was grossly unfair to have given judgment against the defendants without allowing them to file a defence in the form of a counter-affidavit when clearly they were not out of time to do so. The test of bias is not a question of whether the trial tribunal has arrived at a fair result but whether the trial tribunal has dealt fairly and equally
F with the parties before it in arriving at the result. See *Grace Akinfe v. The State [1988] 3 NWLR (Pt. 85) 729*.

At page 741 of the report in the said *Grace Akinfe V. The State (supra)* Nnaemeka-Agu J.S.C. said:

G *"I shall be content to repeat what I said recently about this in the case of Sunday Okoduwa & Others. v. The State [1988] 2 NWLR (Part 76) 333 at pp.354-355, where I said:"*

H *"There are certain fundamental norms in the system of administration of justice we operate. That system is the adversary system, in contradistinction to the inquisitorial system. In that adversary system, parties with their counsel, and the judge have their respective roles to play. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by*

both sides and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance with those rules. Under no circumstances must a judge under the system do anything which can give the impression that he has descended into the arena, as, obviously his sense of justice will be obscured. This is the necessary inference from all the decided cases on the point.”

In Elebanjo v. Dawodu [2006] 15 NWLR (Pt. 1001) 76 at 127-128, this Court held:

“A defendant who knows that there is a point of law which can determine the action in limine can apply to the court by way of a motion or as a point in his pleading to dismiss the action without evidence being taken. The preliminary point of law can be taken after the receipt of the statement of claim and before a defence is filed. The party in such a case may rely on a point of law, even if the issues of fact in the Statement of Claim are conceded. If he fails, an order would be made by the court ordering the filing of a Statement of defence and the suit would proceed to trial.”

(underlining mine)

A defendant to a suit may raise an objection to the jurisdiction of the court at any stage of the hearing. It is not the requirement of the law that the defendant must first file a defence before raising objection to jurisdiction. If he raises objection and the objection fails, he then has a duty to file his defence so that the suit can proceed to hearing in the usual way.

Some of the instances where objection to jurisdiction may be taken are these:

1. On the basis of the claim endorsed on the Writ of Summons alone even when no pleading has been filed: *Attorney-General of Kwara State v. Olawale* [1993] 1 NWLR (Pt.272) 645 at 764.

2. On the basis of the averments in the Statement of Claim of the plaintiff or in a case commenced by originating summons on the basis of the affidavit in support of the originating summons - *Adeyemi v. Opeyori* [1976] 9-10 SC. 31.

3. Upon a motion on notice supported by an affidavit setting out

the grounds upon which the objection is premised - *National Bank of Nigeria v. Shoyoye* [1977] 5 SC. 81.

4. On the basis of the evidence led at the trial - *Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria* [1976] 1 All NLR 409.

B A defendant does not lose his right to file a defence to the action on the ground that the objection raised did not succeed. A defendant is permitted to say that even if the facts deposed to in the affidavit in support of an originating summons are correct, that the court would still not have jurisdiction. Similarly, he could say that the fact deposed to in the affidavit in support of the originating summons are hearsay and inadmissible. If the court decides that such facts are not hearsay, the defendant is not shut out from filing a counter-affidavit to the affidavit thereafter.

C In *Attorney-General of Anambra State v. Okeke* [2002] 12 NWLR D (Pt. 782) 572, the facts of which are similar to this one, following a preliminary objection filed to an application for committal, the application was struck out and not heard on the merits. Upon an appeal to the Court of Appeal, the appeal was allowed. The Court of Appeal claiming to have E relied on Section 16 of the Court of Appeal Act went ahead to consider the contempt proceedings without affording the appellants the opportunity to be heard. An appeal was brought to this court about the procedure adopted by the Court of Appeal.

F Incidentally, this was the case upon which the court below relied to conclude that it had jurisdiction under Section 16 of the Court of Appeal Act to determine the substantive case which had not been heard by the High Court on the merits. This Court per Ayoola JSC at pp. 608-609 of the report observed:

G “In this case the preliminary objection was filed before the date fixed for the hearing of the application for committal on its merits. By reason of the notice of Objection the application was not heard on its merits but was struck out. Unlike the case of *Okotie-Eboh* there was no H determination of the application on its merits. It is not impossible that had the trial Judge overruled the objection the defendants might have overruled the objection the defendants might have sought to file counter-affidavits to contest the merit of the application, in view of the fact that

their preliminary objection related only to procedural conditions precedent to the bringing of the application which they contended were not performed. There is no doubt that had the High Court overruled their preliminary objection, they would have been entitled to be heard fully on the application and bring before the trial court whatever evidence they considered helpful for their defence. They certainly would not have expected the trial Judge to proceed to determine the application on the merits in the same ruling in which he overruled their objection. The trial Judge could not have done so without occasioning a miscarriage of justice.

One incontestable limit to the power of the Court of Appeal to assume full jurisdiction over the whole proceedings is that such first instance jurisdiction exercised by the Court of Appeal pursuant to section 16 does not include what the trial court could not have done. Enough, I believe, has been said to show that the court below should not have proceeded to determine the application on the merits and thereby deny the defendants of the options available to them of mounting a defence to the application on the merits.

For these reasons I would allow the appeal of the 3rd, 4th and 6th defendants to the extent only that the order of committal made against them should be set aside."

(underlining mine)

The Okeke case above is similar on the facts to the instant case. If the court below had not merely cited the case but read the judgment it would have discovered that it could not proceed with the substantive suit in this case without doing injustice to the defendants who had not yet filed a counter-affidavit and whose time under the Rules of Court for filing a counter-affidavit had not expired.

It has been an enduring principle by which this Court has been guided that no man must be condemned unheard. In *Garba v. University of Maiduguri [1986] 1 NWLR (Pt.16) 550*, this Court emphasized the necessity to hear all parties to a dispute before condemning one of such parties.

It is my firm view that the defendants were denied their constitu-

tionial right to a fair hearing in the procedure adopted by the court below to determine the substantive suit. The case in my view should have been left to the High Court to determine on the merits. The defendants would have been able to file their counter-affidavit to contest the facts deposed
B to in the affidavit in support of the originating summons. When the right to fair hearing as entrenched in Section 36 of the 1999 Constitution is breached in relation to a party, the consequence is that the decision becomes a nullity. In the same way, I pronounce the judgment of the court below on the substantive suit a nullity.

C The Supreme Court is the last court in Nigeria. Our decisions in appeals are binding over all the courts in Nigeria on the principles decided. The duty on us is onerous. The principle in a case wrongly decided quickly spreads across the system and is repeated from court to
D court and difficult to recall. This flows from the doctrine of precedent and what lawyers *call stare decicis*. The doctrine ensures that the decisions in courts are stable and easy to predict. Lawyers are thus better positioned to give suitable advice to their clients in the light of the position
E of the law. When we give judgments that bear no semblance of affinity with previous case-law and for no good reason, this Court is exposed to ridicule arid contempt. The international community thinks little of us as a court.

F I want to stress here that a person who brings a case to court expects the case to proceed in accordance with due process of the Law. The wheels of justice may grind slowly but they surely grind. Justice through the court is not the same as the justice we are used to in our private or community life. Within a family, the eldest son can settle
G disputes between his junior brothers and sisters even when father and mother are around. There is no constraining constitution apportioning particular area of jurisdiction as between the son and parents. There is no rule against hearsay. In our private lives we read newspapers and watch the
H television. We hear gossips from friends and relations. We form opinions as to our decisions and reactions based on these things. But a judge is in a different class. He cannot in his adjudication rely on what he has seen or heard outside the courtroom. The opinions of his near relations do not

matter. He is confined only to the facts in the file before him. The judgment or decision he may make in his private life is often not the same as he does in court. In the same way, I have my own private opinion in this case but I must not reflect it in my conclusion.

A court in the process of deciding a case must be guided only by the evidence given before it in court. It must not convey the impression that its judgment is being directed by a desire to heed private or public sentiments. In *Oniah v. Onyia* [1989] 1 NWLR (Pt.99) 514 at 532, this Court per Obaseki J.S.C. said that sentiments have no place in the adjudication system. It is in my view the most unrewarding assignment a judge could undertake if it tried to give judgment as would please a section of the public. It is like a house built on sand which soon disappears with the approach of the rain. It is argued that even if a judgment is wrong, it is acceptable for as long as it is to public good. That clearly is a fallacy. Public good lies in giving a judgment in accordance with the Constitution of Nigeria and other relevant laws. Public good is an ever-changing phenomenon. Some Governors have been impeached in recent times. It was said that the removal of some was good for the country because the Governors concerned were perceived to be bad persons. On the other hand the removal of other Governors was criticized as unconstitutional. To seek to reflect such opinions in court judgment can only lead to a miscarriage of justice. Judgments which are of public good are those based on the Constitution and laws of Nigeria. Not those based on opinions which are constantly changing.

I have throughout my reasoning in this judgment shown that the section 16 of the Court of Appeal Act does not give jurisdiction to the court below to give judgment in favour of the plaintiffs in the substantive suit. I shall now consider the flip side. The court below and this court (in its majority judgment) have stated that the defendants did not file a defence to the suit and that therefore, judgment could be given against them as was done. Now on the supposition that Section 16 applied to this case and that the court below had jurisdiction to hear the substantive suit, the court below could only under Section 16 give the same orders that the High Court could have validly given. In other words, the court below

would put itself in the same position as the High Court of Oyo State. It was on the supposition that the defendants had failed to file a defence “by way of a counter-affidavit that the court below gave judgment against the defendants. This Court had also taken the position that the defendants not having filed a defence deserved the judgment given against them.

But I think with respect that the court below had not adverted its mind to the applicable court rules of Oyo State High Court. Even where a defendant had not filed a defence, the High Court has not the power to proceed to give judgment against him without following the procedure laid down under Order 27 rules 8(1), (2) and 3 of Oyo State High Court Rules dealing with default of pleadings which provide:

“8.(1) *Where the plaintiff makes against a defendant on defendants a claim of a description not mentioned in rules 2 to 6, then if the defendant or all the defendants (where there are more than one) fails or fail to serve a defence on the plaintiff, the plaintiff may after expiration of the period fixed as aforesaid for service of the defence apply to the Court for judgment, and on the hearing of the application the Court shall give such judgment as the plaintiff appears entitled to on his statement of claim.*

(2) *Where the plaintiff makes such a claim as is mentioned in paragraph (1) against more than one defendant then, if one of the defendants makes default as mentioned in that paragraph the plaintiff may:*

(a) *if his claim against the defendant in default is severable from his claim against the other defendants, apply under that paragraph for judgment against that defendant, and proceed with the action against the other defendants; or*

(b) *set down the action on motion for judgment against the defendant in default at the time when the action is set down for trial, or is set down on motion for judgment against the other defendants.*

(3) *An application under paragraph (1) shall be by summons or motion on notice.”*

It seems to me that the procedure prescribed under rule 8 above is designed to serve by way of warning to a defendant in default of pleadings to file his defence to prevent judgment being given against him.

Clearly therefore the court below was in serious error to have done what it did. Under Order 8 above, it is for the plaintiff who believes that a defendant is out of time to file pleadings to bring a motion for judgment. The plaintiffs in this case could not have done so because the defendants were not out of time. The court below just took it upon itself to do that which the High Court could not have validly done. B

I have a personal reservation about the judgment of the court below which we have affirmed in this Court. Its implications in my view are very serious and far-reaching as we may have unwittingly introduced some uncertainties into the case law of this country. We have decided¹ C

1. that Section 16 of the Court of Appeal Act is an all-purpose Notice of appeal invocable in an interlocutory appeal to decide the substantive suit;

2. that it is not necessary for the High Court to have reached any 'decision' before the appellate jurisdiction is invocable; D

3. that Notices of Appeal are not necessary to activate the appellate jurisdiction of the Court of Appeal;

4. that a defendant whose period under court Rules for filing a defence to suit has not expired is precluded from filing one on the ground that he had previously been tardy in the course of the proceedings. E

Indeed in *Senate President v. Nzeribe* [2004] 9 NWLR (Pt.878) 251 at 272, I suggested an approach that could accelerate proceedings in a case where a defendant is objecting to the jurisdiction of the court. I F said:

"The procedural requirement that an issue of jurisdiction should be resolved first does not mean that it must be separately (done). It can be taken along with arguments on the merits of a case. The important thing is that the court should first express its views on the issue of jurisdiction before considering the merits of the case. The advantage of such proceeding is that in the event of an appeal by any of the parties, it is easy for the appellate court to express its views on the decision of the lower court as to jurisdiction and the merit of the case and thereby remove the necessity for two appeals; one as to the jurisdiction of the court and the other as to the merit of the case." G H

(Underlining mine)

And at page 274 of the same report I said:

“In a case brought by originating summons where the whole of the evidence required to determine the merit of the case is in the form of affidavit evidence already filed before the court, it may be prudent to hear together the arguments as to jurisdiction and the merit of the case. Where, however, it is a case involving the taking of evidence of several witnesses as to the merit of the case, it is wise to first and separately dispose of the issue of jurisdiction. In the instant case, the trial court has discretion on whether or not to hear the parties on the issue of its jurisdiction separate from the merit of the suit. In the circumstance, its exercise of its discretion cannot amount to a denial of fair hearing.”

I had made the above suggestion in a matter less controversial as this because I realized that taking the issue of jurisdiction separate from the merits of the case was always bound to cause serious problem of delay and a waste of resources. It is a pity that the High Court did not heed the advice given in the case which was brought to its attention. All the problems in this case would not have arisen and the case would long have been settled had the suggestion been followed. The important thing to note however, is that I have not just become a new convert to the proposition that a Court of Appeal has no jurisdiction to hear the substantive suit when there is no appeal to it on it.

The important thing we must bear in mind is that the question of delay in adjudicatory system is general and widespread. It is evident in all types of cases, I would have wished that we did not have that situation. But the problem cannot be solved by having different standards for different cases or different personalities. That is why the image of the court is depicted with a scale which typifies equal balance. Sometimes it is depicted with the image of a blindfolded man. The import is that there should be common standard for all who come before us.

The case of the plaintiffs is that the defendants were in breach of the provision of Section 188 of the 1999 Constitution. It behoves the court to carefully adjudicate in this matter and give all the parties their day in court. The court below ought not to be seen as using an unconsti-

tutional approach to resolve a dispute as this. It is my belief that no case is truly settled until it is fairly and justly adjudicated upon. This gives the winner joy and the loser a satisfaction that he has had his day in court. But when a loser suffers a judgment without being given an opportunity to offer just one word in defence of the case against him, the court is indirectly encouraging the loser to harbour bitterness in the notion that he has been outmaneuvered by his adversary. This may lead to a fresh bout of litigation. A litigant who has fought and lost a case should have the satisfaction that he lost because his case was weak. B

The proper order to make in this appeal is to send the case back to the High Court to be determined on its merits. Only recently, the case concerning the Governorship dispute was determined by the Anambra State High Court. That is in the way it should be. It is the High Court that has the exclusive original jurisdiction to determine suits. The Court of Appeal has only an appellate jurisdiction in these matters. The only original jurisdiction the Court of Appeal has is under Section 239 of the Constitution in an election concerning the office of the President I do not think that sending the case back to the High Court would have caused too much delay. I only need to order that the case be heard from day to day. In fairness to Ige J. of the Ibadan High Court who heard the case on jurisdiction, he had taken only 5 days to dispose of it. Incidentally, there is in existence a decision of the Court of Appeal, Abuja to guide the High Court on the meaning of $\frac{2}{3}$ (two third) of the members of the House. In *National Assembly v. President [2003] 9 NWLR (Pt.824) 104* at page 1321 said: C D E F

“Giving section 58(5) its ordinary natural meaning, two-thirds majority of each House can only mean two-thirds of the membership of each of the Senate and the House of Representatives. It cannot mean anything else. The section has no relationship with the ordinary quorum of each House. It does not employ a language referable to a proportion of the membership of each House of Representatives. It is two-thirds of each of the whole of the Senate and the House of representatives. In order to override the President’s veto there must be at least 73 members in the Senate -and- at least 240 members in-the House of Representatives. G H

But as I observed earlier, when the Senate made a motion of veto override on the bill on 25/9/2002, there were only 55 Senators present. In the House of Representatives on 26/9/2002 when a motion of veto override was made that was only 204 members: Clearly therefore, the appellant
B *was not properly constituted when the Bill was “passed” into law on 25/9/2002 and 26/9/2002.”*

In that case, it was only a consideration of National interest that dissuaded us from setting aside the Law under which the 2003 elections were conducted. This would have created monumental problems for the country. Happily we had discretion in the matter. So if the Court of Appeal had followed the appropriate procedure and sent the case back to the High Court for determination on the merit, this case might have been concluded even earlier than 7-12-06. Indeed the court below would not
D have needed to wait till 1/11/06 to deliver its judgment.

I do not think that the defendants were employing technicalities to hinder the course of justice. I do not share that opinion. It is the Constitution of Nigeria that set up the High Court, the Court of Appeal and the
E Supreme Court. It is the same Constitution that defines the limit of the jurisdiction of each court. It is the same Constitution that in Section 36 lays down the right to Fair Hearing in a case. The cornerstones of the defendants’ appeal are (1) That the court below had not the original jurisdiction it arrogated to itself and (2) that their right to fair hearing as
F entrenched in section 36 of the Constitution was denied them. Surely, the infraction of the provisions of the Constitution in relation to a citizen cannot be described as mere technicalities. It is by now axiomatic that where a court has no jurisdiction to make an order, but makes it, the
G order is a nullity. In the same way, denying a litigant his right to fair hearing renders the court proceedings a nullity. So where are the technicalities being referred to in counsels argument?

I believe that I have said enough to explain my standpoint in this
H appeal. It is purely on issue of fundamental importance to all Nigerians. It is the necessity to abide by the provisions of our Constitution. From time to time in this Court we offer dissenting opinions. The purpose of such opinion is to strengthen our law and the administration of justice. I have

written several of such opinions in this Court. They are for posterity, lawyers and legal scholars. Having said the above, it is necessary for me to say that the judgment we gave on 7-12-06 is the judgment of this Court. I have not in my opinion in this judgment derogated from the full efficacy of the judgment. It is a pronouncement from the last Court in Nigeria. I enjoin all the parties to abide by it and let peace and harmony prevail in Oyo State. B

In the final conclusion, I would allow this appeal partially. I affirm the decision of the court below on the jurisdiction of the High Court. I set aside the judgment of the court below in so far as it relates to the determination on the merit of the substantive suit. That part of the judgment is a nullity as the court below has no jurisdiction to give it. The High Court is ordered to hear the case from day to day to ensure its expeditious conclusion. Should the order for expeditious hearing be flouted, this Court D would make a report on the matter to the National Judicial Council. In view of the fact that I have affirmed the order of the court below on jurisdiction, I do not think this is a case in which to order costs.

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¹ **EDITOR'S COMMENT**

This dissenting opinion of his lordship, Hon. Justice Oguntade JSC, is no doubt very strong and powerful. Yet it is, the majority opinion that remains the judgment of the Court as rightly acknowledged by his lordship. We think however, with great respect, that the 4 points outlined hereunder by his lordship as being what the Supreme Court decided in this case vide the majority may only be correct to the extent it is taken as a subjective dissenting opinion. A person that relies on the points in canvassing any issue before the courts may be wrong. This is because the majority of their lordships understand the state of the law as properly analysed in the minority opinion, and they did not alter any judicial precedent nor any law. But they are of the view that there are special circumstances that exist in this case that warrant their upholding the Court of Appeal's decision as the only way to do justice in the case in view of its peculiar facts. The good thing that has happened in the majority decision is in keeping with the proverb that says - if the animal engages in a fierce flight, the hunter will give it a fierce gun shot. The courts have since gone the path of not permitting justice to be sacrificed at the altar of technicalities. The Supreme Court has merely shot down the arrogance and constitutional abuse of a state legislature. Long live the Constitution of the Federal Republic of Nigeria. H