

SUPREME COURT OF NIGERIA

13TH JULY, 2007. SC. 187/2002

**CORAM:- A. M. MUKHTAR, I. F. OGBUAGU, F. F. TABAI,
I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH, JJSC**

MRS. MATILDAADERONKE DAIRO APPELLANT
AND

1. UNION BANK OF NIGERIA PLC

2. CHIEF GEORGE AMURUN RESPONDENTS

APPEALS - Briefs - Reply brief - Though not mandatory - Where necessary but not filed by an appellant - He will be deemed to have conceded the new points - Arising from respondent's brief (H1)

APPEALS - Leave - Grounds of appeal - Whether of law or facts - Does not depend on the label given them - The three grounds in this appeal - Are all of law - Making leave of court unnecessary (H2)

APPEALS - Issues - Sole issue - Formulated from the several grounds of appeal in this case - Is competent as it relates to all the grounds (H3)

APPEALS - Appeal court - Primary role of - Other roles include amending lower court's decisions - It must be guided by principles of justice (H4)

COURTS - Issues - Suo motu raising of - Adeniran case - Is distinguished from present case - What trial court did was to raise two points - That were already contained in parties' affidavits and submissions (H5)

TORTS - Defamation - Libel - Jurisdiction - Subject matter and territorial jurisdiction - Lie with Ogun State High Court not Lagos - Since the libel was published at Ogun State (H6)

JUDICIAL PRECEDENTS - Libel - Jurisdiction - Amanambu case prin-

ciple - Is similar to present case - Benson case is governed by different principles of law (H7)

FACTS

Before the Ikeja High Court of Lagos State, plaintiff/appellant took out a writ of summons against the defendants/respondents. Appellant claimed the sum of N25 million damages for the libelous publication pasted by the second respondent on her one storey building at No.12 Adegbite Street, Iju Ajuwon, Agege. Appellant is an assistant Manager with the Nigerian Arab Bank Ltd. Officials of Ist respondent executed a deed of mortgage against their customer, one Alhaji Bakare, from whom the appellant bought the land on which she erected the one storey building. Bakare deposited no title documents. Action was commenced at the Ota High Court of Ogun State whereby the said mortgage deed dated 13-9-1985 was quashed by a certiorari order. Appellant claimed that upon pasting of the Auction Notice, many people went to her house to inquire about her indebtedness to Ist respondent. She was as a result subjected to embarrassment, queries and humiliation by her employer, Nigerian Arab Bank Ltd. She claimed that she had been injured in her credit and reputation and has been brought into public scandal, odium and contempt. Ist appellant was adamant to appellant's demand through her solicitor, for an apology and compensation.

Meanwhile, respondents filed a motion on notice for an order striking out the suit on the ground that trial court had no jurisdiction, as the cause of action (libel), arose in Ogun State. After a thorough examination of the writ of summons, the statement of claim and the affidavit evidence, the trial Judge ruled that he had no jurisdiction and struck out the suit. Appellant's appeal to the Court of Appeal was dismissed. Still dissatisfied, she has further appealed to the Supreme Court.

HELD (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

Briefs - Reply brief

1. Although by Order 6 Rule 5 of this Court's Rules, it is not mandatory to file a reply brief where a respondent's brief raises issues or points of

law not covered in the appellant's brief, an appellant ought to file a reply brief. I agree entirely with the learned counsel for the respondent that where an appellant fails to file a reply brief where it is necessary for him to do so, as in this appeal, he will be deemed to have conceded all the new points or issues arising from the respondent's brief.

It is a practice long established that where a respondent raises issues or points of law not covered by the appellant's brief, the appellant is under a reciprocal duty to file a reply brief to answer such issues or points. It helps to reduce the time the appellant may take in replying to such issues or points during oral argument at the hearing of the appeal. Thus, where an appellant fails to file a reply to a point of law raised in the respondent's brief and merely adopts and relies on his brief of argument at the hearing of the appeal without an oral reply it may amount to a concession of the points of law or issues raised. The situation in the present appeal is even worse; the appellant failed to file a reply brief to the Notice of Preliminary Objection raised and duly argued in the respondents' brief of argument and she failed also to put any appearance to put-up any oral argument in answer to the preliminary objection raised. (p. 3303 B/ G)

Grounds of appeal - Whether of law or facts

2. I have had a careful examination of the above grounds of appeal. In ground one or (a) the appellant is complaining that the Justices of the Court below refused to follow the decision of the Supreme court in the case of Olayiwola Benson & Anor. V. Joseph Oladipolu Ashiru (1967) NWLR page 363 on the ground that the decision therein was obiter. In the only particulars provided for the ground and indicated in another (a) the appellant stated that the said decision is not an obiter. This, in my view, will involve the question of whether the law applied in Benson's case is applicable to the appeal on hand. The complaint in this appeal is on refusal to apply some principles of law. The ground, in my view is a ground of law. The same principle of law applies to ground No. 2 or (b) as it alleges that the Justices of the court below wrongly followed the Supreme Court decisions in the cases of Egbue v. Araka (1988) 3 NWLR (Pt.84) page 589 and Ezeugha Vs. Ademorah (1993) 1 NWLR (Pt.271)

620 at 625. Thus, ground No. (b) is also a ground of law. Appellant's ground No. (c) alleges that the learned Justices of the Court below erred in law in not considering the applicability of the rules of Common law of England on questions of private international law in the High Court of Lagos State as highlighted in Benson's case (Supra). In its particulars, it is stated that the doctrine of stare decisis does not preclude a lower court from pronouncing on a point of law not yet decided by the superior courts. This ground in my view is purely one of law. The settled principle of law on the validity of a Notice of appeal is that when a ground of appeal involves a question of law, it alone can sustain that Notice of Appeal. Thus, by the provision of section 233(2) (a) of the Constitution of The Federal Republic of Nigeria, 1999, such a ground of law confers right of appeal on an appellant without the necessity of seeking or obtaining leave from any court including this court or the court below. The first leg of the Preliminary Objection fails. (pp. 3306 H/ 3307 H)

APPEALS - Issues - Sole issue

E 3. I think, when a sole issue is formulated from several grounds of appeal, except those which are found to be incompetent, defective or academic, and the appellant did not isolate any ground to which that issue relates, the presumption is that it relates to all the grounds.

F It is thus, my humble view that the issue is a live issue and competent. The primary concern of an appellant in formulating issues for the determination of his appeal is that such issues must stem from the grounds of appeal. Consideration of statement of facts giving rise to the matter on appeal is irrelevant and inconsequential at that stage.

G I find no merit in this leg of the objection and it too, fails.

Finally, the respondents' Preliminary Objection lacks any merit. I accordingly overrule and dismiss it. (p. 3308 G)

H Appeal court - Primary role of

4. I think the primary role of all appeal court is to hear and determine appeals that are brought before it. In its determination of an appeal, it may grant, refuse reliefs in an interlocutory application arising therein. It

may allow or dismiss an appeal. It may make consequential orders as the circumstances of the appeal may warrant. Where the appeal court upholds or affirms the decision of the trial court or a court lower to it, it means that the appeal before it is dismissed. Where it allows the appeal, it means the decision of the trial court or the court lower to it is set aside. B It may also make amendments on some decisions of the trial or lower court. In discharging its duties, the appeal court is always guided by the principles of justice. (p. 3311 G)

COURTS - Issues - Suo motu raising of C

5. From the above, I am not ready to accept the submission of learned counsel for the appellant that the Learned Trial Judge formulated new issues suo motu, which were neither placed nor canvassed before him thereby embarking on a voyage of discovery. D

Issues are said to be raised suo motu when they are not covered in the pleadings at the trial court or where on appeal such issues do not form part of the grounds of appeal or issues for the determination of the appeal. E

There is a distinction between the circumstances in the case of Adeniran v. Alao (supra) or as reported in (2001) 18 NWLR (Pt.745) 361; cited by learned counsel for the appellant and the present appeal.

As seen earlier in the present appeal, the points raised by the Learned F Trial Judge stemmed from the parties affidavits on the motion on Notice for an order striking out the suit before the trial court. The two cases are quite distinguishable. I must emphasize the point that it is not prohibited for a court to raise issues suo motu. It can, in its discretion, do so if it sees it fit to so do, provided the discretion is exercised sparingly and in G exceptional circumstances. Moreover, where points are taken suo motu, the parties must be given opportunity to address the court before the decision on the points is made. In the appeal on hand, the two points H raised by the Learned Trial Judge were properly addressed by the parties and rightly decided by the two lower courts as the points were contained within the four corners of the parties affidavits' evidence and the respective submissions made by the learned counsel for the parties.

Libel - Subject matter and territorial jurisdiction

6. There is a finding by the Learned Trial Judge which has not been
B appealed against that Chief Dairo, learned counsel for the appellant in his
reply considered that because the libel was pasted on a property situate in
Ogun State, publication must be assumed to have taken place in Ogun
State. This automatically confers jurisdiction on the High Court of Jus-
C tice of Ogun State and not that of Lagos State. This is because in a
defamatory action, publication of the defamatory statement is an essen-
tial element of the cause of action. So, it is the publication not the com-
position of a libel which is the actionable wrong as the injury alone by it
arises from the effect produced upon its readers.

D Although the learned counsel for the appellant had invoked the
jurisdiction of the High court of Lagos State to try the matter on hand, he
should be reminded that it is not the wishes or consent of a party that
confers jurisdiction on a court. It is the nature of the claim before the
E court and the Constitution or other statutes that confer jurisdiction on a
court. The jurisdiction in this matter is that of venue or place of trial.
Going by the provisions of the Constitution of the Federal Republic of
Nigeria 1979 (including the 1999 Constitution) It is the High Court of
F Ogun State that can properly exercise its jurisdiction on a libel matter that
arose in Ogun State irrespective of which Judicial Division handles the
suit in Ogun State. It is very certain that where a cause of action is
instituted and tried in a court outside the territorial jurisdiction of a state
where the cause of action arose is different from instituting an action
G outside the Judicial Division in the same state where the cause an action
arose. Thus, territorial and subject matter jurisdiction are very concomi-
tant to the exercise of jurisdiction by a Lagos State High Court in this
matter. It certainly lacked both. Any decision done by that court will be a
H nullity. (pp. 3318 C/ 3319 D)

Libel - Jurisdiction - Amanambu case principle

7. The present appeal, in principle, is like that of Amanambu v. Okafor (in

unreported Supreme Court Appeal No. 278/1965 which was cited in the case of Benson v. Ashiru (Supra) by the appellants therein, asking the Supreme Court to follow it. The facts in Amanambu v. Okafor were that the negligent act and the death, had taken place in Northern Nigerian and the Supreme Court held that an action did not lie in the High Court of Eastern Nigeria under the Fatal Accidents Law of Eastern Nigeria. B

I have digested the decisions of both the trial court and the court below. As I observed earlier, the trial court did not say anything about Benson v. Ashiru's case. The attempt of the court below was to distinguish the facts of the appeal before it and that of Benson v. Ashiru (Supra). My understanding is that different criteria applied altogether in both cases especially with regard to the conditionalities laid in Benson v. Ashiru on the applicability of statutes of general application and the Common Law doctrine of private international law. In practice, two or more cases may present facts which may appear to be similar. On closer-examination however, some fine distinctions may well be noted and the set of laws applicable to the two cases may have to differ. The two cases i.e. Benson v. Ashiru (Supra) and this appeal, are in my view, quite distinguishable and governed by different principles of the law. The issue of whether Benson's case was obiter or not, seems to me to an unnecessary splitting of the hair which has no real effect on the present appeal. (p. 3319 H) C D E

F

NOTABLE POINTS OF INTEREST

MUHAMMAD JSC

1. Law is an organic phenomenon which develops along with the society G

I think before I go ahead to consider whether the decision in Benson v. Ashiru (supra) was as an obiter or not, it is germane at this juncture to state that, law generally, whether statute or case law is an organic phenomenon which develops along with the society. It is worthy of note that the Benson's case (Supra) was decided in 1967. I think I am entitled to take judicial notice that by 1967, this country was experiencing its 1st Military Rule which was by Decrees and Edicts in addition to adopted laws of general application applicable in the courts and Nigeria was just H

broken into 12 states from the then Regional Governments. So there were still some hang-overs and fusions of laws, rules and practices of the regions into the newly created states. This continued for sometime. However, in 1979, a Constitution for the whole Federation was enacted into Law which demarcated the territorial jurisdiction of each state with its Local Governments. (p. 3316 E)

2. *Case law research - It is lazy for counsel to rely on head notes in law reports*

Now coming back to the case of Benson v. Ashiru (supra). I think I should start by commenting that it is not desirable or ideal for a counsel to rely and cite holdings or editors summary of a case. That in my view is a lazy counsel's approach. A counsel who is serious must devote his time and attention to go deep into the judgment of a court in order to arrive at the exact holding of that court. This will certainly obviate occurrence of avoidable mistakes. I find support in my view in what Uwais, former Chief Justice of Nigeria once said in the case of Franchal (Nig.) Ltd. v. N. A. B. Ltd. (2000) 9 NWLR (Pt.671) 1 at pp 13 - 14 H - A:

"It is lazy for counsel to rely on headnotes in law reports instead of reading the whole of the facts of the case he is relying on to see how relevant the decision in the case is to his own case." (p. 3319 E)

OGBUAGU JSC

3. *Libel - Where cause of action arose - When case is struck out*

It is now firmly settled that in an action for libel, the proper issue for the adjudication of the matter, is where the cause of action arose - i.e. where the alleged libel was published and not where the defendant/defendants necessarily resides or reside. I will add that it is also firmly settled, that where a court finds and holds that it has no jurisdiction, it strikes out the suit or matter and it cannot transfer such suit or matter. (p. 3331 C)

4. *Difference between ratio decidendi and obiter dictum - Only ratio is binding*

In the case of Nigeria-Arab Bank Ltd. v. Barri Engineering Nig. Ltd.

(1995) 8 NWLR (Pt. 413) 257; (1995) 9 SCNJ 147 @ 175, Ogundare, JSC, (of blessed memory) in dealing with the difference between Ratio Decidendi and Obiter Dictum, stated inter alia, as follows:

“The doctrine of judicial precedent (stare decisis) requires all subordinate courts to follow decisions of Superior Courts even where the decision are obviously wrong having been based upon a false premise: this is the foundation on which the consistency of our judicial decision is based. See Ngwo v. Monye (1970) 1 ANLR 91 @ 100. It is however, the principle of law upon which a particular case is decided that is binding. Such principle is called the ratio decidendi. A statement made in passing by a judge which is not necessary to the determination of the case in hand is not a ratio decidendi of the case, but an obiter dictum and it has no binding effect for the purpose of the doctrine of judicial precedent. See Ofunne v. Okoye (1966) ANLR 91”.

[the underlining mine]

The learned counsel for the Appellant from the above, can now see with respect, that he was standing on quick sand when he submitted albeit erroneously, to the effect, that every obiter dictum of the Superior Court or this Court, must be or is binding on the Court of Appeal and other lower courts. (p. 3335 B)

CHUKWUMA-ENEH JSC

5. Court's territorial jurisdiction is relevant before adjudication

I must restate that just as the subject matter of a case has to come within the court's jurisdiction, the court's territorial jurisdiction and the composition of the court are other essential aspects of jurisdiction to giving competence to the proceedings before the court. Putting it rather simply, it is the nature of the subject matter or parties or the territorial limits over which the court can exercise jurisdiction that restricts the exercise of jurisdiction of court. This is the case of the Lagos State High Court, that its jurisdiction in this matter is restricted by the territorial limit imposed by the instrument establishing it and 1999 the Constitution which defined the areas, of the two states. (p. 3340 F)

REPRESENTATION

Lanre Ogunlesi, Esq. for the respondents

Appellant was not in court and not represented but served.

CASES REFERRED TO

- B Ogbechie v. Onochie (1986) 2 NWLR (Pt.26) 484
Godwin v. C. A. C (1998) 14 NWLR (Pt.554) 162
Oje v. Babalola (1991) 4 NWLR (Pt.185) 280 A
Popoola and ors v. Adeyemo and Anor (1991) 8 NWLR (Pt.257) 1
- C Shuaibu v. Maihodu (1993) 3 NWLR (Pt.284) 748
Chukwuogor v. Attorney General, Cross River State (1998) 1 NWLR (Pt.534) 375
Ayalogu v. Agu (1998) NWLR (Pt.532) 129
- D Maigoro v. Garba (1999) 10 NWLR (Pt.624) 555
NAJIB STEPHEN V. OLLIVIO PEDROCHI (1933) NNLR 51
Nigeria-Arab Bank Ltd. v. Barri Engineering Nig. Ltd. (1995) 8 NWLR (Pt. 413) 257; (1995) 9 SCNJ 147
- E Adesokan v Adegorolu (1997) 3 NWLR (pt 493) 261
Ajayi v Military Administrator, Ondo State (1997) 5 NWLR (pt 504) 237
Emiator v Nigeria Army (1999) 2 NWLR (pt 631) 362
Agbanelo v Union Bank of Nigeria Ltd (2000) 4 SC (pt 1) 233
- F Oduntanh v Akibu (2000) 12 SC (pt 11) 106

LEAD JUDGMENT BY MUHAMMAD JSC

- The plaintiff at the Lagos State High Court of Justice Holden at
G Ikeja within the Ikeja Judicial Division, took a writ of summons against the defendant. She indorsed the following claim:

*“Plaintiff claim is for N25 Million damages for the libelous publication pasted by the second defendant on the Plaintiff’s one story building
H of No.12, Adegbite Street, Iju Ajuwon, Agege.”*

Background facts giving rise to the above claim as contained in the printed Record of Appeal, show that the plaintiff is a banker of repute with the Nigerian Arab Bank Ltd holding the post of an Assistant Man-

ager in the Bank. She is the owner of a property known and described as No. 12, Adegbite Street, Iju - Ajuwon, Agege in the Ikeja Local Government Area of Lagos State. The Plaintiff claimed that on or about the 10th of January, 1981, the 1st defendant caused an Auction Notice to be pasted on her one Storey building at No. 12, Adegbite Street, Iju-Ajuwon Agege. B The Plaintiff never had any transaction with the 1st defendant or authorized any person to mortgage the property for any consideration. She claimed that many people went to her house to inquire about her indebtedness to the 1st defendant. She was as a result, subjected to embarrassment, queries and humiliation by her employers at the Nigerian Arab Bank C Ltd.

On enquiring from the Land Registry Abeokuta, Ogun State, it was discovered that the officials of the 1st defendant at its Oni Panu branch executed a deed of mortgage on the party for one of their customers, Alhaji Mojeed Alepo Bakare from whom the plaintiff bought the land upon which the one storey building at No. 12, Adegbite Street, Iju - Ajuwon, Agege was erected without the said Alhaji Mojeed Alepo Bakare depositing any title documents. Action was commenced at the Ota High D Court of Ogun state whereby the said mortgage deed dated 13th September, 1985, registered as No. 13 at page 13, in vol. 276 of Land Registry, with the consent of the Governor were quashed by Order of a Certiorari E in suit No. MT/7/91 Matilda Aderonke Dairo v. Military Governor of Ogun State & Ors (5/3/92). The plaintiff maintained that by pasting the said Auction Notice on her property that portrayed, her in bad faith and F unworthy of any credit. The plaintiff demanded, through her solicitor, an apology and compensation from the 1st defendant to which the latter remained adamant G

By reason of pasting the Auction Notice on the premises the plaintiff has been injured in her credit and reputation and has been brought into public scandal, odium and contempt. The plaintiff thus claimed against the defendants jointly and severally as per her writ of summons. H

Meanwhile, a motion on Notice was filed and moved before the trial, court for an order striking out the suit on the ground that the trial court had no jurisdiction as the cause of action - Libel - arose in Ogun

State. After having a thorough examination of the writ of summons, the statement of claim and the affidavit evidence, the learned trial judge ruled that he had no Jurisdiction to try the case as the cause of action arose in Ogun State while he was presiding over a Lagos State High Court. He accordingly struck out the suit with costs in favour of the defendants. Dissatisfied with the ruling of the trial court the plaintiff/applicant filed her Notice of Appeal to the Court of Appeal. Three grounds of appeal were set out therein. The Court of appeal dismissed the appeal. The appellant now comes to this court. She set out four grounds of appeal in the Notice of Appeal.

Briefs were filed and exchanged by the parties. The respondents filed Notice of preliminary objection whose arguments were incorporated in the respondents brief of argument.

Learned counsel for the appellant formulated one issue for the determination of this court. It reads as follows:-

“Whether the Court of Appeal was right in upholding the decision of the High Court?”

Learned Counsel for the respondents formulated two issues. They are as follows:

“(1) Whether the Court of Appeal was right when it held that the High Court of Lagos State has no jurisdiction in a libel suit in which the publication of the libelous document did not take place within the jurisdiction of the Court.

(2) Whether in this libel action, the Court of Appeal was bound by the decision of the Supreme Court in the fatal accident’s case of Olayiwola Benson & Anor v. Joseph Oladipupo Ashiru (1967) 1 All N.L.R. which was stated to be an obiter Dictum.”

Permit me My Lords to deal with the Notice of the preliminary objection raised by the respondents first. The Notice of the Preliminary Objection was dated 22nd April, 2003 but filed on 13/10/03. (a period of almost six months between the date of making and the date of filing in court) It reads:

“TAKE NOTICE that the RESPONDENTS will raise by way of PRELIMINARY OBJECTION in its Brief of Argument that the issue

raised by the Appellant did not flow from the Grounds of Appeal in the Notice of Appeal and furthermore that the Grounds of Appeal are grounds of fact or at best grounds of mixed law and fact.

AND for such order or other order as this Honourable Court may deem fit to make in the circumstances.”

Four grounds upon which the Preliminary Objection was based are as follows: -

1. *“The only issue raised by the Appellant did not flow from the Grounds of Appeal in the Notice of Appeal filed by the Appellant at pages 103 to 104 of the Record of Appeal.*

2. *The Grounds of Appeal filed by the Appellant are grounds of facts or at best mixed law and fact and the leave of either the lower Court or this Honourable Court was not sought before the Notice of Appeal was filed.*

3. *By virtue of the provisions of Section 233(2) of the Constitution of the Federal Republic of Nigeria 1999 an Appellant can only appeal as of right to the Supreme Court if the grounds of appeal involve questions of law alone.*

4. *It is only after leave had been obtained under section 233(3) of the said Constitution can grounds of appeal involving questions of fact or mixed law and fact can be competent before the Supreme Court.”*

In his brief of argument, learned counsel for the respondents classified his Preliminary Objection into two: (a) that all the grounds of appeal were premised on grounds of fact or at best grounds of mixed law and fact and that by the provision of section 233(3) of the Constitution an appellant can have a right to appeal only with the leave of either the Court of Appeal or this Court. That as leave was never sought or obtained, this court is urged to strike out the appeal. Learned counsel cited and relied on several cases including, *infer alia*, *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.26) 484 at 491; *Godwin v. C. A. C* (1998) 14 NWLR (Pt.554) 162. (b) that the only issue for determination raised by the appellant did not seem to flow from the three grounds of appeal filed and moreso when the same is read in conjunction with the statement of facts of the appellant at page 2 paragraph 0/4 of the appellants brief of argu-

ment especially the point that the learned trial judge did embark, on a voyage of discovery. This point, the learned counsel argued was not placed before the learned trial judge. It thus became a fresh issue which was never canvassed before the learned trial judge. That issue, learned
B counsel argued further, never formed any ground in the grounds of appeal and no leave of this court was obtained before canvassing arguments on the point. Learned counsel urged this court to discontinue the issue and that the appeal should be dismissed. Learned Counsel cited
C the case of Oje v. Babalola (1991) 4 NWLR (Pt.185) 280 A-B in support of his arguments.

On the date this appeal was slated for hearing, the appellant and her counsel were not in court. They did not file a reply brief in answer to the Notice of Preliminary objection filed by the respondents. Learned
D counsel for the respondents argued that the implication of appellant not filing a reply to the Notice of Preliminary objection is that she had nothing to answer.

Starting from our own Court's Rules, Order 6 Rule 5(3) stipulates
E as follows:

*"The appellant may also file in the court and serve on the respondent a reply brief within four weeks after service of the brief of the respondent on him but except for good and sufficient cause shown a reply
F brief shall be filed and served at least three days before the date set down for the hearing of the appeal."*

Although the Supreme Court Rules as cited above have not stated the aim, role or purpose of a reply brief I think the function, aim, role or purpose of a reply brief is to answer or deal with any new points arising
G from the respondent's brief. Nnaemka - Agu, JSC; in the case of Okpala and another v. Ibeme and Others (19B9) 2 NWLR (Pt.102) 208, made the same observation and he said

*"What is provided for is a reply brief where necessaryEven
H so, where it is necessary, it should be limited to..... any new points arising from the respondent's brief."*

It is interesting to note what Kendall Griffith, a lawyer and past President of the Appellate Lawyers Association of Illinois Bar, said on

reply brief in his article titled “Effective Brief Writing”, contained in a Journal called “The Forum” (1980-81) vol. at page 469 that:

“A reply brief if filed at all should be short and hard hitting. It should answer any matter raised for the first time on the appellee’s brief if the appellee has completely missed the point or has confused a legitimate point a reply is appropriate. Clarification should be succinct and brisk.”

Although by Order 6 Rule 5 of this Court’s Rules, it is not mandatory to file a reply brief where a respondent’s brief raises issues or points of law not covered in the appellant’s brief, an appellant ought to file a reply brief. See: Popoola and ors v. Adeyemo and Anor (1991) 8 NWLR (Pt.257) 1; Shuaibu v. Maihodu (1993) 3 NWLR (Pt.284) 748, Chukwuogor v. Attorney General, Cross River State (1998) 1 NWLR (Pt.534) 375. **I agree entirely with the learned counsel for the respondent that where an appellant fails to file a reply brief where it is necessary for him to do so, as in this appeal, he will be deemed to have conceded all the new points or issues arising from the respondent’s brief.** See: Okoye & Ors v. Nigerian Construction & Furniture Co. Ltd. (1991) 6 NWLR (Pt.199) 501 where this court per Akpata, JSC held:

“The appellant’s completely ignored the relevance of Order 29 and its effect in the entire proceedings in the trial court. No reply brief - was filed to meet the contention of the defendant/respondent on the issues. I am in agreement with the Court of Appeal that the appellants are deemed to have conceded that Order 29 rightly took care of the plaintiffs/appellants suit.”

See further: Popoola & Ors v. Adeyemo & Anor, (Supra); Ayalogu v. Agu (1998) NWLR (Pt.532) 129; Shuaibu v. Maihodu (Supra); Ogidi v. Egba (1999) 10 NWLR (Pt.623) 42. **It is a practice long established that where a respondent raises issues or points of law not covered by the appellant’s brief, the appellant is under a reciprocal duty to file a reply brief to answer such issues or points. It helps to reduce the time the appellant may take in replying to such issues or points during oral argument at the hearing of the appeal. Thus, where an**

appellant fails to file a reply to a point of law raised in the respondent's brief and merely adopts and relies on his brief of argument at the hearing of the appeal without an oral reply it may amount to a concession of the points of law or issues raised. The situation in the present appeal is even worse; the appellant failed to file a reply brief to the Notice of Preliminary Objection raised and duly argued in the respondents' brief of argument and she failed also to put any appearance to put-up any oral argument in answer to the preliminary objection raised.

Now, the challenge posed to the grounds of appeal touches on the jurisdiction of this court. Jurisdiction is the life-wire of a court as no court can entertain a matter where it lacks jurisdiction. Issue of jurisdiction can be raised at anytime even on appeal to this court. Because of its decisive nature, jurisdiction cannot be conferred on or taken away from any court just because the parties have agreed or consented to do so. Although the non - filing of a reply brief by the appellant may amount to a concession to the points raised by the respondents in their Notice of Preliminary Objection, arguments of which are contained in the respondent's brief of argument, I think this court is still under a duty to consider the points of objection raised by the respondents as a challenge to the jurisdiction of this court. In doing so, I would like to have a cursory look at the criteria set out by a long list of, decided cases on how to distinguish a ground of appeal based on law alone; on facts alone or on mixed law and facts. The following principles may serve as a guide:

i. Where the court is being invited to investigate the existence or otherwise of certain facts upon which the award of damages to the respondent was based, such a ground of appeal is a ground of mixed law and fact, See: *Maigoro v. Garba* (1999) 10 NWLR (Pt.624) 555

ii. A ground of appeal which challenges the findings of fact made by the trial court or involves issue of law and fact is a ground of mixed law and fact. See: *Maigoro v. Garba* (Supra)

iii. Where the evaluation of facts established by the trial court before the law in respect thereof is applied, is under attack or question, the ground of appeal is one of mixed law and facts; See: *Maigoro v.*

Garba (Supra)

iv. Where evaluation of evidence tendered at the trial is exclusively questioned, it is a ground of fact simplicata. See: Ogbechie v. Onochie (Supra)

v. Where it is alleged that the trial court or an appellate court misunderstood, the law or misapplied the law to the admitted or proved facts, such a ground of appeal is one of law simplicita. See: Nwadike v. Ibekwe (Supra).

vi. It is a ground of law if the adjudicating tribunal or court took into account some wrong criteria in reaching its conclusion or applied some wrong standard of proof or, if, although in applying the correct criteria, it gave wrong weight to one or more of the relevant factors. See: O' Kelly v. Trusthouse Forte P. I. C. (1983) 2 All E.R at P. 486: Nwadike v. Ibekwe (1987) 12 SC; 14

vii. Several issues that can be raised on legal interpretation of deeds, documents, term of art, words or phrases, and inferences drawn therefrom are grounds of law. See: Ogbechie v. Onochie (Supra) pp 491 - 492

viii. It is a ground of law where the ground deals merely with a matter of inference even if it is limited to admitted or proved and accepted facts. See: Nwadike v. Ibekwe (Supra)

ix. Where it is alleged that there was no evidence or no admissible evidence upon which a finding or decision was based, this is regarded as a ground of law, See: Ogbechie v. Onochie (Supra) where, Esq., JSC, citing with approval an article by C. T. Emery in Vol. 100 LQR held:

“If the tribunal purports to find that a particular event occurred although it is seized of no admissible evidence that the event did in fact occur, it is a question of law.”

It was the contention of Learned Counsel for the respondents that all the three grounds of appeal in the appellant's Notice of Appeal dated 25th July, 2001 and filed on 19th September, 2001 are grounds of fact or at best grounds of mixed law and fact. I think I should quote hereunder, H these grounds of appeal: -

“(3) GROUNDS OF APPEAL: (a) The learned trial judges of the Court of Appeal erred, in law by not following the decision of the Su-

preme court in the case of Olayiwola Benson & Anor Vs. Joseph Oladipupo Ashiru (1967) NWLR Page 363 on the grounds that the decision therein was obiter.

PARTICULARS

B *a) The decision in the case of Olayiwola Benson vs. Oladipupo Ashiru (1957) NWLR Page 363 ratio 2 is not obiter. The reporter of the (1967) 1 ALL NLR page 184 wrongly put the word obiter at the top of all the holdings of the Court contrary to the contest of the judgment as contained on page 188 of the report.*

C *b) The learned judges of the Courts of Appeal erred in law by following the Supreme Court decisions in the cases of Egbue Vs. Araka (1988) 3 NWLR (Pt.84) page 598 and Ezeugha Vs. Adimorah (1993) 1 NWLR (Pt.271) Page 620 at 625.*

D **PARTICULARS**

i) The operation of order 1A Rule 4 High Court of Lagos State Civil Procedure Rules 1972 and the decision of the Supreme Court in the case of Nneji Vs Chukwu (1988) 3 NWLR Part 81 page 184 on the bindingness of the rule of each court on its operation were not raised and considered in the two cases.

F *c) The learned trial judges of the Court of Appeal erred in law by not considering the applicability of the rules of common law of England on questions of private international law in the High Court of Lagos State as highlighted in the case of Olayiwola Benson Vs Joseph Oladipopu Ashiru since the learned trial judges of the Court of Appeal held that it did not come for decision in that case.*

PARTICULARS

G *The doctrine of stare decision does not preclude a lower court from pronouncing on a point of law not yet decided by the Superior Court.*

H *d) Other grounds of appeal are to be filed on the receipt of the proceedings of the Court of Appeal.”*

I have had a careful examination of the above grounds of appeal. In ground one or (a) the appellant is complaining that the Justices of the Court below refused to follow the decision of the

Supreme court in the case of Olayiwola Benson & Anor. V. Joseph Oladipopu Ashiru (1967) NWLR page 363 on the ground that the decision therein was obiter. In the only particulars provided for the ground and indicated in another (a) the appellant stated that the said decision is not an obiter. This, in my view, will involve the question of whether the law applied in Benson's case is applicable to the appeal on hand. The complaint in this appeal is on refusal to apply some principles of law. The ground, in my view is a ground of law. The same principle of law applies to ground No. 2 or (b) as it alleges that the Justices of the court below wrongly followed the Supreme Court decisions in the cases of Egbue v. Araka (1988) 3 NWLR (Pt.84) page 589 and Ezeugha Vs. Ademorah (1993) 1 NWLR (Pt.271) 620 at 625. Thus, ground No. (b) is also a ground of law. Appellant's ground No. (c) alleges that the learned Justices of the Court below erred in law in not considering the applicability of the rules of Common law of England on questions of private international law in the High Court of Lagos State as highlighted in Benson's case (Supra). In its particulars, it is stated that the doctrine of stare decisis does not preclude a lower court from pronouncing on a point of law not yet decided by the superior courts. This ground in my view is purely one of law. See generally: Ogbechie & Ors v. Onochie & Ors (1986) 1 NSCC 443 at 446. Board of Customs and Excise V. Barau (1982) 10 SC 48 at page 137; Godwin v. C. A. C. (Supra). The issue of distinguishing a ground of law from that of fact or that of mixed law and fact is indeed a thorny one. It tasks the mind of an appellate judge. See: Ogbechie V. Onochie (Supra); Nwadike & Ors v. Ibekwe & Ors (1987) 12 SC 14 at page 53. Although the decision on whether a ground of appeal; raises a question of law alone does not. depend on the label an appellant may give to the ground in question, it is evident in this appeal that from all the grounds set out by the appellant, he was certainly raising grounds of law, especially when the totality of each of the grounds along with its particulars is taken together. This, exactly, is what this court did in the case of Ojemen & 3 Ors v. His Highness William O. Momodu II & 2 Ors (1983) 3 SC 173. The settled principle of law on the validity of

a Notice of appeal is that when a ground of appeal involves a question of law, it alone can sustain that Notice of Appeal. Thus, by the provision of section 233(2) (a) of the Constitution of The Federal Republic of Nigeria, 1999, such a ground of law confers right of appeal on an appellant without the necessity of seeking or obtaining leave from any court including this court or the court below. The first leg of the Preliminary Objection fails.

On the second leg of the Preliminary Objection that the only issue formulated by the appellant did not arise from any of the grounds of appeal. I have already set out the grounds of appeal above. Let me now reproduce the issue formulated for the determination of this appeal. It reads as follows:

“Whether the Court of Appeal was right in upholding the decision of the High Court.”

It is the submission of learned counsel for the respondents that the issue being canvassed as regards the learned trial judge embarking on a voyage of discovery and determining issues not placed before him is a fresh issue which was never canvassed in the lower court and which did not form any ground of the grounds of appeal filed by the appellant. Learned counsel urged this court to discountenance the issue, as it did not flow from the grounds of appeal.

What is the decision of the trial court? On page 63 of the Record of Appeal, the Learned Trial Judge, held as follows:

“After a thorough examination of the writ of summons and the statement of claim, I rule that this court has no Jurisdiction to try this case as the cause of action arose in Ogun State. The suit is accordingly struck out.

The court below dismissed the appeal and affirmed the trial court’s decision. **I think, when a sole issue is formulated from several grounds of appeal, except those which are found to be incompetent, defective or academic, and the appellant did not isolate any ground to which that issue relates, the presumption is that it relates to all the grounds.** See: *Olowsago v. Adebajo* (1988) 4 NWLR (Pt.88) 275; *Adamu v. Ikharo* (1988) 4 NWLR (Pt. 89) 474.

It is thus, my humble view that the issue is a live issue and competent. The primary concern of an appellant in formulating issues for the determination of his appeal is that such issues must stem from the grounds of appeal. Consideration of statement of facts giving rise to the matter on appeal is irrelevant and inconsequential at that stage. B

I find no merit in this leg of the objection and it too, fails.

Finally, the respondents' Preliminary Objection lacks any merit. I accordingly overrule and dismiss it. C

In considering the appeal I shall limit myself to the issue formulated by the appellant. It reads as follows:

“Whether the Court of Appeal was right in upholding the decision, of the High Court?”

Making his submissions in the brief of arguments, learned counsel D for the appellant stated that the Court of Appeal was wrong in upholding the decision, of the trial court as the issue determined before the trial court was not placed before it. The trial court lacked jurisdiction to suo motu formulate issues and thereafter embark on a voyage of discovery to E make findings on them. Learned Counsel cited in support the case of Adeniran v. Alao (2001) 12 SC (Pt.2) 59 at page 87. Secondly, the issue which came up before the Supreme Court's decision in the case of Egbue V. Araka (1988) 3 NWLR (Pt.84) 598 was based on the provision of F Order 1A Rule 2 of the Lagos State High Court Rules, 1972. Nowhere, it was argued further, in that decision, where the Supreme Court held that before the High Court of a state can have jurisdiction in the publication of a libelous article the publication must have taken place within the jurisdiction of the court as carried by Ratio 6 of the Report. That piece of state- G ment was said by Mr. Kehinde Sofola (SAN) on pages 606 - 607 of the report. Learned Counsel for the appellant made a short comparison between the provisions of Order 9 and Order 7 of the Lagos State High Court Civil Procedure Rules, 1972, He argued that the learned Justices of H the Court below were wrong to have relied on Order 9 Rule (1) (f) of the Lagos State High Court Rules (Supra) which he said did not specifically confer jurisdiction on the commencement of libel action on the place of

publication of the libelous document. The learned counsel submitted further, that contrary to the decision of the Court of Appeal, the Supreme Court decision in *Olayiwola Benson v. Oladipolu Ashiru* (supra) on page 363 of the report, ratio 2 was an obiter as the reporter therein wrongly
B put the word obiter at the top of all the holdings of the court contrary to the contents of the judgment as contained on pages 188 of the body of the report. Learned counsel argued that it was still open to the Court of Appeal Justices to make a pronouncement on the applicability of the Rules
C of the common laws of England on question of Private International Law in the High Court of Lagos State as the Court of Appeal would not be caught by the doctrine of stare decisis. He referred to the case of *7 Up Bottling Co. Ltd. & Ors v. Abiola & Sons Nig. Ltd.* (1995) 3 NWLR (Pt.383) 257 at pages 207 - 271. Learned Counsel submitted that the
D Supreme Court decision in *Olayiwola v. Ashiru* (Supra) is still good law as it has not been overruled subsequently by the same court and the Court of Appeal is bound by it. The appellant urges this court to set aside the decision of the Court of Appeal and Order the trial court to hear the
E suit on its merits.

On the main appeal, learned counsel for the respondents formulated two issues for determination. I already set out these issues earlier. Appellants lone issue has comprehensively take care of these two issues.
F I shall consider them together in line with the appellant's lone issue. Learned Counsel referred this court to the motion on Notice together with the supporting affidavit at pages 7 - 10 of the Record of Appeal for this court to see how unmeritorious the appeal is. He referred to paragraphs 5 - 10
G of the supporting affidavit and some part of the trial court's proceedings. Learned Counsel submitted strongly that flowing from the oral submissions of learned counsel for the respondents, Mr. Adeneji and that of the appellant Mr. Dairo, the pith of the respondents prayer was that being a
H libel action, the High Court of Lagos State, has no jurisdiction in the matter as the alleged libel arose in Ogun State. Learned Counsel submitted that in the circumstances, the Learned Trial Judge was quite in order when she raised the question which the appellant had complained of in her brief of argument and it was not a voyage of discovery, or formulat-

ing issues suo motu by the Learned Trial Judge as arguments on the issues were earlier canvassed by both Counsel before the Learned Trial Judge raised such issues. Learned Counsel urged us to reject the submission of the appellant that the Learned Trial Judge embarked on a voyage of discovery by suo motu formulating issues which were not canvassed before the court and that the lower court compounded the error in their judgment.

It was argued for the respondents that the references to Order 1A Rule 4 of the High Court of Lagos State Civil Procedure Rules 1972, which was applicable when the action was instituted at the court of first instance, the provisions of that Rule were of no use or helpful to the appellant. Learned Counsel for the respondents set out the rule in his brief in extenso. He set out also Order 7 Rule 1(f) of the said Rules. Learned Counsel argued that it is the place a libel is published that the cause of action arose. He cited the cases of *Ezomo v. Oyakire* (1985) 2 SC 260; *Egbue v. Araka* (1988) 3 NWLR (Pt.84) 598

On the case of *Benson v. Ashiru* (supra) Learned Counsel submitted that the case had not been adopted in any other case by the Supreme Court to enable it acquire the force of a ratio decidendi and the same was not made per incuriam as stated, in the said law Report (NLR), the statement of the Supreme Court was made obiter. The case of *Benson v. Ashiru* (Supra) was in relation to fatal accident and not libel.

On the applicability of the Rules of Common Law of England on the question of private International Law in the High Court of Lagos State, this court is urged to ignore appellants submission as same was never raised as a ground of appeal and or part of issues for determination of the appeal before the lower court. Learned Counsel for the respondents urged us to dismiss this appeal and uphold the judgment of the court below.

I think the primary role of all appeal court is to hear and determine appeals that are brought before it. In its determination of an appeal, it may grant, refuse reliefs in an interlocutory application arising therein. It may allow or dismiss an appeal. It may make consequential orders as the circumstances of the appeal may

warrant. Where the appeal court upholds or affirms the decision of the trial court or a court lower to it, it means that the appeal before it is dismissed. Where it allows the appeal, it means the decision of the trial court or the court lower to it is set aside. It may also make amendments on some decisions of the trial or lower court. In discharging its duties, the appeal court is always guided by the principles of justice.

The main complaint against the lower court's judgment is that it upheld the decision of the trial court when it was the trial court that formulated issues suo motu and arguments were not canvassed before it by the parties. I agree with the learned counsel for the appellant to the extent that the law is quite settled that where a court raises issues suo motu the parties should be given equal opportunity to address the court on such issues. Failure to do so will render the proceedings of that court, however well conducted, to a nullity. See: *Nteogwulle v. Otuo* (2001) 16 NWLR (Pt.738) 58 *Adigun v A. G. Oyo State* (1987) 1 NWLR (Pt53) 678. But is that what happened in this case? It is clear from the Record of Appeal (pages 28 - 29) that there is a proceeding by the trial court in respect of a motion on Notice filed by the defendants praying for an order striking out the suit for lack of Jurisdiction. Learned Counsel for the defendants/applicants, Mr. Adeneji, moved the motion. Mr. Dairo for the plaintiff/respondent/appellant, responded. In his response (submissions) he stated, inter alia;

"The publication we are complaining about was pasted in Ogun State but the publication emanated from the office of the Auctioneer (the 2nd defendant) in Lagos as reflected in the endorsement of our writ of summons.....my submissions are that the Defendants are in Lagos and I submit that the 2nd Defendant (the Auctioneer) also committed publication In Lagos. The posters comanated (sic) from his office in Lagos."

After summarizing the submissions of the respective counsel, the Learned Trial Judge asked (himself) the following questions:

1) "Where does the cause of action arise in the case herein?"

2) Does, reference to the location of the office and sub-office of the Auctioneer with the writ of summons anonymous with (sic) the aver-

ment in the statement of claim that publication took place in the free of (sic) the Auctioneer in Lagos.”

The learned trial judge then went ahead to answer the two questions posed above which resulted in his declining jurisdiction. **From the above, I am not ready to accept the submission of learned counsel for the appellant that the Learned Trial Judge formulated new issues suo motu, which were neither placed nor canvassed before him thereby embarking on a voyage of discovery.**

Issues are said to be raised suo motu when they are not covered in the pleadings at the trial court or where on appeal such issues do not form part of the grounds of appeal or issues for the determination of the appeal.

There is a distinction between the circumstances in the case of *Adeniran v. Alao* (supra) or as reported in (2001) 18 NWLR (Pt.745) 361; cited by learned counsel for the appellant and the present appeal. In the former's case it was a land matter where both parties did not raise the issue of due execution of the deed of conveyance relied upon by the appellant. At the conclusion of hearing, the trial court dismissed the appellant's claim on the ground that the appellant did not establish due execution and due authentication of the deed of conveyance relied upon by him. On appeal to the Court of Appeal, the Court of Appeal affirmed the judgment of the trial court and held further that the respondents established the equitable defences of laches and acquiescence. The Supreme Court, per Uwaifo, JSC stated:

“in the present case, the two courts below went into diversionary issues not relevant and not canvassed by the parties”

As seen earlier in the present appeal, the points raised by the Learned Trial Judge stemmed from the parties affidavits on the motion on Notice for an order striking out the suit before the trial court. The two cases are quite distinguishable. I must emphasize the point that it is not prohibited for a court to raise issues suo motu. It can, in its discretion, do so if it sees it fit to do so, provided the discretion is exercised sparingly and in exceptional circumstances. Moreover, where points are taken suo motu, the parties

must be given opportunity to address the court before the decision on the points is made. In the appeal on hand, the two points raised by the Learned Trial Judge were properly addressed by the parties and rightly decided by the two lower courts as the points were contained within the four corners of the parties' affidavit evidence and the respective submissions made by the learned counsel for the parties.

With regard to some orders cited from the Lagos State High Court Civil Procedure Rules, 1972, such as Order 9, Rule 1(f). Order 1, Rule (4); I fail to see their relevance in this appeal as they make provisions applicable to Lagos State High Court whereas that court itself declined jurisdiction on the matter in litigation.

Another point which was vigorously argued by learned counsel for the appellant is the holding of the lower court on the case of Benson v. Ashiru (supra). It is important here too, to distinguish the case of Benson v. Ashiru (Supra) from the appeal on hand, in Benson's case it is reported that the plaintiff/respondent, for and on behalf of himself and the dependant relatives of the deceased, whom he described as his wife, took an action against the appellants in the High Court of Lagos under the Fatal Accident Act, 1846 (of England) for the recovery of damages representing the pecuniary loss sustained by her death through the negligent driving of the second defendant at Iperu in Western Nigeria.

The Trial Judge held that it was the Fatal Accident; Act, 1846 that was the applicable law and that the plaintiff had proved that the death of the deceased was caused by the negligence of the second defendant and the latter finding was not contested on appeal. He held again that the plaintiff had failed to prove that he was married to the deceased and awarded damages only for the benefit of the children and parents, as well as for funeral expenses.

On appeal, it was contended that since the accident occurred in Western Nigeria the law applicable was the Torts Law of Western Nigeria and not the Fatal Accident Act, 1846. The Supreme Court held, per Brett, JSC as follows:-

“On the material date, damages for causing the death of a human

being were recoverable in Lagos under the Fatal Accidents Act, 1846 and 1864, which applied as statutes of general application which had been in force in England on the 1st January, 1900...They were recoverable in Western Nigeria under part 2 of the Torts Law. The trial judge was of the opinion that the Fatal Accidents Act applied in Western Nigerian concurrently with the Torts Law, but in this he overlooked the Law of England (application) Law (Cap 60) under which English Statutes of general application ceased to apply as such in Western Nigeria from and after the 1st July, 1959.....the rules of the Common Law of England on questions of private International Law apply in the High Court of Lagos. Under these rules an action of tort will lie in Lagos for a wrong alleged to have been committed in another part of Nigeria if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in Lagos; and secondly, it must not have been justifiable by the law of the part of Nigeria where it was done.”

The grudges of the appellant was that the trial court refused to follow the case of Benson v. Ashiru (Supra) which the Court below affirmed. What is gatherable from the record of appeal is that the learned counsel for the appellant who appeared for his client throughout in both the trial court and the court below, stated while making his submission on the motion on Notice before the trial court, which was moved on 28th March, 1994, that:

“I also regard to the Rules for Auction for Tort (sic). The Common Laws of private International Law applies in Lagos State. I refer to OLA YIWOLA BENSON AND ANOTHER V. JOSEPH OLADIPUPG ASHIRU (1957) NMLR Page 363 at 367. I urge the Court to apply the reasoning in that case.”

The trial court did Trot make any reference to the above case in its ruling. Ground No. (a) of the appellants grounds of appeal attacked the trial court’s decision on its failure to follow that decision. Learned counsel for the appellant encapsulate that round under the sole issue he raised for the determination of the court below. He argued it in the appellant’s brief (page 71 of the record).

In its judgment, the court below considered the issue thoroughly and held as follow:-

“The learned Counsel for the Appellant made reference to the Supreme Court decision in *OLAWIYOLA BENSON V. JOSEPH OLADIPUPO ASHIRU* (1967) 1All NLR. 184, that questions of private International Law apply in the High Court of Lagos. That case is not on all fours with this present case. That case, it would appear, involved issues relating to the Fatal Accident and not libel. Besides, that statement of the Supreme Court was made obiter. As obiter dictum it is not binding on the lower Court as precedent as far as the doctrine of stare decision is concerned. See pp. 85 line 35 of the Reports as obiter (1) which shows clearly that the statement was an obiter dictum. In view of the position of the law this Supreme Court decision is not binding on the lower court as a precedent. The lower court was right to have refused to be bound by it or over (sic) considered it.

Apart from the position of the law being very clear as regard venue I have shown above that the Constitution of the action for libel in case of *OLAYIWOLA V. ASHIRU* (Supra) appears to be archaic and not in tune with the position of the law as explained above.”

I think before I go ahead to consider whether the decision in Benson v. Ashiru (supra) was as an obiter or not, it is germane at this juncture to state that, law generally, whether statute or case law is an organic phenomenon which develops along with the society. It is worthy of note that the Benson’s case (Supra) was decided in 1967, I think I am entitled to take judicial notice that by 1967 this country was experiencing its 1st Military Rule which was by Decrees and Edicts in addition to adopted laws of general application applicable in the courts and Nigeria was just broken into 12 states from the then Regional Governments. So there were still some hang-overs and fusions of laws, rules and practices of the regions into the newly created states. This continued for sometime. However, in 1979, a Constitution for the whole Federation was enacted into Law which demarcated the territorial jurisdiction of each state with its Local Governments. The 1999 Constitution provided for the demarcation to each of the states including new ones. Lagos and Ogun States

are by that exercise two different states, each with its separate geographical entity and Local Governments. The 1979 Constitution in section 3(1) provides:

“3(1) *there shall be nineteen states in Nigeria, that is to say, Anambra, Bauchi, Bendel, Benue, Borno, Cross River, Gongola, Imo, Kaduna, Kano, Kwara, Lagos, Niger, Ogun, Ondo, Oyo, Plateau, Rivers and Sokoto.*”

(2) *Each state of Nigeria named in the first column of part 1 of the First schedule to this Constitution shall consist of the area shown opposite thereto in the second column of that Schedule.*”

(underlining supplied for emphasis)

The first schedule, part 1 thereof, for the purposes of this appeal provides the area covered by each of the two states of Lagos and Ogun as follows:

State	Area	State Headquarter	
Lagos	Lagos - Island, Lagos Mainland, Shomolu, Mushin, Epe, Badagry, Ikorodu, Ikeja	Ikeja	E
Ogun	Abeokuta, Odeda, Obafemi- Owode. <u>Ifo-Otta.</u> , Egbodo North, Egbodo South, Ijebu-Ode, Ijebu-North, Ijebu-East, Remo	Abeokuta	F

(underlining supplied for emphasis)

Each of the two states mentioned above, by the operation of the new Constitution, has its own judiciary and personnel with no one overlapping or dependant on the other. Section 6 of the said Constitution provides:

“(2) *The Judicial powers of a state shall be vested in the courts to which this section relates being courts established, subject as provided by this Constitution, state.*”

Section 234(1) of the same Constitution established a High Court for each state of the Federation with its Chief Judge and other Judges (Section 270 of the 1999 Constitution). Each of the High Courts has its own Rules of practice and procedure which operate independent of one

another.

Thus, if a cause of action arises in any of the states of the Federation within the period when the 1979 Constitution started to be in application, and except where jurisdiction is taken away by the same Constitution, jurisdiction must reside in the respective court of that state.

The subject matter of Litigation in this appeal is Libel. Generally, a cause of action in the tort of libel arises where the libel is published. See: Ezomo v. Oyakire (1985) 2 SC 260; Egbue v. Araka (1938) 3 NWLR (Pt.84) 598; O' Keefe v. Walsh (1903) 2 TR; 706; Powel v. Gelsten (1916) 2 K.B. 609.

There is a finding by the Learned Trial Judge which has not been appealed against that Chief Dairo, learned counsel for the appellant in his reply considered that because the libel was pasted on a property situate in Ogun State, publication must be assumed to have taken place in Ogun State. This automatically confers jurisdiction on the High Court of Justice of Ogun State and not that of Lagos State. This is because in a defamatory action, publication of the defamatory statement is an essential element of the cause of action. So, it is the publication not the composition of a libel which is the actionable wrong as the injury alone by it arises from the effect produced upon its readers. See: Lee v. Wilson (1934) 51 C.L.R. 276 at 287.

Although the learned counsel for the appellant had invoked the jurisdiction of the High court of Lagos State to try the matter on hand, he should be reminded that it is not the wishes or consent of a party that confers jurisdiction on a court. It is the nature of the claim before the court and the Constitution or other statutes that confer jurisdiction on a court. The jurisdiction in this matter is that of venue or place of trial. Going by the provisions of the Constitution of the Federal Republic of Nigeria 1979 (including the 1999 Constitution) It is the High Court of Ogun State that can properly exercise its jurisdiction on a libel matter that arose in Ogun State irrespective of which Judicial Division handles the suit in Ogun State. It is very certain that where a cause of action is instituted

and tried in a court outside the territorial jurisdiction of a state where the cause of action arose is different from instituting an action outside the Judicial Division in the same state where the cause an action arose. In the case of International Nigerbuild Construction Co. v. Giwa (2003) 13 NWLR (Pt.836) 69 at 74 -76, the Court of Appeal stated in that respect as follows:

“there is a world of distinction between jurisdiction as it relates to the territorial, geographical jurisdiction of a court and jurisdiction in relation to the judicial division within which to commence an action. The distinction between venue as an aspect of jurisdiction which could be heard, is often provided in the rules of court of various states of the Federation. But when it comes to territorial jurisdiction, which is whether a suit ought to have been brought in another, the criteria is different. In such a case, the court has no jurisdiction and it cannot be conferred by agreement or consent of the parties.”

I am in complete agreement with that holding. **Thus, territorial and subject matter jurisdiction are very concomitant to the exercise of jurisdiction by a Lagos State High Court in this matter. It certainly lacked both. Any decision done by that court will be a nullity.** See: Madukolu v. Nkemdilim (1962) 1 All NLR (Pt.4) 587

Now coming back to the case of Benson v. Ashiru (supra). I think I should start by commenting that it is not desirable or ideal for a counsel to rely and cite holdings or editors summary of a case. That in my view is a lazy counsel’s approach. A counsel who is serious must devote his time and attention to go deep into the judgment of a court in order to arrive at the exact holding of that court. This will certainly obviate occurrence of avoidable mistakes. I find support in my view in what Uwais, former Chief Justice of Nigeria once said in the case of Franchal (Nig.) Ltd. v. N. A. B. Ltd. (2000) 9 NWLR (Pt.671) 1 at pp 13 - 14 H - A:

“It is lazy for counsel to rely on headnotes in law reports instead of reading the whole of the facts of the case he is relying on to see how relevant the decision in the case is to his own case.”

The present appeal, in principle, is like that of Amanambu v. Okafor (in unreported Supreme Court Appeal No. 278/1965 which

was cited in the case of *Benson v. Ashiru* (Supra) by the appellants therein, asking the Supreme Court to follow it. The facts in *Amanambu v. Okafor* were that the negligent act and the death, had taken place in Northern Nigerian and the Supreme Court held that an action did not lie in the High Court of Eastern Nigeria under the Fatal Accidents Law of Eastern Nigeria.

I have digested the decisions of both the trial court and the court below. As I observed earlier, the trial court did not say anything about *Benson v. Ashiru*'s case. The attempt of the court below was to distinguish the facts of the appeal before it and that of *Benson v. Ashiru* (Supra). My understanding is that different criteria applied altogether in both cases especially with regard to the conditionalities laid in *Benson v. Ashiru* on the applicability of statutes of general application and the Common Law doctrine of private international law. In practice, two or more cases may present facts which may appear to be similar. On closer-examination however, some fine distinctions may well be noted and the set of laws applicable to the two cases may have to differ. This was the purpose of the court below's decision although put in stronger language. I do not think that a foul language, if at all, used by a court, although uncalled for and always discouraged, has the effect of changing a law. The two cases i.e. *Benson v. Ashiru* (Supra) and this appeal, are in my view, quite distinguishable and governed by different principles of the law. The issue of whether *Benson*'s case was obiter or not, seems to me to an unnecessary splitting of the hair which has no real effect on the present appeal.

In the final analysis, I find no merit in this appeal. I hereby dismiss the appeal and affirm the court below's judgment. The respondents are entitled to N10,000.00 costs from the appellant.

H

MUKHTAR JSC

In the court below, the appellant's appeal was dismissed, with Galadima J.C.A. making the following finding in the course of the lead

judgment:-

“I am of the view that since the proceedings in the lower court were not brought before or originated in Ogun State High Court it would be an infraction of the Constitution if the Chief Judge of Ogun State accepts a transfer of a matter that emanated from Lagos State. Such an action will be clearly incompetent, unconstitutional, null and void.” B

What gave rise to the appeal was the ruling of Omotoso J. (of blessed memory) which struck out the suit before the High Court of Lagos State on an application to so strike out the suit. The learned trial judge in concluding the ruling stated thus:- C

“After a thorough Examination of the Writ of Summons and the statement of claim, I rule that this court has no jurisdiction to try this case as the cause of Action arose in Ogun State. The Suit is accordingly struck out.” D

The appeal before this court is based on three grounds of appeal, from which a single issue for determination was distilled in the appellant’s brief of argument. The issue is, whether the Court of Appeal was right in upholding the decision of the High Court. A notice of preliminary objection E was raised in the respondents’ brief of argument.

The purpose of the preliminary objection is to attack the three grounds of appeal, on the ground that they are grounds of mixed law and fact, in respect of which leave ought to have been obtained either in the Court of Appeal or this court, by virtue of Section 233 (2) (a) of the Constitution of the Federal Republic of Nigeria 1999. I will take the grounds individually with the corresponding submissions of learned counsel. It is instructive to note that the learned counsel for the appellant did not deem it fit to file an appellant’s brief of argument to address the preliminary objection and respond to the respondents’ arguments. Ground G (a) of appeal in the notice of appeal is as follows:-

“The learned trial judges of the Court of Appeal erred in law by not following the decision of the Supreme Court in the case of Olayiwola Benson and Anor vs Joseph Oladipupo Ashiru (1967) NMLR page 363 on the grounds that the decision therein was obiter. H

PARTICULARS

(a) *The decision, in the case of Olayiwola Benson vs Oladipupo Ashiru (1967) NMLR page 363 ratio 2 is not obiter. The reporter of the (1967) 1 ALL NLR page 184 wrongly put the word Obiter at the top of all the holdings of the court contrary to the contents of the judgment as contained on page 188 of the report”.*

Reading the above ground and its particulars very carefully I find that the ground is of law that does not require the leave of court.

Ground (b) reads as follows:-

“(b) *The learned judges of the Court (sic) of Appeal erred in law by following the Supreme Court decision in the cases of Egbe vs Araka (1988) 3 NWLR (part 84) page 598 and Ezeugha vs Adimorah (1993) 1 NWLR part 271 page 620 at 625.*

PARTICULARS

The operation of order 1 Al Rule 4 High Court of Lagos State Civil Procedure Rules 1972 and the decision, of the Supreme. Court in the case of Nneji vs Chukwu (1988) 3 NWLR Part 81 Page 184 on the bindingness of the rules of each court on its operation were not raised and considered in the two cases”.

This ground of appeal is purely a ground of law simpliciter, which does not require any leave of court to file and argue. Suffice it to say that it is valid and competent and should so remain. A ground of appeal that is one of law is a “valid” ground.

Then the last ground which reads thus:-

“(c) *The learned trial judges of the Court of Appeal erred in law by not considering the applicability of the rules of common law of England on questions of private international law in the High Court of Lagos State as highlighted in the case of Olayiwola Benson vs Joseph Oladipupo Ashiru since the learned trial judges of the Court of Appeal held that it did not come for decision in that case.*

PARTICULARS

The doctrine of stare decisis does not preclude a lower court from pronouncing on a point of law not yet decided by the superior courts”

Again this is a ground of law that does not require leave from any court to argue. The supra ground is thus a competent and valid ground of

appeal which cannot be struck out as submitted by learned counsel for the respondents. In the case of Medical and Dental Practitioners Disciplinary Tribunal v. Dr. John Emewulu Nicholas Okonkwo 2001 7 NWLR part 711 page 206 at page 232 Ayoola, JSC on treating a similar objection had this to say -

“It suffices to say that there is now a growing list of authorities affording guide to the determination of the nature of a ground of appeal. The most often cited is Ogbechie & Ors v. Onochie & Ors. (1986) 2 NWLR (Pt.23) 484; (1986) Vol. 7 NSCC 443 (No 1). However, in each case in which an objection such as in this case is raised to the ground of appeal, the court still has to examine the ground and determine its nature. Recently, objection was raised to grounds which raised questions that are broadly similar to the questions raised by the grounds objected to in this appeal in the case of Shanu & Anor v. Afribank (Nigeria) Ltd. (2000) 13 NWLR Part 684)392. In that case this court held thus:

“Where the ground of appeal complains that the tribunal has failed to fulfill an obligation cast on it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely: whether or not there is such an obligation or whether what the tribunal did amounted to an infraction of such obligation provided that all the facts needed are there on the record and are beyond controversy”. In the present case it is evident that ground 5 raises a question of law alone.”

I am fortified by the above.

Still under the notice of preliminary objection, learned counsel for the respondent has submitted that the single issue raised in the appellant’s brief of argument does not flow from the three grounds of appeal. The said issue has already been reproduced in the earlier part of this judgment. The argument of learned counsel for the respondents that issues must flow or be distilled from the grounds of appeal is in order. I subscribe to it and the case of Oje v Babalola 1991 4 NWLR part 185 page 267 cited by learned counsel does support the argument. However, the issue that is attacked now cannot be said not to flow from the grounds of appeal in this appeal, because they do. The issue to my mind is all

embracing and it encompasses the grounds of appeal, for it affects the decision of the trial court as a whole. It is not on some isolated findings or error of the court, but every aspect of the decision; which in my view relates to the grounds of appeal. In this regard I overrule this aspect of
B the respondents' objection, and refuse to strike out the issue.

It is only the notice of preliminary objection that I wish to highlight on in this contribution, and not the argument in the appeal proper. I have read in advance the lead judgment delivered by my learned brother
C Muhammad, JSC and I agree completely with the reasoning and conclusion reached therein that the appeal has no merit and substance. I also dismiss the appeal in its entirety. I abide by the consequential orders made therein.

D

OGBUAGU JSC

This is an appeal against the Judgment of the Court of Appeal, Lagos Division (hereinafter called "the court below") delivered on 22nd
E June, 2001 affirming the Ruling of the Ikeja High Court presided over by Omotoso, J. (of blessed memory) delivered on 28th June, 1994, striking out the Appellant's suit for lack of jurisdiction. As a matter of fact, the appeal both in the court below and in this Court, is about the proper
F VENUE for the institution of the Libel Suit instituted by the Appellant. There are three (3) Grounds of Appeal and without their particulars, they read as follows:

*"(a) The learned trial Judges (sic) (meaning Justices) of the Court of Appeal erred, in law by not following the decision of the Supreme
G Court in the case of Olayiwola Benson & anor. vs. Joseph Oladipupo Ashiru (1967) NMLR 363 on the grounds that the decision therein was obiter.*

*(b) The learned judges (sic) of the Courts of Appeal (sic) erred in
H law by following the Supreme Court decision in the cases of Egbue vs. Araka (1988) 3 NWLR (Pt.84) vase 598 and Ezeugha vs Adimorah (1993) 1 NWLR Pt.271 page 620 at 625.*

(c) The learned trial judges, (sic) of the Court of Appeal erred in

law by not considering the applicability of the rules of common law of England on questions of private international law in the High Court of Lagos State as highlighted in the case of *Olayiwola Benson vs. Joseph Oladipupo Ashiru* since the learned trial judges (sic) of the Court of Appeal held that it did not come for decision in that case". B

The Relief sought from this Court, reads as follows:

"An order setting aside the judgment of the Court of Appeal and restoring the suit and an order that the matter be heard on its merit. The Appellant will urge the Supreme Court to overrule its earlier decisions in the case of Egbue vs. Araka (1988) 3 NWLR (Pt.84) page 593 as it perpetrates injustice on litigants". C

[the underlining mine]

The Appellant has formulated one (1) issue for determination, namely D

"Whether the Court of Appeal was right in upholding the decision of the High Court?"

On its part, the Respondents formulated two (2) issues for determination, namely, E

"(1) Whether the Court of Appeal was right when it held that the High Court of Lagos State has no jurisdiction in a libel suit in which the publication of the libelous document did not take place within the jurisdiction of the Court. F

(2) Whether in this libel action, the Court of Appeal was bound by the decision of the Supreme Court in the fatal accident's case of Olayiwola Benson & anor. v. Joseph Oladipupo Ashiru (1967) 1 All NLR, which was stated to be an obiter dictum". G

[the underlining mine]

I note that the Respondents, filed on 13th October, 2003, a Notice of Preliminary Objection pursuant to Order 2 Rule 9 of the Rules of this Court. The Grounds for the application are stated to be,

"1. The only issue raised by the Appellant did not flow from the Grounds of Appeal in the Notice of Appeal filed by the Appellant at pages 103 to 104 of the Record of Appeal. H

2. The Grounds of Appeal filed by the Appellant are grounds of

fact or at best mixed law and fact and the leave of either the lower court or this Honourable Court was not sought before the Notice of appeals was filed.

3. By virtue of the provisions of Section 233(2) of the Constitution of the Federal Republic of Nigeria 1999 an Appellant can only appeal as of right to be Supreme Court if the Grounds of Appeal involve questions of law alone.

4. It is only after leave had been obtained under Section 233(3) of the said Constitution can Grounds of Appeal involving questions of fact or mixed law and fact can be competent before the Supreme Court”.

I note that although the said Notice of Preliminary Objection, is incorporated in the Respondents’ Brief of Argument the Appellant, never reacted by way of Reply Brief to this objection. Worse still, on 30th April, 2007 when this appeal came up for hearing, neither the Appellant nor her learned counsel showed up/appeared even though there is evidence ‘of service on the learned counsel, of both the Respondents’ said Notice and their Brief including the Hearing Notice. Pursuant to Order 6 Rule (6) of the Supreme Court Rules (as amended in 1999), the appeal was treated by the Court, as having been argued.

My quick answer to the Preliminary Objection, is that, while I agree with Ground 1 thereof, but as regards Grounds 2, 3 and 4 thereof, is that the three Grounds of Appeal, in my respectful view, amount in effect, to complaints about the application of the said decisions of this Court by the court below. In the circumstances, I will, tolerate the said grounds and concentrate on the lone issue of the Appellant together with Issue 1 of the Respondents as they are similar in substance although differently couched and deal also, with Issue 2 of the Respondents. I therefore, overrule the Objection.

Before coming to the merits of the appeal, the facts of the case, have been clearly stated in the lead Judgment of my learned brother, Muhammad, JSC. I adopt the same as mine. In substance, the libel complained about by the Appellant, is the pasting of the Auction Sale Notice on the building of the Appellant situate at Ogun State.

I will pause here, to dismiss at once and as lacking in substance,

the submission of the Appellant in the Brief at page 2 0/5 (a) that the issue determined by the learned trial Judge, was not placed before that court and that he lacked the jurisdiction, to suo motu formulate issues and thereafter, embarked on a voyage of discovering to make findings on them. This is because, I see at page 7 of the Records, that there was a motion on notice filed by the Respondents seeking for an Order,

“Striking put this suit as the High Court of Lagos State has no jurisdiction in this matter. The cause of action (the alleged libel) arose in Ogun State”.

The motion was supported by a thirteen (13) paragraph affidavit. The application was argued by the learned counsel for the parties. See pages 58 to 60 of the Records. The learned trial Judge, in a considered Ruling, referred to the endorsement in the Writ of Summons and posed two (2) questions, which appear at pages 31 and 62-63 of the Records, namely,

“(1) Where does the cause of action arise in the case herein?

(2) Does a reference to the location of the Office and Sub Office of the Auctioneer (i.e. the 2nd Respondent) with the Writ of Summons Anonymous with an averment in the Statement of Claim that publication took place in the free (sic) of the Auctioneer in Lagos? (sic).

It is the act of the publication of a libelous material that constitutes the cause of action. See O’KEEFE K WALSH (1903) 2 TR: 706. It is said that “to give a cause of action there must be publication by the Defendant, that is the foundation of the action “per Bray, Judge in POWEL V. GELSTAN (1916) 2 KB; (sic) at page 609.

The answers to the two questions which I have posed above are (1) paragraphs 4 and 10 of the Statement of Claim in the action herein avers that publication of the alleged label (sic) took place by the pasting of the Auction Notice at 12 Adegbite Street Iju Ajuwon, Agege, Lagos State, although Counsel for the Plaintiff Chief Dairo is well aware that Iju Ajuwon is in OGUN STATE, not in Lagos State and this was why the earlier action of the plaintiff herein was filed by him in Otta Judicial Division, of Ogun State High Court i.e. suit No. MT/7/91 MATILDA ADERONKE DAIRO V MILITARY GOVERNOR OF OGUN STATE

AND OTHERS. I rule that the publication, which is the cause of action in the case herein took place in Ogun State not in Lagos State”.

[the underlining mine]

His Lordship, then stated that there is no assertion in the Statement of Claim that any publication took place in Lagos. That reference to the location of the Office of the 2nd Defendant, did not amount to an assertion that there was publication of a libelous matter within Lagos State. That it is the Statement of Claim which had to be examined, to ascertain whether there is a cause of action. He cited and relied on the case of Rinco Construction Company Ltd, v. Vee Industries Ltd. (1992) 5 NWLR (Pt.240) 248-249. Then he/she, concluded as follows:-

“After a thorough Examination of the Writ of Summons and the Statement of Claim, I rule that this Court has no jurisdiction to try this case as the cause of Action arose in Ogun State. The Suit is accordingly struck out”.

[the underlining mine]

I have deliberately, reproduced part of the relevant proceedings in the trial court in order to show unequivocally, that the learned counsel for the Appellant - Chief Dairo, with respect, was most/very unfair to the learned trial Judge in the said assertion/submission/contention referred to by me hereinabove. Idigbe, JSC (of blessed memory) in the case of Ndaeyo v. Ogunnaya (1977) 1 S.C. 7 @ 14, stated that a Judge, has the jurisdiction, to be wrong in law. I will respectfully add that this is why, there is in place, Appellate Courts and invariably, many Grounds of appeal start with “the learned trial Judge or Justices, erred in law or fact or misdirected himself or themselves”. Indeed His Lordship in the said case, referred to the statement of Diplock, L.J. in the case of Oscroft v. Benabo (1967) 2 AER 548 @ 557 where the following appear, inter alia:

“After all court have jurisdiction to be wrong in law; that is why we have appeals on questions of law”.

Now, the court below in its Judgment - per Galadima, JCA at pages 94 and 95, of the Records, stated inter alia, as follows:

“The Lower Court had made a finding of fact that the property situate, known and described as No. 12 Adegbite Street, Iju-Ajuwon Agege

near Iju Works and covered by Certificate of Occupancy No. 000 1155. dated 22nd November, 1985 and registered as No. 51 at page 51 Volume 291 Lands Registry Abeokuta, Ogun State is situate in Ogun State of Nigeria. That finding has not been challenged. It would appear that the Appellant did not place the concret (sic) fact before the lower court initially when she stated in her Statement of Claim in paragraphs 3, 4 and 10 that the property is situate, in Lagos State of Nigeria. B

The Appellant (sic) had conceded that the publication his client was complaining about was pasted on the property in Ogun State and in no other place. If so it is the Ogun State High Court not Lagos State that has jurisdiction over this matter, irrespective of the fact the publication emanated from the office of the 2nd Respondent, the auctioneer in Lagos State or that the 1st Respondent has his office in Lagos State. The publication was not made in Lagos State. C D

Jurisdiction is conferred in libel actions on a court in Nigeria when and if the cause of action, that is the publication, arose within its Jurisdiction “.

[the underlining mine] E

At pages 96 and 97 of the Records, the court below referred to Order 8 Rule 1, (f) of the Rules of Lagos State, 1999 as regards service out of jurisdiction of a Writ of Summons and when it may be allowed by the court or a Judge in Chambers. Rule (f) provides as follows: F

“The action is founded on a Tort committed within the jurisdiction”

His Lordship, referred to the case of (I will cite it in full) The Hon. Egbue v. Hon. Araka (1988) 1 NWLR (Pt.84) 598 @ 601 which is also reported in (1988) 7 SCNJ. 190. which he noted, was a similar case as the instant one leading to this appeal, which arose before Omotoso, J. (of blessed memory) and this Court, upheld his/her decision. In Egbue v. Araka (supra), His Lordship, partly reproduced the relevant holding of this Court thus: G H

“Before the High Court of a State can have jurisdiction in the publication of a libelous article the publication must have taken place within the jurisdiction of the Court”.

[the underlining mine]

His Lordship, also referred to the case of Ezeugha v. Adimorah (1993) 1 NWLR (Pt.271) 620 @ 625 - per Uwaifo, JCA (as he then was) which was on appeal on the proper venue for the institution of an action
B for libel and reproduced the relevant holding of that court as follows:

“Let me first refer to the observation of Obaseki JSC, in NSIRIM V. NSIRIM (1990) 3 NWLR (Pt.138) at 297 as follows:

*“The material part of the cause of action in libel is not in writing but the publication of the libel.....The act of publishing the libelous matter constitutes the cause of action..... What then is publication. By publication is meant the making known of the defamatory matter to some
C persons other than the person to whom it is written.*

*From the above it is plain that it is the place a libel is published
D that the cause of action arose. In the present case, the alleged libelous letter was published to the Attorney-General of Anambra State and the Director of Public Prosecutions, both residing in Enugu. Obviously the cause of action arose in Enugu”.*

E [the underlining mine]

At pages 99 and 100 of the Records, His Lordship, stated inter alia, as follows:

*“It should be noted that the objection raised by the Respondents at
F the lower court was not as regards judicial division but the proper State High Court competent to adjudicate over the matter. Legally, Lagos State High Court and Ogun State High Court are not within the same Judicial Divisions. It is not possible to make transfer of cases between the two States. See S. 234(1) and S. 236 of the 1979 Constitution.*

*I am of the view that since the proceedings in the lower court were
G not brought before or originated in Ogun State High Court it would be an infraction of the Constitution if the Chief Judge of Ogun State accepts a transfer of a matter that emanated from Lagos State. Such an action will
H be clearly incompetent, unconstitutional, null and void. See JACOB NDAEYO V.GODWIN OGUNNAYA (1977) (Supra)”.*

I agree as I cannot fault the above.

I note that at page 94 of the Records, His Lordship, had stated

inter alia, as follows:

“..... *The true position of the law is that only the Chief Judge of each State may, at any time or any stage of the proceedings transfer the proceedings from one Judge to another of the same or of some other Judicial Division. See NAJIB STEPHEN V. OLLIVIO PEDROCHI (1933) B NCLR 51. Any order made in this regard is also subject to appeal. It should however be noted that it is not competent for an Judge, (sic) including a Chief Judge to transfer any proceeding front one state to another. See JACOB NDAEYO V. GODWIN OGUNNAYA SC. 395 - 14th January, C 77. (Unreported)*”.

For purposes of emphasis, as rightly held by the court below which holding or decision, is supported by the decided authorities of this Court and one of them, held by the Court of Appeal, it is now firmly settled that in an action for libel, the proper issue for the adjudication of the matter, is where the cause of action arose - i.e. where the alleged libel was published and not where the defendant/defendants necessarily resides or reside. See Chief Nsirim v. Nsirim and Egbue v. Araka (both supra). I will add that it is also firmly settled, that where a court finds and holds that it has no jurisdiction, it strikes out the suit or matter and it cannot transfer such suit or matter. See the cases of NEPA v. Adegbenro & 15 ors. (2602) 18 NWLR (Pt. 798) 295; (2002) 12 SCNJ. 173 @ 186 and Arjay Ltd. v. Airtime Management Support Ltd. (2003) 2 SCNJ. 148 @ 173 just to mention but a few. F

Before concluding this Judgment, I will deal even briefly, with Ground (a) of the Ground of Appeal, which is sub-sumed in the lone issue of the Appellant and dealt with at page 3 paragraph 05/ (e) and (f) of the Appellant's Brief dealing with the case of Olayiwola Benson v. Oladipupo Ashiru (supra) which is also reported in (1967) All NLR 184 @ 188 and also with Issue 2 of the Respondents. G

While the Appellant asserts and contends that the decision in the case, is not an obiter as erroneously reported in All NLR contrary he H says, to the NCLR ratio 2, the learned trial Judge, labeled or called it at page 97 of the Records, “archaic” holding that it is an obiter and therefore, not binding on the trial court.

Said he, inter alia as follows:

“..... Besides, that statement of the Supreme Court was made obiter. As obiter it is not binding on the lower court as precedent as far as the doctrine of stare decision, (sic) is concerned. See paragraph 85 line 15 of the Reports at obiter (1) (sic) which shows clearly that the statement was an obiter dictum. In view of the position of the law this Supreme Court decision is not binding, on the lower court as a precedent. The lower court was right to have refused to be bound by it or over (sic) considers it.

Apart from the position of the law being very clear as regard venue I have shown above, that the constitution of the action for libel in case of OLAYIWOLA ASHIRU (supra) appears to be archaic and not in tune with the position of the law as explained above”.

It is the submission of the, learned counsel for the Appellant, that “even if the Court of Appeal judges (sic) were correct (which is not conceded), it will be open to the Court of Appeal to make pronouncement on the applicability of the Rules of the Common Laws of England on question of Private International Law in the High Court, of Lagos. State as the Court of Appeal will not be caught, by the doctrine of stare decisis. See the case of 7UP Bottling Company Ltd and others vs. Abiola and Sons Nigeria Ltd. (1995) 3 NWLR part383 page 257 at pages 270 - 271 here the Supreme Court held as follows:-

“The legal position is that the Court of Appeal and other lower courts are bound by the decisions of the Supreme Court. However where the principles enunciated in the decisions of the Supreme Court are not relevant or applicable to the issue or issues arising for determination in the case before the Court of Appeal or any other lower courts, it is not necessary that the Court of Appeal or any other lower court should apply the aforesaid principle”.

[the underlining mine]

The learned counsel, then queried thus:

“What makes the Supreme Court decision in the case of Olayiwola vs. Ashiru (supra) archaic when it has not been overruled by another Supreme Court decision?”

He then submitted that the said case, is still good law as it has not been overruled by another Supreme Court decision. That contrary to the finding of the Court of Appeal on page 97 of the Records of Appeal to the effect,

“That case is not in all fours with this present case. That case, it would appear, involved issues relating to the Fatal Accident and not libel”.

He finally submitted that the above case, covers all Torts including libel.

With respect, I have, no hesitation, in rejecting and dismissing the assertion that the Olayiwola’s case (supra) covers all sorts of Torts including libel. I say so because, the principle in the Tort of negligence involving Fatal Accident cases, CANNOT and WILL NEVER be the same principle, as to jurisdiction in libel cases as eloquently stated by this Court that in an action for libel, the proper venue for adjudication of the matter, is where the cause of action arose – i.e. where the libel, was published and not where the defendant resides. The principle as to venue in Fatal Accident cases, in my respectful view, is miles and miles apart from that of place of publication of the said Libel. As a matter of fact, going into the question of obiter dictum in the circumstances, will amount, in my respectful view, to an academic exercise as the two Torts of libel and place of its publication and Fatal Accident cases, are not the same and cannot be the same, I so hold.

Be that at it may, for the records and/or for purposes of emphasis, the decision of this Court in 7UP Bottling Co. Ltd, & ors. Vs. Abiola & Sons Nig. Ltd, (supra) which is also reported in (1995) 3 SCNJ. 37 @ 49 as regards obiter dictum, is firmly settled. See also the case of Afro-Continental Nig. Ltd, v. Ayantuyi & 8 ors. (1995) 9 NWLR (Pt.420) 411 @ 435 also cited and relied on in the Respondents’ Brief (it is also reported in (1995) 12 SCNJ. 1 @ 23-24 - where Iguh, JSC, stated inter alia, as follows:

“It is indisputable that the judgment of a court, the legal principle formulated by that court which is necessary in the determination of the issues raised in the case, that is to say, the binding part of the decision is

its ratio decidendi as against the remaining parts of the judgment which merely constitute obiter dicta, that is to say, what is not necessary for the decision. See Saudi v. Abdullahi (1989) 4 NWLR (Pt.116) 387; Bamgboye v. University of Ilorin (1991) 8 NWLR (Pt.207)1 at page 24 etc. An
 B *Obiter dictum of the Supreme Court is clearly not binding on this court or indeed on the lower Courts, for obiter dicta, though they may have considerable weight are not rationes decidendi and are therefore not conclusive authority. See American International Insurance Co. v. Ceekay Traders Ltd. (1981) 5 S.C. 81 at page 110. Where however an obiter dictum in one case has been adopted and becomes a ratio decidendi in a latter case, such obiter dictum will be taken to have acquired the force of a ratio decidendi and would therefore become binding. See Victor Rossek and others v. African Continental Bank and Another (1993) 8 NWLR*
 D *(Pt.312) 382. The question whether a decision or pronouncement of this court is binding on the Court of Appeal depends on whether that decision or pronouncement is an obiter dictum or was made per incuriam.*

If the pronouncement is a mere obiter dictum then of course, it
 E *cannot be binding, but if it was made per incuriam, it will nevertheless be binding on the Court of Appeal in accordance with the principle of stare decisis until the error in the judgment has been corrected”.*

[the underlining mine]

F His Lordship cited/referred to some other decided cases in support therein. See also per Kutigi, JSC, (as he then was now CJN) at page 12 of SCNJ.

The decision in 7UP Bottling Co. Ltd. v Abiola & Sons Nig. Ltd, (supra) as regards obiter dictum, as I have stated above, is firmly settled
 G particularly when dealing with the hierarchy of courts and the principle, that it is not proper for a lower court, to defy the decided authority of a higher court otherwise, it may border on or amounts to judicial impertinence. In the above case, the case of Osho v. Foreign Finance Corpora-
 H tion (1991) 4 NWLR (Pt.184) 157 was referred to, to the effect that the legal position in this country, is that the Court of Appeal and other lower courts, are bound by the decision of this Court. That however, where the principle enunciated in any decision of this Court, is not relevant or appli-

cable to the issue or issues arising for determination in the case before the Court of Appeal or lower court, it should not apply the aforesaid principle. See also the cases of Nigerian Airports Authority v. Chief Okwo (1995) 7 SCNJ. 1 @ 12, 13; and recently, Dalhatu v. Turaki & 5 ors. (2003) 7 SCNJ. 1 @ 12, 17. In the case of Nigeria-Arab Bank Ltd. v. Barri Engineering Nig. Ltd. (1995) 8 NWLR (Pt. 413) 257; (1995) 9 SCNJ 147 @ 175, Ogundare, JSC, (of blessed memory) in dealing with the difference between Ratio Decidendi and Obiter Dictum, stated inter alia, as follows:

“The doctrine of judicial precedent (stare decisis) requires all subordinate courts to follow decisions of Superior Courts even where the decision are obviously wrong having been based upon a false premise: this is the foundation on which the consistency of our judicial decision is based. See Ngwo v. Monye (1970) 1 ANLR 91 @ 100. It is however, the principle of law upon which a particular case is decided that is binding. Such principle is called the ratio decidendi. A statement made in passing by a judge which is not necessary to the determination of the case in hand is not a ratio decidendi of the case, but an obiter dictum and it has no binding effect for the purpose of the doctrine of judicial precedent. See Ofunne v. Okoye (1966) ANLR 91”.

[the underlining mine]

The learned counsel for the Appellant from the above, can now see with respect, that he was standing on quick sand when he submitted albeit erroneously, to the effect, that every obiter dictum of the Superior Court or this Court, must be or is binding on the Court of Appeal and other lower courts. See also the case of Dalhatu v. Turaki & 5 ors. (supra). In other words, in considering or determining whether a decision is obiter dictum or not, each case, must be looked at on its peculiar facts.

For the avoidance of doubt, in the said case of Olayiwola v. Ashiru (supra) which I had stated is a Fatal Accident case, the motor accident which caused the death of the deceased, happened in Iperu in the former Western Nigeria. Thereafter, the Plaintiff for and on behalf of himself and the dependant relatives of the deceased whom he described as his wife,

sued, the Defendants/Appellants in the High Court of Lagos under the Fatal Accidents Act, 1846. The trial court found the negligence proved, but not the Plaintiffs marriage to the deceased and awarded damages only to the dependant relatives. On appeal, this Court, held that the Plaintiff from the High Court Rules, did not have any interest of his own and therefore, not qualified to sue in a representative capacity having no title to so sue. The action was therefore, dismissed.

As even appears in the ANLR, the trial Judge had held erroneously, that the Act, also applied in Western Nigeria concurrently with the Torts Law. Issue was joined in this regard. It was held inter alia, by this Court per Brett, JSC, that the rules of Common Law of England on the question of Private International Law, apply in the High Court of Lagos. That under these rules, an action for Tort will lie in Lagos, for a wrong alleged to have been committed in another part of Nigeria if,

“(a) the wrong was of such a character that it would have been actionable if it had been committed in Lagos and

(b) it must not have been justifiable by the law of the part of Nigeria where it was done”.

It is this holding that is stated or described by the Editor, in the (1967) ANLR 184 @ 188 to be obiter, that the learned counsel, for the Appellant, has submitted in their Brief, to cover all Torts including libel. With the greatest respect to the learned counsel, by no stretch of imagination, can the above holding of this Court, be equated to or described as similar to the principle in libel cases as regards publication and venue of an action contained in the said Judgments in Egbue v. Araka, Nsirim v. Nsirim cited in Ezeugha v. Adimorah (supra). While I agree with the court, below, that the position of the law as regards venue in the publication of libel cases, being very clear, and that the decision in Olayiwola v. Ashiru (supra) is inapplicable, I, with respect, do not agree with it, that the said decision in Olayiwola’s case (supra) is “archaic”. In my respectful view, that pronouncement, is at best or worst, an obiter. It is now firmly settled that where a decision of a Court is right, the reason given for so holding, is immaterial. See the case of United Bank For Africa Ltd. & anor. v. Mrs. Ngozi Achoru (1990) 6 NWLR (Pt.156) 254 @ 270;

In substance, in my respectful view, all that the court below stated in this respect, boil down or amount to the fact that the ease of Olayiwola v. Ashiru (supra), is not applicable to the facts in the instant case leading to this appeal. All the fuss in the Appellant's Brief in respect of this part or B issue, with respect, is unnecessary. I respectfully, reject the same as being frivolous and lack substance. In any case, both in the Grounds of Appeal and in the issues formulated in the court below by the Appellant, the applicability of the said Common Law Rules, were not pleaded or C raised. So, it is now a non-issue. I so hold.

In concluding this Judgment, I note that there are concurrent findings of fact by the two lower courts and on the decided authorities of this Court, I cannot interfere. I abide by the consequential order in respect of D costs.

TABAI JSC

I have read, in advance, the leading judgment of my learned brother E Muhammad JSC and I agree that the appeal lacks merit. The alleged libelous publication was established to have been published in Ogun State and it is the High Court of Ogun State that has jurisdiction. There is certainly no basis for disturbing the concurrent decision of the two courts F below. I also dismiss the appeal. I abide by the orders on costs in the lead judgment.

CHUKWUMA-ENEH JSC

This appeal is on the proper venue for the institution of this action, a libel action. The Lagos State High Court declined jurisdiction and struck out the suit. The action has commenced in the Lagos State High Court, Ikeja Judicial Division the plaintiff claimed inter alia against the defendant H jointly and severally the sum of N25million for libel. In expatiation the plaintiff had averred in the statement of claim, as follows:

“10. That by pasting the said auction notice on the plaintiff's

property at No. 12 Adegbite Street, Iju Ajuwon, Agege Lagos State the auction notice and the words contained therein in their natural and ordinary meaning meant and were understood to mean.

(a) *That the owner of the property No. 12 Adegbite Street, Iju Ajuwon, Agege is indebted to the first Defendant.*

(b) *That the plaintiff is unable to pay her debt.*

(c) *That the plaintiff's property No. 12 Adegbite Street, Iju Ajuwon, Agege is to be sold as a result of the inability of the plaintiff to pay her debt;*

(d) *That the plaintiff is not a fit and proper person to hold the post of an Assistant Manager in the Nigeria Arab Bank Ltd or any other financial institution for tat matter*

11. *The said auction notice pasted by the second Defendant on the property of the plaintiff as agent of first Defendant was due to the negligence or collusion of the official of the first Defendant their Unipanu Branch without proper investigation”*

12 *By a letter Ref. OD/GEN/40/Vol. 2/26 dated 26th March, 1992. The plaintiff through her solicitor Chief Olu Dairo demanded an apology and compensation from the first Defendant on behalf of the plaintiff but the first Defendant remained adamant.*

13 *By reason of the premises, the plaintiff has been injured in her credit and reputation and has been brought into public scandal, odium and contempt.”*

Wherefore the Plaintiff's claim is for N25 million damages for the libellous publication as endorsed on the Writ of Summons.

Before the instant suit, the plaintiff had earlier commenced an action as per suit No. MT/7/91 before the Ota High Court in Ogun State where the property on which the libellous'-publication was posted is situate.

On having been served with the processes in this matter from the Lagos State High Court, the Defendant by an application filed on 12/3/1993 accompanied, by an affidavit in support challenged, the jurisdiction of the said court to adjudicate on the alleged libellous matter of which its publication was made in Ogun State and to have it struck out, for want of

jurisdiction' as the cause of action arose in Ogun State not in Lagos State. The trial court acceded to the Defendant's prayer in the application. The application is struck out. Dissatisfied with the decision of the trial court the plaintiff appealed to the Court of Appeal, -which again dismissed the appeal and affirmed the ruling of the trial court. The plaintiff B has finally appealed to this court on a Notice of Appeal; dated 25/7/2001 containing 3 grounds of Appeal.

The plaintiff is the appellant in this court while, the Defendants are the respondents.

Parties in this matter filed and exchanged their respective briefs of argument. The Respondents in their brief of argument have raised a preliminary objection to the three grounds of appeal as per the Notice of Appeal as offending Section 233 (2) (a) of the 1999 Constitution and therefore are incompetent. The cases of *Ogbechie. v Onochie* (1986) 2 D NWLR (pt 26) 484 at 491 and *Godwin v C.A.C* (19V8) 4 NWLR (pt 584) 162 have been relied upon to contend that the three grounds have been improperly couched as errors in law but are unequivocally grounds of fact or at best, grounds of mixed law and fact as brought out by their E particulars of error.

This aspect of the appeal has been dealt with satisfactorily in the lead judgment of my learned brother Muhammad JSC whose judgment I have had the privilege of a preview before now, and agree with his reasoning and conclusion. There is no need over flogging that issue and so F I go to other questions in the matter.

The appellant have raised a sole issue for determination in her brief of argument it reads as follows:

"(1) Whether the Court of Appeal was right in upholding the decision of the High Court." G

The Respondents have identified 2 issues in their brief of argument as follows:-

"(1) Whether the Court of Appeal was right when it held that the High Court of Lagos State has no jurisdiction in a libel suit in which the publication of the libellous document did not take place within the jurisdiction of the court." H

(2) *Whether in this libel action, the Court of Appeal was bound by the decision of the Supreme Court in the fatal accident's case of Olayiwola Benson and anor v. Joseph Oladipupo Ashiru (1967) 1 ANLR which was stated to be an obiter dictum.*"

B I intend to look at issue one as raised in both briefs of argument which in essence encompasses then question of venue and the ambit of the court's jurisdiction predicated on the facts as contained in the statement of claim in this matter. I look at this question from the jurisdiction perspective as against bring into the matter the doctrine of forum conveniens without addresses of counsel. It is my view having read issue one C in both briefs of argument more closely that issue one as raised in the respondent's brief of argument encapsulates issue one in the appellant's brief. The two issues are therefore to be treated together.

D Notwithstanding, a lot of dust stirred up in this matter by the appellant; it is beyond the realm of certainty that in this matter the crux of the question to be answered hinges on whether having published the alleged libellous material in Ogun State a common cause between the E parties, the Lagos State High Court can after all assume jurisdiction to deal with the matter. In this regard, it is the factor of publication that significantly stands out, and juxtaposed to it is the question as to the court that has the power to entertain the suit. See Ezeugha v. Adimorah (1993) F 1 NWLR (pt.271) 620 at 625 F - G. The facts of this, matter lead one to the inevitable; conclusion that the publication of the instant libellous matter happened as conceded by the appellant within the territorial confines of Ogun State also the situs of the property on which the notice of the auction sale was pasted. In this regard, I must restate that just as the G subject matter of a case has to come within the court's jurisdiction, the court's territorial jurisdiction and the composition of the court are other essential aspects of jurisdiction to giving competence to the proceedings before the court. See Wuyep v Wuyep (1997) 10 NWLR (pt 523) 154, H Madukolu v Nkemdilim (1962) 1 ANLR 587, Magaji v Matari J2000) 5 SC 46, Aloa v ACB Ltd (2000) 6 SC (pt. 1) 27 Araka v Ejeagun (2000)12 SC (pt 1) 99. Putting it rather simply, it is the nature of the subject matter or parties or the territorial limits over which the court can exercise juris-

diction that restricts the exercise of jurisdiction of court. See: Ibrahim v. INEC (1999) 5 NWLR (pt.614) 334 at 341. This is the case of the Lagos State High Court, that its jurisdiction in this matter is restricted by the territorial limit imposed try the instrument establishing it and 1999 the Constitution which defined the areas, of the two states.

I now turn to examine the question of publishing of the instant libellous matter not on any elaborate scale although within the context of Defamation in order to tailor accordingly my reasoning above to which of the two States, Ogun State or Lagos State has jurisdiction over this matter. It is settled law that there is no actionable wrong in defamation unless there is publication, of the defamatory material to at least one person not being the person defamed. Thus, the place of the publication therefore becomes important factor. The instant publication happened in Ogun State even the processes filed in court say so. It is true to say that the mere fact of Lagos State being the centre from which the libellous stuff emanated does not ipso facto make it the centre of publishing the instant libel. Indeed, it is not as even the appellant conceded that much. It is therefore, not the writing of libellous stuff that is the cause of action; it is the publication. See C.R.S.N. Corporation v Oni (1995) 1 NWLR (pt371) 270 at 276. I think I am right in saying that publication which is making known of defamatory material (i.e. libellous matter as in this case) to some other person(s) is the cause of action in defamation and also in the instant matter. In this regard, I buttress the proposition by a strong legal authority as Nsirim v Nsirim (1990) 3 NWLR (pt.138) 285. However, I must make the point that to ascertain where a libellous matter as here is published recourse must be had to the statement of claim See Ibrahim v Osun (1987) 4 NWLR (pt 67) 965. From scrutinizing the statement of claim, the point has to be made that it is the place the cause of action arose that is also the place the libellous matter was published; both agree in Otta in Ogun State. I shall come to round off this point later in this judgment.

Meantime, this takes me to the question of cause of action again, very crucial in the context of this matter. Cause of action has been defined as a combination of facts or circumstances giving the plaintiff a

right to sue. By a line of authorities it comprises of two factors namely: the defendant's, wrongful act and consequential damage suffered by the plaintiff. See *Adesokan v Adegorolu* (1997) 3 NWLR (pt 493) 261, *Ajayi v Military Administrator, Ondo State* (1997) 5 NWLR (pt 504) 237, *Emiator v Nigeria Army* (1999) 2 NWLR (pt 631) 362, *Agbanelo v Union Bank of Nigeria Ltd* (2000) 4 SC (pt 1) 233; *Oduntan v Akibu* (2000) 12 SC (pt 11) 106 and *NV Scheep v. The MV "S. Araz"* (2000) 12 SC (pt 1) 164. There can be no gainsaying that the cause of action is publishing the libellous stuff to a third party. And, indeed in this matter it is the place the libel is published that the cause of action also arose i.e. Ogun State. See *Ezeugha v. Adimorah* (supra). The fact that Ogun State is also the situs of the subject matter (i.e. land) in this action and thus it strengthens the case of Ogun State as the proper venue for the hearing and determination of the matter. The Lagos. Stated High Court has no power to hear and determine the instant matter. Therefore, the trial court as well as the Court below, rightly in my view declined jurisdiction to entertain the matter. Issue 3 is resolved against the appellant.

Before I sign off this judgment must express my disgust over the delay occasioned to this matter which has dragged on for this long that is, said 25/5/1992 (when the writ issued) nearly 14 years now over interlocutory matters and appeals. The appellant's counsel, respectfully, has for those years being chasing shadows. Now, that the chips are down and the chickens have come home to roost he must start counting the costs of the wasted years. And the psychological trauma he has brought to bear on his client through his indulgence in frivolities over undeserving appeals. Of course, looking at the other side of the coin, one has one or two things to say against the system itself that allowed him to gamble thus far. Both questions deserve to be addressed urgently.

In sum, this appeal is unmeritorious and I agree with judgment of my learned brother, Muhammad JSC, that the appeal should be dismissed. I dismiss it and abide by the orders in this lead judgment.