

SUPREME COURT OF NIGERIA

11TH APRIL 2008 SC. 337/2002

**CORAM :-A. I. KATSINA-ALU, S. A. AKINTAN, M.
MOHAMMED, W. S. N. ONNOGHEN, F. F. TABAI , JJSC**

WEST AFRICAN EXAMINATION APPELLANT
COUNCIL

AND

AKINOLA OLADIPO AKINKUNMI RESPONDENT

ACTIONS - Issues - Competence and jurisdiction - Issues of - Should be accorded priority of consideration - As they render the suit liable to be struck out (H1)

CONSTITUTIONAL LAW - Fundamental rights - Enforcement procedure - Propriety of - Fundamental Rights (Enforcement Procedure) Rules 1979 - Is not applicable - Where main claim - Is not on fundamental rights (H2)

ACTIONS - Competence of - Determining factor - In ascertaining competence of an action - Is plaintiff's claim - And the reliefs sought - Not how couched but essence thereof (H3)

FACTS

The applicant/respondent had commenced a fundamental right enforcement application under the Fundamental Rights (Enforcements Procedure) Rules 1979, against the respondent/appellant before the High Court of Lagos State in October 1999. Respondent had by the application sought an order of the trial court compelling the appellant to revalidate the result obtained by the respondent in the West African School Certificate Examination conducted by the appellant, which result was cancelled by the appellant after it's provisional release. Prior to the cancellation, the respondent had used the provisional result to secure admission into the University of Ilorin. The ground upon which the respondent sought the reliefs was that the appellant cancelled the results in punishment for his alleged involvement in examination malpractice without giving him fair hearing.

The trial court, after hearing the suit on affidavit evidence as applicable under the Fundamental Rights (Enforcement Procedure) Rules 1979, granted to the respondent all the reliefs sought. Appellant appealed to the Court of Appeal against the decision of the trial court but the appeal was dismissed. Hence the appellant has brought the instant appeal to the Supreme Court. Briefs were filed and exchanged in accordance with the Supreme Court Rules. Appellant raised four issues for determination in its brief while respondent raised three. One of the issues raised by each party was on the validity of the Fundamental Right (Enforcement Procedure) Rules 1979, as the procedure adopted by the respondent in complaining against the cancellation of his results by the appellant. It was eventually on that issue alone that the appeal was determined.

ISSUE FOR DETERMINATION

1. *Whether the respondent's complaint or claim against the cancellation and/or withdrawal of his Senior School Certificate Examination (S.S.C.E) result by the appellant could be validly brought by an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, wherein the violation of Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Article 7 of the African Charter on Human and Peoples' Rights is being alleged?*

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

ACTIONS - Issues - Competence and jurisdiction

1. The respondent's issue three is, in substance, the same as the appellant's issue three. The issue is that of competence and jurisdiction and should, of necessity, be accorded priority of consideration for the obvious reason that resolution of same in favour of the appellant renders the suit liable to be struck out for incompetence. (p. 1947 D)

Fundamental rights - Enforcement procedure - Propriety of

2. The settled principle is that in ascertaining the justiceability or competence of a suit commenced by way of an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court must ensure that the enforcement of the fundamental rights under Chapter IV of the Constitution is the main claim and not the ancillary claim. Where the main or principal claim is not the enforcement of a

fundamental right the jurisdiction of the court cannot be said to be properly invoked and the action will be liable to struck out for incompetence. In *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt.510) 549, this court per Ogundare, JSC, at page 576-577 gave effect to this principle when he stated:-

“The primary complaint of the appellant in the whole case was his deposition as the Emir of Muri; the alleged breaches, fundamental rights to fair hearing, liberty and freedom of movement were merely accessory to his primary complaint. The proceedings by way of the Fundamental Rights (enforcement Procedure) Rules, are inappropriate in the circumstances..... The appellant herein ought to have come by way of a Writ of Summons.....”

In *Egbuonu v. Borno Radio Television Corporation* (1997) 12 NWLR (Pt.531) 29, this court applied the same principle. Invoking the principle, this court per Kutigi, JSC, (as he then was) now CJN at page 40 stated:-

“In this appeal the claims are partly for wrongful dismissal or termination of appointment and partly for breach of fundamental right But here as in Tukur the principal claim being wrongful termination of appointment which ought to have been commenced by a Writ of Summons which was not, then all the claims, principal and subsidiary which flow directly from it are incompetent and ought to be struck out. That was what the Court of Appeal did in this case. I believe it was right.” (pp. 1947 H/1948 F)

ACTIONS - Competence of - Determining factor

3. It is settled law that, in ascertaining the competence of a suit, the determining factor is the plaintiff's claim. On this question however, it is not the manner in which the claim is couched that matters. Nor is the categorisation given to the claim by the defendant that counts. The court has a duty to carefully examine the reliefs claimed to ascertain what the claim is all about.

A careful examination of the three reliefs shows clearly that although the first relief claims a declaration that the cancellation was a breach of the respondent's right of fair hearing and therefore unconstitutional, the main claim is the order for restoration of the cancelled result and making same available to the University of Ilorin for his

graduation. Thus, the mere assertion of the violation of the respondent's constitutional rights of fair hearing does not necessarily make the action maintainable by recourse to the Fundamental Rights (Enforcement Procedure) Rules. The court has to examine the reliefs closely to ascertain what the plaintiff claims. On a thorough scrutiny of the reliefs claimed, it is my view that the principal and ultimate claim is the restoration of the cancelled result of the respondent for the purpose of its use for his graduation. And on the authority of *Tukur v. Government of Taraba State* (supra) and others which I have discussed above, this suit ought to have been initiated by a Writ of Summons where the parties could have filed and exchanged pleadings and evidence adduced and tested on the issue about the propriety or otherwise of the appellant's cancellation of the respondent's result. In the 30 paragraph counter-affidavit of the appellant, for instance, the appellant raised issues about the respondent's status as "an external candidate" and matters incidental thereto, whether or not she had any duty for direct communication with the respondent, etc. These are not issues that can be effectually tried and resolved by affidavit evidence. (pp. 1949 D/1950 C)

NOTABLE POINTS OF INTEREST

AKINTAN JSC

1. Action founded on contract cannot be brought under the Fundamental Procedure Rules

One of the issues is whether the respondent's action can properly be instituted under the Fundamental Rights (Enforcement Procedure) Rules, 1979. The position of the law on that point has long been settled in a number of decided cases. The law on the point, as well settled, is that only actions founded on a breach of any of the Fundamental Rights guaranteed in the Constitution can be enforced under the Rules. It is also a condition precedent to the exercise of the court's jurisdiction that the enforcement of Fundamental Right or the securing of the enforcement thereof should be the main claim and not an accessory claim. It follows therefore that an action founded on contract, such as one for wrongful dismissal or termination of an appointment, cannot be brought under the Rules. (p. 1952 E)

MOHAMMED JSC

2. Proceedings flowing from a claim wrongly initiated is a nullity

The law is trite that where a claim is not initiated by due process of law, the claim is incompetent and where all the same the incompetent claim was heard by the court, the proceedings before the court are a nullity. (p. 1954 F)

B

REPRESENTATION

Chief Uche Ohadugha, for the Appellant.

Jiti Ogunye, (with him, Lekan Alabi), for the Respondent.

C

CASES REFERRED TO

WAEC v. Mbamali (1992) 3 NWLR (Pt. 230) 481

Peterside v. I.M.B. (Nig.) Ltd. (1993) 2 NWLR (Pt.278) 712 at 731-734

D

Ransome Kuti v. A.G. of the Federation (2001) FWLR (Pt. 80) page 1637 at 1709

Dieli v. Iwuno (1996) 4 NWLR (Pt. 445) 622 at 633

Tukur v. Govt. of Taraba State (1997) 6 NWLR (Pt. 510) 549 at 569

Okeke v. Oruh (1999) 4 S.C. (Pt. II) 37; (1999) 6 NWLR (Pt. 606) E 175 at 192

Calabar East Co-operative v. Ikot (1999) 12 S.C. (Pt. I) 133

Ajuwon v. Adeoti (1990) 3 S.C. (Pt. II) 76

Agu v. Ikewibe (1991) 4 S.C. 1; (1991) 3 NWLR (Pt. 180) 385 at 403 and 416

F

Olaniyi v. Aroyehun (1991) 7 S.C. (Pt.I) 1; (1991) 5 NWLR (Pt.194) 652 at 686

Global Trans Oceanico S.A. v. Free Ent. (Nig.) Ltd, (2001) 2 S.C, 154

G

Baba v. N.C.A.T.C. (1991) 7 S.C. (Pt.I) 58; (1991) 5 NWLR (Pt.192) 388 at 414-415

Oyeyemi v. Commissioner For Local Govt. (1992) 2 NWLR (Pt.226) 662 at 678

H

STATUTE & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 36, 42, 46
African Charter on Human and Peoples Rights (Ratification and

Enforcement) Act, Cap. 10, LFN, 1990, Article 7
 Fundamental Rights (Enforcement Procedure) Rules, 1979, O. 1 r. 2
 & 3

LEAD JUDGMENT BY TABAI JSC

B This action was initiated at the Lagos Division of the High Court of Lagos State by way of a motion *ex parte* filed on the 5th of October, 1999. The applicant therein is the respondent in this appeal. The respondent therein is the appellant here. The application was brought under Section 46(1) and (2) of the 1999, Constitution and C Order 1 Rules 2 and 3(1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. In the application, the respondent sought the leave of the court to bring an application for the enforcement of his fundamental right of fair hearing.

D Leave was granted and pursuant thereto the respondent, on the 20th October, 1999, filed a Motion on Notice. The reliefs sought were:

“(i) *A declaration that the cancellation of the results obtained by the applicant in the May/June, 1992, Senior School Certificate Examination by the respondent is illegal, unconstitutional, null and void as same violates the applicant’s right to fair hearing guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 and Article 7 of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap 10, Laws of the Federation of Nigeria, 1990.*

(ii) *An order quashing the decision of the respondent to cancel the said results and compelling the respondent to issue the applicant a certificate based on the said results.*

G (iii) *An order compelling the respondent to furnish the Admission Office of University of Ilorin the purportedly cancelled results of the applicant in the said May/June, 1992, Senior School Certificate Examination forthwith.”*

H The application contained a 23 paragraph statements of facts to which were attached Exhibits A, B, C and D. In opposing the application the appellant filed a 30 paragraph counter-affidavit to which were attached Exhibits PE1, PE2, PE3 and PE4. The parties, through their counsel filed and exchanged written addresses. In its

ruling on the 12th September, 2002, the application was granted by the trial court. Dissatisfied, the appellant went on appeal to the court below. By its judgment on the 8th April, 2002, the appeal was dismissed.

Still aggrieved, the appellant has come on appeal to this court. The appellant's Brief was prepared by Uche Ohadugha and it was filed on the 25/3/03. He also prepared appellant's Reply Brief which was filed on the 18/3/04. Mr. Jiti Ogunye prepared the respondent's Brief. Same was filed on the 5/6/03. The Notice of Appeal dated the 5th July, 2002, contained eight grounds of appeal. And from these grounds learned counsel for the appellant formulated the following four issues for determination:-

1. Whether in the conduct and writing of the May/June, 1992, Senior School Certificate Examinations, the status of the respondent as "*external candidate*" was proper and/or allowed and whether the said status had any effect on the respondent in this transaction.

2. Whether the relationship that exists between the appellant and the respondent in the conduct and writing of the Senior School Certificate Examinations was contractual and which empowers the appellant to withhold and cancel results of any candidate(s) including that of the respondent who engaged in examination malpractices.

3. Whether an application for a declaration under the Fundamental Rights (Enforcement Procedure) Rules, 1979, that the cancellation of the respondent's result in the May/June, Senior School Certificate Examinations is illegal, unconstitutional and violates the respondent's right to fair hearing under Section 36 of the 1999, Constitution and Article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation of Nigeria, 1990, as the respondent was not heard, either orally or in writing before the cancellation can be maintained, sustained or resolved as a constitutional issue, in a case of examination malpractice against a candidate and in the face of the Rules and Regulations governing the conduct of the examinations.

4. Whether or not in the circumstances, there should be public policy considerations in arriving at a decision by the court.

Mr. Ogunye for the respondent identified the following three issues for determination:-

1. Whether the cancellation of the result of the respondent in the May/June, 1992, West African School Certificate Examination after the release of same to the respondent by the appellant on the ground that the respondent engaged in examination malpractice, is not illegal, unconstitutional, null and void in view of the fact that the respondent was not accorded a fair hearing before the cancellation of the result?

2. What is the nature of the relationship between the respondent and the appellant (whether the relationship between the respondent and appellant in the May/June, 1992, West African School Certificate Examination which the respondent sat for was contractual and whether the undertaking by the respondent to abide by the rules governing the said examination when he registered for same empowered the appellant, while exercising its statutory disciplinary power and the West African Examination Council Act, Cap. 468, Laws of the Federation of Nigeria, 1990, to cancel the respondent's result without regard to the respondent's right to fair hearing under the Constitution and the African Charter on Human and Peoples' Rights)?

3. *Whether the respondent's complaint or claim against the cancellation and/or withdrawal of his Senior School Certificate Examination (S.S.C.E) result by the appellant could be validly brought by an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, wherein the violation of Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Article 7 of the African Charter on Human and Peoples' Rights is being alleged?*

On behalf of the appellant, Chief Uche Ohadugha made the following submissions. With respect to the appellant's issue one, learned counsel distinguished two categories of candidates for the Senior School Certificate Examinations conducted by the appellant yearly. According to him, the first category are "*School Candidates*" who are final year students in a secondary school who are registered through and presented by the secondary school to the appellant specifically for the May/June edition of the Senior School Certificate Examinations. The second, according to counsel, are the "*Private Candidates*" who apply individually and register with the appellant specifically for the November/December edition of the Senior School Certificate Examinations.

It was the submission of learned counsel that the respondent, not being a final year student of the Atunrase Boys High School, Surulere, Lagos, was not qualified, in the first place, to be registered through and presented by the said secondary school to the appellant for the May/June, 1992, Senior School Certificate Examinations. It was his final submission on this issue that the respondent cannot therefore be heard to complain, having exposed himself to the risk of non-qualification to so act and the consequences that ensued. B

On the second issue it was the submission of learned counsel for the appellant that there was a contractual relationship between the appellant and the respondent and that the Rules and Regulations which constitute the terms and conditions of the said contract are contained in the Standard Forms prepared and presented by the appellant to the candidates including the respondent who accepted to be bound by the said terms and conditions by filling and signing same. Counsel referred specifically to Section B2(1) and (2) of the appellant's Rules and Regulations and submitted that in view of the malpractices established in the respondent's centre by the National Examinations Committee to which body the Principal of the Atunrase Boys High School, Surulere also belongs, the appellant had the right to cancel the provisional result of the school including the result of the respondent. He submitted that *WAEC v. Mbamali* (1992) 3 NWLR (Pt. 230) 481, is distinguishable from this case. C D E

As regards the third issue, it was the submission of learned counsel that the rights sought to be enforced are common law contractual rights and not fundamental rights enforceable by recourse to the Fundamental Rights (Enforcement Procedure) Rules, 1979. It was the contention for the appellant that the mere fact of a declaratory relief would not elevate the cancellation of the result without a hearing to a constitutional right. The release or cancellation of the Senior Secondary Certificate Examination result relates and is limited to the parties' contractual obligation and has nothing to do with the fundamental rights in the Constitution, counsel argued. On the meaning of the fundamental rights enshrined in the Constitution, learned counsel relied on *Peterside v. I.M.B. (Nig.) Ltd.* (1993) 2 NWLR (Pt.278) 712 at 731-734 and *Ransome Kuti v. A.G. of the Federation* (2001) FWLR (Pt. 80) page 1637 at 1709, According to coun- F G H

sel, the civil rights and obligations of the respondent exist independent of his entitlement to fair hearing and therefore the rights claimed are not constitutional rights to which the respondent is entitled.

On the 4th issue of whether there should be public policy considerations in arriving at a decision by the court, learned counsel referred to Section 1 (i) of the West African Examinations Council Act, Cap. 468, of the Laws of the Federation of Nigeria, 1990 and submitted that in the performance of its duties in the conduct and review examinations and the award of Certificate and diplomas, the appellant is bound to act in the interest of the public at large and for public good. He relied on *Sonnar (Nig.) Ltd. & Anor. v. Partenreedri M.S. Norwind* (1987) 9-11 S.C. 121 at 143. Counsel pointed out the uncontroverted fact that the whole school cheated in the examination and submitted that an order for the revalidation of the entire school's result and cautioned on the devastating repercussions of such a pronouncement. He urged in conclusion that the appeal be allowed.

On the 28/12/07, the respondent filed a Notice of Preliminary Objection which is argued in pages 5-8 of the respondents Brief of Argument. It was argued, in substance, that ground 3 of the 8 grounds Notice of Appeal was neither raised in the High Court and Court of Appeal, nor covered by any issue or argument in the appellant's Brief and that the ground should therefore be deemed as having been abandoned. It was further argued that the appellant's issue No. 4 does not relate to nor rest on any ground of appeal and ought to be struck out. For these submissions, learned counsel for the respondent relied on *Dieli v. Iwuno* (1996) 4 NWLR (Pt. 445) 622 at 633, *Tukur v. Govt. of Taraba State* (1997) 6 NWLR (Pt. 510) 549 at 569, *Okeke v. Oruh* (1999) 4 S.C. (Pt. II) 37; (1999) 6 NWLR (Pt. 606) 175 at 192, *Calabar East Co-operative v. Ikot* (1999) 12 S.C. (Pt. I) 133; (1999) 14 NWLR (Pt. 638) 225 at 247, *Omo v. J. S.C. Delta State* (2000) 7 S.C (Pt.II) 1; (2000) 12 NWLR (Pt. 682) 444 at 454 – 455. It was further argued that ground 6 of the Notice of Appeal and appellant's issues Nos. 1 and 4 are fresh points which do not flow from the judgment of the leave of court below and having regard to the failure to seek and obtain the leave of court to raise and argue the ground and issues 1 and 4 based therein are incompetent.

In support of this submission, counsel relied on *Ajuwon v. Adeoti* (1990) 3 S.C. (Pt. II) 76; (1990) 2 NWLR (Pt.132) 271 at 283 -284, *Agu v. Ikewibe* (1991) 4 S.C. 1; (1991) 3 NWLR (Pt. 180) 385 at 403 and 416, *Olaniyi v. Aroyehun* (1991) 7 S.C. (Pt.I) 1; (1991)) 5 NWLR (Pt.194) 652 at 686, *Global Trans Oceanico S.A. v. Free Ent. (Nig.) Ltd*, (2001) 2 S.C, 154; (2001) 5 NWLR (Pt.726) 426 at 438, etc and Order 6 Rule 5(1) of the Supreme Court Rules, 1985 (as amended).

With respect to respondent's first issue, the insistence of learned counsel for the respondent is that the cancellation of the respondent's result on the ground of examination malpractice is not only a punishment for an academic wrong but also that a criminal offence has been committed. This cancellation on the ground of an alleged malpractice without the respondent being heard violates his fundamental rights of fair hearing, he argued. It was contended that in exercise of disciplinary powers against a candidate for examination malpractice, the appellant is acting in a quasi-judicial capacity, comparable to a domestic or administrative tribunal bound to observe the twin rules of natural justice - namely (i) *audi alteram partem* and (ii) *neon judex debet esse in causa sua* - embodied in Section 36(1) of the 1999 Constitution and Article 7 of the African Charter on Human and Peoples' Rights. Reliance was placed on *Baba v. N.C.A.T.C.* (1991) 7 S.C. (Pt.I) 58; (1991) 5 NWLR (Pt.192) 388 at 414-415, *Oyeyemi v. Commissioner For Local Govt.* (1992) 2 NWLR (Pt.226) 662 at 678, *WAEC v. Mbamali* (1992) 3 NWLR (Pt.230) 481. A further submission is that the cancellation of the result was also illegal. Learned counsel referred to the undisputed facts of the respondent's use of the provisional result for admission into the University of Ilorin in October, 1992 and the fact that he only became aware of the cancellation five years after in November, 1997 and submitted that the appellant was, in the circumstances, caught by the doctrine of estoppel by conduct. Reliance was placed on *Oyeyemi v. Commissioner For Local Govt.* (supra) and *Ude v. Nwara* (1993) 2 NWLR (Pt.278) 638 at 662 - 663.

The respondent's second issue pertains to the nature of the legal relationship between the parties. Learned counsel for the respondent referred to Rule 2(6) of the appellant's Rules and Regula-

tions made pursuant to Section 23(1) of the West African Examination Council Act and submitted that the rules are not common law rules of the law of contract. The legal relationship of the parties, it was argued, is statutory and reliance was placed on *Garba v. University of Maiduguri* (1986) 1 NWLR (Pt.18) 550. In response to the appellant's argument that given the large number of candidates involved in the examination malpractice, it was impracticable to accord every candidate a hearing before the cancellation, it was the contention of the respondent that the rules of natural justice provided in the fair hearing provisions of the Constitution and the African Charter on Human and Peoples' Right cannot be circumvented on such flimsy grounds. Assuming (without conceding) that the legal relationship is contractual, counsel argued, it was a contract with statutory flavour similar to that in *Garba's* case and under which any punishment by way of cancellation of result must be preceded by due process. For the third issue of the respondent, learned counsel referred to what he described as a fundamental concession of the appellant at the court below to the effect that the action could well be brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979 and submitted that the Court of Appeal did no more than upholding that position. It was argued that once the respondent claims that he was punished without the opportunity of being heard, he has raised the issue of natural justice and his fundamental rights under Section 36 of the Constitution and for which protection he rightly initiated the action via the Fundamental Rights (Enforcement Procedure) Rules. In conclusion counsel urged that the appeal be dismissed.

In the appellant's Reply Brief, the following arguments were proffered. With respect to ground 3 of the Notice of Appeal the short answer was that it was not argued. On the appellant's issue one, learned counsel for the appellant referred to paragraphs 9 and 11 of the facts in support of application and paragraph 24 of the counter-affidavit and submitted that the issue of "*School Candidates*" for May/June, Senior School Certificate Examinations and that "*External Candidates*" are not allowed for the May/June Examinations was raised at the High Court. Counsel further referred to the Briefs of the parties at the court below and argued that the issue was also raised and argued but that it was not considered in its judgment. It was further

contended that the issue of public policy raised and canvassed both in the High Court and the court below.

Let me first dispose the Preliminary Objection. Ground 3 of the grounds of appeal was not argued and so that takes care of itself. With respect to that arguments about public policy and public good, I am persuade by the argument of the respondent that there is no ground of appeal which it is predicated. I would therefore discountenance all arguments on the appellant's issue four. It is also my view that the arguments about whether the relationship between the parties is contractual or statutory are not quite relevant to the proper determination of the appeal. I would for that reason also discountenance the lengthy arguments in that respect.

Having disposed of the points raised in the Preliminary Objection let me proceed to deliberate on the issues raised in the appeal. From a careful examination of the issues formulated by the parties it appears to me that the respondent's issues one and three sufficiently determine the appeal. ***The respondent's issue three is, in substance, the same as the appellant's issue three. The issue is that of competence and jurisdiction and should, of necessity, be accorded priority of consideration for the obvious reason that resolution of same in favour of the appellant renders the suit liable to be struck out for incompetence.***

The issue is whether, having regard to the reliefs claimed, this action is validly brought by way of an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979. I have earlier, in this judgment, noted in substance the rather sustained argument of Chief U. Ohadugha for the appellant to the effect that the relationship between the parties is contractual which clear terms constitute the Rules and Regulations, of the appellant and to which the respondent accepted to be bound; and that an action emanating therefrom can only be initiated by the issuance of a Writ of Summons and not through an application as was done in this case. He cited some authorities on the guiding principles which I have also noted above.

The settled principle is that in ascertaining the justiceability or competence of a suit commenced by way of an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, the court must ensure that the en-

forcement of the fundamental rights under Chapter IV of the Constitution is the main claim and not the ancillary claim. Where the main or principal claim is not the enforcement of a fundamental right the jurisdiction of the court cannot be said to be properly invoked and the action will be liable to struck out for incompetence. In *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt.510) 549, this court per Ogundare, JSC, at page 576-577 gave effect to this principle when he stated:-

“The primary complaint of the appellant in the whole case was his deposition as the Emir of Muri; the alleged breaches, fundamental rights to fair hearing, liberty and freedom of movement were merely accessory to his primary complaint. The proceedings by way of the Fundamental Rights (enforcement Procedure) Rules, are inappropriate in the circumstances..... The appellant herein ought to have come by way of a Writ of Summons.....”

Applying the same principle, Belgore, JSC, (as he then was) at page 578, said:-

“This matter was taken to the trial court on a wrong vehicle instead of a Writ of Summons designed for initiating an action it was started with a Motion on Notice under Fundamental Rights Procedure under the Constitution. The crux of the complaint in the trial court however is whether the plaintiff was lawfully deposed as the Emir of Muri, but was cloaked under Fundamental Rights. Since the main procedural approach at the trial court was incompetent, no relief could flow from it.”

In *Egbuonu v. Borno Radio Television Corporation* (1997) 12 NWLR (Pt.531) 29, this court applied the same principle. Invoking the principle, this court per Kutigi, JSC, (as he then was) now CJN at page 40 stated:-

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

the Court of Appeal did in this case. I believe it was right.”

In his own contribution Ogundare, JSC., at page 42 said:-

“Having regard to the claims of the appellant set out in the judgment of my learned brother and the affidavit evidence adduced at the trial, there can be no doubt that his main complaint was against the termination of his appointment with the respondent (which he regarded as wrongful) and his sole relief was his reinstatement. All these are not matters for the procedure provided for in Section 42 of the 1979 Constitution. Appellant’s action should have been commenced by a Writ of Summons as provided for in the High Court Rules of Borno State. The action having been thus commenced wrongly, it was rightly struck out by the court below.”

This principle was applied with equal force in *Sea Trucks (Nig.) Ltd. v. Anigboro* (2001) 1 S.C. (Pt.1) 45; (2001) 2 NWLR (Pt.696) 159 at 182.

The question now is whether the principle in these cases applies to this case as to render the suit liable to be struck out for incompetence. ***It is settled law that, in ascertaining the competence of a suit, the determining factor is the plaintiff’s claim. On this question however, it is not the manner in which the claim is couched that matters. Nor is the categorisation given to the claim by the defendant that counts. The court has a duty to carefully examine the reliefs claimed to ascertain what the claim is all about.*** I have earlier reproduced the three reliefs claimed in this action. The first relief seeks a declaration that the cancellation of the respondent’s May/June, 1992, Senior School Certificate Examination Result by the appellant is illegal, unconstitutional, null and void as it violates the respondent’s right of fair hearing. The 2nd and 3rd reliefs claim an order compelling a reversion of the appellant’s cancellation of the respondent’s result, revalidation of the result and furnishing the Admissions Office, University of Ilorin with revalidated result.

The trial court held the view that the suit was rightly brought under the Fundamental Rights (Enforcement Procedure) Rules of the 1979 Constitution and proceeded to grant the reliefs claimed. The Court of Appeal in its reaction endorsed the position of the trial court and concluded:-

"I agree with this view. It is correct, for once it is accepted that the respondent having received a punishment (that is by the cancellation of examination result) by the appellant, an administrative body without hearing, it becomes incontestable that the Fundamental Rights (Enforcement Procedure) Rules, can be invoked to seek legal redress....."

The court's reasoning was predicated entirely on the assertion in the first relief about there being breach of the respondent's natural justice and his fundamental rights of fair hearing under the Constitution. That approach was, with respect rather superficial. The court was bound to carefully examine the reliefs claimed to see what the claim is all about. **A careful examination of the three reliefs shows clearly that although the first relief claims a declaration that the cancellation was a breach of the respondent's right of fair hearing and therefore unconstitutional, the main claim is the order for restoration of the cancelled result and making same available to the University of Ilorin for his graduation. Thus, the mere assertion of the violation of the respondent's constitutional rights of fair hearing does not necessarily make the action maintainable by recourse to the Fundamental Rights (Enforcement Procedure) Rules. The court has to examine the reliefs closely to ascertain what the plaintiff claims. On a thorough scrutiny of the reliefs claimed, it is my view that the principal and ultimate claim is the restoration of the cancelled result of the respondent for the purpose of its use for his graduation. And on the authority of *Tukur v. Government of Taraba State* (supra) and others which I have discussed above, this suit ought to have been initiated by a Writ of Summons where the parties could have filed and exchanged pleadings and evidence adduced and tested on the issue about the propriety or otherwise of the appellant's cancellation of the respondent's result. In the 30 paragraph counter-affidavit of the appellant, for instance, the appellant raised issues about the respondent's status as "an external candidate" and matters incidental thereto, whether or not she had any duty for direct communication with the respondent, etc. These are not issues that can be effectually tried and resolved by affidavit evidence.**

For the foregoing reasons, I hold that this action initiated under the Fundamental Rights (Enforcement Procedure) Rules, is incompetent and is for that reason, liable to be struck out. The result is that this issue of competence and jurisdiction is resolved in favour of the appellant and which effectually determines the appeal. And having come to this conclusion, it serves no useful purpose to go into the second issue. B

In conclusion, I hold that this appeal succeeds. The judgment of the trial court affirmed by the Court of Appeal be and is hereby set aside. In its place is substituted judgment striking out the suit for lack of competence and jurisdiction. In view of the peculiar circumstances of the respondent, I make no orders as to costs. C

KATSINA-ALU

I have read before now in draft the judgment of my learned brother, Tabai, JSC., in this appeal. I agree with his reasoning and conclusion. I have nothing useful to add. D

AKINTAN JSC

The respondent was a candidate at the Senior School Certificate Examinations conducted by the appellant in May/June, 1992. Although that examination was meant exclusively for students in secondary schools, but the respondent was able to get enrolled in the same examination as an external student. On the release of the results for the examinations conducted during the period, the respondent obtained a provisional statement of results and with it he got an admission into the University of Ilorin. But after the release of the results, the appellant conducted investigations into cases of examination malpractices. Following such investigations, the appellant discovered that the results of the entire centre No. 15185, where the respondent sat for the examination had to be cancelled. The reason given for the cancellation was that with the collusion of the teachers and the examiners in the centre, there was massive examination fraud. The school was immediately informed of the decision. F G H

The respondent who claimed not to be aware of the cancella-

tion of the entire results of the centre where he sat for the examination until about five years after the event, decided to commence the present action at Lagos High Court by filing a motion *ex-parte* in which he sought leave to enforce his fundamental right to fair hearing under Order 1 Rules 2 & 3(1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979. He also sought for (1) a declaration that the cancellation of the results he obtained in the May/June, Senior School Certificate Examination by the appellant be declared null and void; (2) an order quashing the decision of the appellant to cancel the results and compelling it to issue the respondent a certificate based on the said results forthwith; and (3) an order compelling the appellant to furnish the Admission Office of University of Ilorin the purportedly cancelled result of the applicant. The application was supported with an affidavit to which a counter-affidavit was filed by the appellant.

The learned trial Judge granted the *ex parte* application and after taking submissions from learned counsel for the parties, in the Motion on Notice, delivered his reserved judgment in the matter. In it, he granted all the reliefs sought by the plaintiff (now respondent). An appeal against the judgment to the Court of Appeal was dismissed. The present appeal is from the judgment of the Court of Appeal.

Briefs were filed by the parties in this court. Four issues were formulated by the appellant as arising for determination in the appeal. One of the issues is whether the respondent's action can properly be instituted under the Fundamental Rights (Enforcement Procedure) Rules, 1979. The position of the law on that point has long been settled in a number of decided cases. The law on the point, as well settled, is that only actions founded on a breach of any of the Fundamental Rights guaranteed in the Constitution can be enforced under the Rules. It is also a condition precedent to the exercise of the court's jurisdiction that the enforcement of Fundamental Right or the securing of the enforcement thereof should be the main claim and not an accessory claim. It follows therefore that an action founded on contract, such as one for wrongful dismissal or termination of an appointment, cannot be brought under the Rules. See *Egbuonu v. B. R. T. C.* (1997) 12 NWLR (Pt. 531) 29 and *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt. 510) 549.

Applying the law as declared above to the facts of the present case, it is clear that what the respondent sought from the court was for the reversal of the cancelled results of the examination he took in May/June, 1992, which the appellant conducted. The relationship between the appellant and the respondent had nothing to do with the provisions of the fundamental rights guaranteed by the Constitution and the enforcement of which could be carried out under the Fundamental Rights (Enforcement Procedure) Rules, 1979. The respondent's action was therefore incompetent as it was wrongly commenced.

For the above reasons and the fuller reasons given in the leading judgment written by my learned brother, Tabai, JSC., the draft of which I have read, I allow the appeal and make similar consequential orders as are made in the leading judgment, including that on costs.

MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal Lagos Division, delivered on 8th April, 2002. The appeal originated from a suit filed by the respondent as applicant in the High Court of Justice of Lagos State at Lagos, to enforce his fundamental right of fair hearing under Sections 46(1) and (2) and 316(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Order 1 Rules 2 and 3(1) of the Fundamental Rights (Enforcement Procedure) Rules, 1979, against the appellant which was the respondent. In the action, the respondent principally prayed for an order of the trial court compelling the appellant to revalidate the result obtained by the respondent in the West African School Certificate Examination, cancelled by the appellant after its provisional release and which the respondent used in securing admission into the University of Ilorin. The ground upon which the respondent sought for the reliefs, was that the Appellant cancelled the respondent's results and punished him thereby on the basis that he engaged in examination malpractice without giving him a fair hearing.

The trial court after hearing the suit on the affidavit in support of the application and counter-affidavit filed in defence thereof, was convinced that the respondent had proved his case against the ap-

pellant and granted all the reliefs sought in its ruling/ judgment delivered on 12th September, 2000. The appellant's appeal against this decision of the trial court was also dismissed by the Court of Appeal in its decision given on 8th April, 2002, thereby giving rise to the present further appeal by the appellant.

B Although four issues for the determination of the appeal were formulated in the appellant's Brief of Argument while three issues were identified in the respondent's Brief of Argument, since issues number 3 in both the appellant's and the respondent's Briefs of Argument have raised issue of competence of the suit or action of the respondent at the trial court, that issue must be resolved first. This issue as framed by the respondent is right to the point and it reads.

C "3. Whether the respondent's complaint or claim against the cancellation and/or withdrawal of her (sic) Senior School Certificate Examination (SSCE) result by the appellant could be validly brought by an application under the Fundamental Rights (Enforcement Procedure) Rules, 1979, where in the violation of Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and Article 7 of the African Charter on Human and Peoples' Rights is being alleged?"

E While the appellants arguments on this issue is centered on the view that the respondent's complaint or claims against the appellant for the cancellation of the results were not appropriately brought before the trial court in accordance with the law, the respondent has strongly argued that the two courts below were right in holding that the action was properly brought under the Fundamental Rights (Enforcement Procedure) Rules, 1979, having regard to appellant's conduct in violation of the respondent's right of fair hearing.

F The law is trite that where a claim is not initiated by due process of law, the claim is incompetent and where all the same the incompetent claim was heard by the court, the proceedings before the court are a nullity. See *Madukolu & Ors. v. Nkemdelim & Ors.* (1969) 2 SCNLR 341. It is also the law that where the main or principal claim in an action brought for the enforcement of Fundamental Right under the Fundamental Rights (Enforcement Procedure) Rules, 1979, is not the enforcement or protection of a fundamental right, the Rules are not appropriate to initiate such actions. See *Tukur v. Government of Taraba State* (1997) 6 NWLR (Pt.510) 549, *Sea Trucks*

(Nig.) Ltd. v. Anigboro and Grace Jack v. University of Agriculture Makurdi (2004) 1 S.C (Pt. II) 100; (2004) 5 NWLR (Pt. 865) 208 at 226 - 227. In the instant case where the main or principal claim of the respondent was against the cancellation or withdrawal of his Senior School Certificate Examination result, the complaint of the alleged denial of fair hearing, was only a subsidiary claim. Therefore the respondent's action as constituted ought to have been brought by a Writ of Summons and heard on pleadings. B

In the light of the foregoing, I entirely agree with my learned brother, Tabai, JSC., in his leading judgment that this appeal must be allowed. Accordingly, I also allow the appeal and abide with the orders made in the leading judgment including the order on costs. C

ONNOGHEN JSC

I have had the privilege of reading in draft, the leading judgment of my learned brother, Tabai, JSC., who has exhaustively dealt with the issues raised for determination. D

I agree with his reasoning and conclusion that the appeal is meritorious and should be allowed. I accordingly allow same and abide by the consequential orders contained in the said leading judgment including the order as to costs. E

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