

**SUPREME COURT OF NIGERIA**  
16TH MAY, 2008 SC. 265/2002  
**CORAM:- S. U. ONU, D. MUSDAPHER, S. A. AKIN-  
TAN, A. M. MUKHTAR, I. F. OGBUAGU, JSC**

OWNERS OF MV "ARABELLA" ..... APPELLANT/  
CROSS - RESPONDENT

AND  
NIGERIA AGRICULTURAL INSURANCE  
CORPORATION ..... RESPONDENT/  
CROSS - APPELLANT

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RULES OF COURT - Noncompliance with - Effect of - Rules of Court  
- Partake of the nature of subsidiary legislations - And have force of  
law - Noncompliance therewith - Must therefore be punished (H1)

PRACTICE & PROCEDURE - Court processes - Issuance and ser-  
vice of - In civil litigation - Issuance and service of processes - Are  
distinct though interrelated - Service may be void - Though issuance  
be valid - But both are void in the instant action (H2)

PRACTICE & PROCEDURE - Rules of court - Noncompliance with  
- Proper sanction - Where noncompliance went to the jurisdiction of  
Court - Proceedings therein - Would be null and void - It is immate-  
rial that defendant participated therein (H3)

ORDERS OF COURT - Jurisdiction - Lack of - Proper order - Where  
court finds - That it lacks jurisdiction to entertain an action - Proper  
order to make - Is an order striking out - Not an order dismissing the  
action (H4)

JURISDICTION - Issue of - Manner of raising - It may be raised by  
way of a preliminary objection - Without need to file pleadings - Or  
vide notice of intention to defend - Under the undefended list pro-  
cedure (H5)

JURISDICTION - Issue of - Primacy of - Issue of Jurisdiction when

**1978** Owners of MV "Arabella" v. N.A.I.C. (2008) 5 KLR (pt. 254)

raised - Being a threshold question - Must be resolved first - Before further proceedings - Even under undefended list procedure (H6)

APPEALS - Cross appeal - Nature of - A cross appeal is a distinct and independent appeal - Whatever be the fate of the main appeal - May not affect the cross appeal - And does not affect it in the instant case (H7)

APPEALS - Issues - Propriety of - Duty of court - An intermediate appellate court - Is duty bound to consider all issues - Properly raised before it - In case the decision on the point - Is reversed on further appeal - Its decision on other points - May then become relevant (H8)

APPEALS - Issues - Raised but not dealt with - Power to resolve - Where Court of Appeal fails to consider - An issue submitted to it in judgment - Supreme Court can deal with it - Instead of sending it back to that court - Especially where the issue is one of law (H9)

ACTIONS - Limitation - Statute of limitation - Admission of liability - Effect on barred action - Where an action has become statute barred - Subsequent admission of liability - Can not retrospectively revive the action (H10)

### **FACTS**

The plaintiff/Appellant had instituted an action under the undefended list, at the Federal High Court, Lagos Division, against three defendants jointly and severally claiming the sum of US \$34,578.80 (Thirty-four thousand five hundred and seventy eight dollars, eighty cents) as the amount owed it by defendants. The Respondent was the 2nd defendant in the said action. Service of the writ was effected on the defendants in Abuja without leave of court, and there was no endorsement on the writ that it was to be served outside the jurisdiction of the issuing court. The 1st and 3rd defendant paid the amount said to be owed by them to the Appellant, but the Respondent (then 2nd Defendant) is contesting the said suit. Respondent filed a motion at the trial contending that the court lacked jurisdiction on two grounds.

The first ground was that the issuance and service of the writ was incompetent. The second ground was that the action was statute barred as against the Respondent. From the records, it appears that the cause of action arose on 2nd May, 1993, while the action was commenced on 4th January, 1996.

After hearing the Respondent's motion, the learned trial judge held that the action was not statute barred. Nevertheless, the judge set aside the Writ and its service as incompetent and proceeded to dismiss the suit. Both parties were aggrieved by the decision of the trial judge. Appellant appealed to the Court of Appeal against the order dismissing the suit while the Respondent, as cross appellant, cross appealed in respect of the holding that the action was not statute barred. The Court Appeal upheld the decision of the trial court setting aside the writ and its service but substituted the dismissal of the suit with an order striking it out. The Court also held that in view of its decision on the appeal, the cross appeal had become academic. It therefore struck out the cross appeal. Again both parties felt aggrieved by the decision of the Court of Appeal. Appellant has now appealed against the order striking out the suit. The respondent/cross appellant has appealed against the order striking out its cross appeal as academic.

### **ISSUES FOR DETERMINATION**

*“Issue No. 1: Whether the Court of Appeal was not right to have set aside the issuance and service of Writ of Summons, which was issued and served on the respondent without leave of court first sought and obtained in violation of the Sheriff and Civil Process Act, Cap 407?”*

*Issue No. 2: Whether the appellant was entitled to judgment under the Undefended List when the respondent has raised a Preliminary Objection to the jurisdiction of the court and has also filed a notice of intention to defend.”*

### **CROSS APPEAL**

*(3). Whether the Hon. Court of Appeal was right when it held that such crucial, fundamental and jurisdictional issues of limitation of action canvassed in the cross-appellant's cross - appeal were “rendered academic” because of its decision in the cross-respondent's appeal (on mere procedural question of service) and which is differ-*

*ent in nature, substance and effect from the cross-appeal?*

(4). *Whether the court below was right to have purportedly resolved the five issues raised in the cross-appellant's cross-appeal against the cross-appellant, when in fact, it did not hear, consider or try the said issues?*

B (5). *Whether the court below, having set aside the order of dismissal and substituted it for the order of striking out, should not have either earlier, or immediately after proceeded to determine whether or not the cross-respondent's action is statute-barred?*

C **HELD** (Unanimously dismissing the appeal and allowing the cross appeal per **OGBUAGU JSC**)

***RULES OF COURT - Noncompliance with - Effect of***

1. Without much ado. I agree with the submission of the respondent, D that the appellant, having admitted that it never complied with the mandatory requirement of the law as regards issuance and service of the Writ of Summons outside Lagos, it cannot avoid or escape from the consequences of such non-compliance merely by submitting that the law does not apply.

E Firstly, as to how rules of court are treated, it is now firmly settled that rules of court, are not mere rules, but they partake of the nature of subsidiary legislations by virtue of Section 18(1) of the Interpretation Act and therefore, have the force of law. That is why F rules of court, must be obeyed. This is because and this is also settled, that when there is non-compliance with the rules of court, the court, should not remain passive and helpless. There must be a sanction, otherwise, the purpose of enacting the rules, will be defeated.  
(p. 1991 B)

G ***Court processes - Issuance and service of***

2. Issuance of civil process and service of the same, are distinct though interrelated steps in civil litigation. A writ may be valid while its service, (as in the instant case leading to this appeal), may suffer from H some defect. This is why and this is also settled that where a Writ of Summons, has been regularly issued without compliance with the Act, what is void, and to be set aside is the service and not the writ itself.

The appellant in his said Brief, having conceded that no leave of court was sought and obtained for the service on the respondent, of the said Writ of Summons in spite of the mandatory provisions of Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rule, 1976, this should have been the end of this appeal. What is more, as rightly submitted in the respondent's Brief, neither Section 19 of the Federal High Court Act, nor any other Act, expressly or otherwise, excluded the operation of the Act and Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rules. The provisions of the Act, guide the service of the processes of the Federal High Court as a court established by the National Assembly. Service of a writ out of jurisdiction, is not a matter of the court's discretion. Not only is it provided for in the said rules of the Federal , High Court which provision, must therefore, be obeyed, it is crucial to the prosecution of an action in the court. This is why, without proper service, it follows without more that no valid appearance, can be entered by the defendant, although a defendant is entitled to and can enter an appearance on protest or a conditional appearance.

I note that even the issuance of the said Writ of Summons which was not endorsed for service of the defendants outside jurisdiction, was rightly declared by the learned trial Judge, as void. This is because of the mandatory nature of the provisions of Section 97 of the Act which provide as follows:-

*“Every Writ of Summons for service out of the State in which it was issued shall, in addition to any endorsement of notice required by law of such State..... have endorsed thereon a notice to the following effect..... “this Summons is to be served out of the State .....and in the State of.... ”(p. 1992 A)*

### ***Rules of court - Noncompliance with - Proper sanction***

3. Where an act is void, then it is in law, a nullity. See the case of Odu'a Investment Co. Ltd. v. Talabi (1997) 10 NWLR (Pt.523) 1 at 617. Referring to Skenconsult's case (supra), it was held that if the defect or non-compliance complained of, went to the competence or jurisdiction of the trial court, then the proceedings therein, would be null and void. That it is of no moment that the defendant, had taken some steps in the proceedings. That non-compliance with the

Act, was not a mere irregularity, but a fundamental defect which went to the root of the jurisdiction and competence of the court.

The court below at page 190 of the record also referred to Nwabueze v. Obi Okoye (supra) and stated inter alia as follows:-

B *“Having regard to what I have said above, the learned trial Judge, in the proper exercise of her jurisdiction ought to have set aside the issuance and the service of the writ..... I have somewhere in this judgment said service of the writ is very fundamental to assumption of jurisdiction by a court of law. If the, service of the writ as in the instant case, is basically and fundamentally defective at that point the court lacks jurisdiction to adjudicate, anything done thereon is null and void...”*

The above is trite law which is long settled. (p. 1993 H)

D ***Jurisdiction - Lack of - Proper order***

4. It is trite that where a court finds out and holds that an action is incompetent, null and void or that it has no jurisdiction to entertain it, it does not dismiss the action, but merely strikes it out. The appellant in the court below, conceded that the suit ought and should have been struck out instead of being dismissed. (p. 1995 B)

***JURISDICTION - Issue of - Manner of raising***

F 5. I note that in the instant case, the respondent, had raised a Preliminary Objection to the effect that the writ was improperly issued and served and that the action, was statute-barred. This of course, raised the issue of jurisdiction and the respondent, in my respectful view, did not have to raise it only in its notice of intention to defend the suit as has been erroneously contended and canvassed by the G appellant. The position of the law in this regard, cannot be different in my respectful view, merely because, the suit, was brought under the Undeclared List.

H It need be stressed and this is also settled firstly, that the question or issue of whether or not an action is statute-barred, is one touching on or goes to jurisdiction. This is why, the question whether a period of limitation of action is held or settled not to be a matter of practice and procedure, but rather one of law as contained in relevant statutes.

Order 27 Rule 1 of the Federal High Court (Civil Procedure) Rules, Cap. 134, Laws of the Federation of Nigeria, 1990, provides as follows:-

*"Where a defendant conceives that he has a legal or equitable defence to the suit, so that even if the ..... he may raise this defence by motion that the suit be dismissed without any answer upon questions of fact being required from him."* B

[the underlining mine]

This is exactly, what the respondent did by filing the said motion. (pp. 1995 F/1997 F) C

### ***JURISDICTION - Issue of - Primacy of***

6. Finally and firstly, a judgment or order by a court without jurisdiction, is a nullity. Secondly, if a court is shown to have no jurisdiction, the proceedings however well conducted, are a nullity. D

In the case of Alhaji Salami v. Oseni & 3 Ors. (supra), cited and relied on by the respondent's learned counsel, the Court of Appeal - per Onalaja, JCA., (Rtd.), stated at pages 631-632 inter alia as follows:-

*"It is trite law that the competence of an action is a threshold question and once raised like locus stand and/or jurisdiction of the court it must be taken first and decided before consideration of any other issue."* E

Learned counsel for the appellant, can now see, that he was standing on quick sand, when he asked the trial court, to enter judgment for the appellant when an application challenging the jurisdiction of the court, to entertain the suit, was still pending. My answer to this issue 2 is that the court below, was right in refusing to enter judgment under the Undefended List. (pp. 1998 G/1999 A/F) F G

### ***Cross appeal - Nature of***

7. I agree with the submission in paragraph 1.2 of the cross-appellant's Brief that a cross-appeal, is a distinct appeal and independent appeal and whatever be the fate of the main appeal, may not (not does not) affect the cross-appeal. This is because, not only does Order 3 Rule 9 of the Court of Appeal Rules, provide, as follows:- H

*"All appeals shall be by way of re-hearing and shall be brought*

*by notice (hereinafter called “notice of appeal”) ..... ”*

It is also settled, that a cross-appeal, is akin to a counter-claim and to be valid, a competent Notice of Appeal is filed, after which, Briefs are filed and exchanged. This is why and this is also settled, that where a party is seeking to set aside a finding which is crucial and fundamental to a case, he can only do so, through a substantive cross-appeal. This is because, the effect of a cross-appeal, is to call for the reversal of a decision and that the error, is so crucial and fundamental. (pp. 2000 H/2001 C)

***APPEALS - Issues - Propriety of***

8. It has been emphasized, stated and restated, that an intermediate appellate court such as the Court of Appeal, is duty bound, to consider all the issues that are properly raised before it. This is because, in the event of the decision on that point being reversed on a further appeal, its’ decision on the rest of the other points, may then be considered by the higher court for a final determination of the appeal. In fact, in the case of *Ishaya Bamaiyi v. The State* (2001) 4 S.C. (Pt.I) 18; (2001) 8 NWLR (Pt.915) 270; (2001) 4 SCNJ 103, it is stated or it was held that it is the duty of court, to pronounce on all issues raised before it. (p. 2002 A)

***APPEALS - Issues - Raised but not dealt with***

9. I agree with the cross-appellant in its submission in paragraph 1.10 of its Brief, that the court below, having affirmed the decision of the trial court that the issuance and service of the Writ of Summons, were not valid, it should have proceeded, to deal with and determine, the issue of the suit or action itself, being statute-barred which was raised in the cross-appeal of the cross-appellant. More so, as it was/is an issue of law which also touched/touches on jurisdiction of the trial court to entertain the said suit.

Since I have respectfully held that the court below, was wrong in its said approach, this court in my respectful view, has an option either to send the case back to the court below to pronounce on the said issues which can be dealt with together or invoke its powers under Section 22 of the Supreme Court Act and Order 8 Rule 12 (2) of the Supreme Court Rules, which provides that the court, has wide



powers to deal with any appeal before it and make any order as is just to ensure the determination on matters in respect of the real issue or issues in controversy between the parties. I have noted in this judgment that an appeal, is in the nature of a re-hearing. I have also noted that the suit leading to this appeal, was initiated/instituted in 1996 and that the Latin maxim is, interest republicae ut sit finis litium - There must, in the public interest, be an end to litigation. B

I will therefore, opt to deal with the issue of the action being statute-barred raised by the cross-appellant more so, as there are arguments in respect thereof in the said Briefs of the parties. I have support in my decision in the case of Global Transport Oceanico S.A. v. Free Enterprises Nig. Ltd. (2001) 2 S.C. 154; (2001) 5 NWLR (Pt.706) 462 at 429; (2001) 2 SCNJ 224 - per Kalgo, JSC., (Rtd.) also cited and relied upon in the cross-appellant's Brief where it was held, inter alia, as follows:- C D

*"Where the Court of Appeal fails to consider an issue submitted to it in judgment, on appeal the Supreme Court will either send the cases back to the Panel of the Court of Appeal to consider the issue or the Supreme Court can deal with it especially where the Issue is one of law in this case locus standi....."* (p. 2003 A/E) E

### ***Statute of limitation - Admission of liability***

10. The learned trial Judge referred to the case of Eboigbe v. NNPC (1995) (sic) (it is (1994) 5 NWLR (Pt.349) 649 (it is also reported in (1994) 6 SCNJ 71), where it was held that for purpose of instituting an action in court, time begins to run from the date the cause of action accrues. He/she thereafter, stated that Section 26(1) of the Decree, has the effect of a Statute of Limitation. His Lordship, then relied on an alleged "*admission*" in Exhibit FA4A dated 28th February, 1995 and Exhibit FA5 dated 30/3/95, in holding that the action, was not statute-barred. F G

With the greatest respect, having held that the cause of action arose either about September, 1991 or in May, 1993, the action having been brought in January, 1996, i.e. more than the (12) twelve months period specified in the gross error in relying on an alleged admission which in any case, was made, after the action had already been statute-barred. The said admission, were made in the said ex- H

hibits in 1995. The question I or one may ask is, did the so-called admission retrospectively, revive the suit that was already “*dead*” having been caught by the limitation period? I think not. In fact, the learned trial Judge “*imported*” the doctrine of admission which is a common law principle, into a statutory provision. This is not right.

B As rightly submitted by the cross-appellant at page 12 of their Brief, it is now settled, that where statutory provision, is in conflict with or differs from common law, the later-common law, gives place to the statute. (pp. 2004 H/2005 H)

C ***NOTABLE POINT OF INTEREST***  
***OGBUAGU JSC***

*Court should make the best it can in inelegant Briefs*

1. From the foregoing, the court below, with respect, was in grave error, when in its comment observation, it held that the five issues distilled by the cross-appellant, are “*very horrible*” and proceeded to make some uncomplimentary remarks on the counsel that drafted the same. Worse still, in the end, it held that the cross-appeal, had turned academic and that the court cannot accommodate academic issues. It then struck out the cross-appeal.

It is settled firstly, that the attitude of an appellate court, is to make the best that it can, out of a bad or inelegant Brief and need not strike it out. (p. 2001 E)

F ***REPRESENTATION***

Ayo Olorunfemi, for the Appellant/Cross-Respondent.

Ume Chukwuma Machukwu, for the Respondent/Cross-Appellant.

G ***CASES REFERRED TO***

Sabru Motors Nig. Ltd. v. Rajab Enterprises Nig. Ltd. (2002) 4 S.C. (Pt.II) 67; (2002) 4 SCNJ/ 370 at 382; (2002) 7 NWLR (Pt. 766) 243.

H Maersk Lines & Anor. v. Addide Investment Ltd. & Anor. (2002) 4 S.C. (Pt.II) 157; (2002) 11 NWLR (Pt.778) 317; (2002) 4 SCNJ 433 at 472.

Barrister Onyenucheya v. Military Administrator of Imo State & Ors. (1997) 1 NWLR (Pt.482) 429

Ogunmokun v. Military Administrator Osun State (1999) 3 NWLR (Pt.594) 261 C.A.

Balogun v. Panalpina World Transport (Nig.) Ltd. (1999) 1 NWLR (Pt.585) 66 C.A.

Attorney-General of the Federation v. Guardian Newspapers Ltd. (1999) 5 S.C. (Pt.III) 59; (1999) 9 NWLR (Pt.618) 187 S.C. B

Ege Shipping & Trading Ind. v. Tigris Int'l Corp. (1999) 10-12 S.C. 60; (1999) 14 NWLR (Pt.637) 70 S.C.

Ayorinde v. Obi (2000) 3 NWLR (Pt.649) 348 S.C

Babatunde v. Olatunji (2000) 2 S.C. 9; (2000) 2 NWLR (Pt.646) C  
557 S.C.

Galadima v. Tambai (2000) 6 S.C. (Pt.I) 196; (2000) 11 NWLR (Pt.677) 1 S.C.

### ***STATUTES & RULES REFERRED TO***

Constitution of the Federal Republic of Nigeria, 1979, s. 19(1) D

Sheriffs & Civil Process Act, Cap. 407, LFN, 1990, ss. 96, 97, 98 & 99

Federal High Court (Civil Procedure) Rules, 1976, O. 3, 10, and 27  
rr. 1, 11, 12, 13 and 14 E

Supreme Court Rules, O. 8 r. 12(2)

### ***LEAD JUDGMENT BY OGBUAGU JSC***

These are another interlocutory appeals against the decisions F  
of the Court of Appeal, Lagos Division (hereinafter called "*the court below*") delivered on 3rd June, 2002, allowing in part the appeal of the cross-respondent. While affirming the finding of the trial court in its ruling delivered on 15th July, 1996, that the issuance and service of the writ, was void, it substituted the dismissal of the suit with an G  
order of striking out. It held that the cross-appeal, was purely academic and therefore, struck it out.

The appellant while appealing against the said order striking out the suit, the cross-appellant, is appealing against the order striking out its cross-appeal on the said holding that it is academic. H

The facts briefly stated are that the appellant who is/was the plaintiff in the trial court, on 4th January, 1996, instituted an action in the Undefended List against three defendants jointly and severally

claiming the sum of \$34,578.80 (Thirty-Four Thousand Five Hundred and Seventy Eight US dollars. Eighty Cents) as the amount owed it by the said defendants. Service of the writ was effected on the defendants in Abuja at Plot 452, Tafawa Balewa Way, Area 3, Garki. Abuja without the leave of the trial court. It appears from the records, that the 1st and 3rd defendants, paid the amount said to be owed by them to the appellant, but the 2nd defendant (now the respondent/cross-appellant), is contesting the said suit. On 4th December, 1996, when the suit was to come up for hearing, the respondent/cross-appellant, filed a motion seeking an order for the dismissal and/or striking out of the suit as being incompetent or for lack of jurisdiction of the trial court to entertain it. After hearing arguments from the learned counsel for the parties, on 13th May, 1996, the learned trial Judge - Ukeje, J. (as she then was), in a considered ruling dated 12th July, 1996, but delivered on 15th July, 1996, set aside the said writ and its service and proceeded to dismiss the suit. In respect of whether the action was statute-barred in respect of the 2nd respondent/ cross-appellant, he/she, held that it is/was not statute-barred. The appellant appealed to the court below against the order of dismissal of the suit, while the respondent/cross-appellant, cross-appealed in respect of the said decision that the action is/was not statute-barred. Because of the said decisions of the court below, the appellant has appealed to this court, while the respondent has also cross-appealed.

The appellant filed three grounds of appeal and has formulated two issues for determination, namely -

*"1. Whether the Court of Appeal was right in setting aside the issuance of service of the appellant's Writ of Summons taken out in the Federal High Court, Lagos on the grounds that leave was required to issue and serve the same on the respondent at Abuja? (Grounds 1 & 2).*

*2. Was the Court of Appeal right in failing to enter judgment under the "Undefended List" for the appellant herein as against the respondent when it was clear that the said respondent has no defence to the suit and did not file any notice of intention to defend as required under Order 3 Rule 11 Federal High Court (Civil Procedure) Rules. 1976, (then applicable)? (Ground 3)."*

On its part, the respondent/cross-appellant has also formulated two issues for determination. They read as follows:-

*"Issue No. 1: Whether the Court of Appeal was not right to have set aside the issuance and service of Writ of Summons, which was issued and served on the respondent without leave of court first sought and obtained in violation of the Sheriff and Civil Process Act, Cap 407?"*

*Issue No. 2: Whether the appellant was entitled to judgment under the Undefended List when the respondent has raised a Preliminary Objection to the jurisdiction of the court and has also filed a notice of intention to defend."*

When this appeal came up for hearing on 18th February, 2008, Olorunfemi Ayo, learned counsel for the appellant, adopted their Brief and the cross-respondent's Brief. He urged the court to allow the appeal and to dismiss the cross-appeal. He also referred to and relied on case No. 7 in the list of authorities - i.e. Abiola v. Federal Republic of Nigeria (1995) 3 NWLR (Pt.382) 203 at 231-232 C.A.

Ume, Esqr., - learned counsel for the respondent/cross-appellant, also adopted their Brief and the cross-appellant's Brief. He informed the court that he was abandoning their invitation to the court, to overrule its decision in the case of Abia State & 35 Ors. v. Attorney-General of the Federation (2002) 3 S.C. 106; (2002) 6 NWLR (Pt.763) 264, which he allegedly stated is "*erroneous*" at page 13 paragraphs 3-7 up to page 20 paragraph 3.2 before "summary conclusion" of their Brief. The same is hereby struck out.

He submitted, that it is wrong to say that the Federal High Court, is one court or that Sections 96 and 99 of the Sheriffs & Civil Process Act, are inapplicable or undeniable. He referred to case No. 1 in their additional list of authorities - i.e. Salami v. Oseni (2002) 14 NWLR (Pt. 788) 623 at 626 C.A. ratio 1 in relation to the cross-appeal. He finally, urged the court, to dismiss the appeal and allow the cross-appeal.

The said issues of both parties, in my respectful view, are substantially the same or similar although differently couched, I will therefore, deal with them together in this judgment. I note that in paragraph 4.1 at page 3 of the appellant's Brief, it is conceded that it is not in dispute that the Writ of Summons, was issued at the Federal

High Court Registry, Lagos and was served on the respondent in Abuja - a place outside the jurisdiction of the Federal High Court sitting in Lagos, without the prior leave of the trial court being sought and obtained by the appellant. I note also that in the respondent's Brief, it is stated that the said Writ, was to be served on the appellant (sic). It is also conceded by the appellant in paragraph 4.2 of its Brief that the court below - per Aderemi, JCA., (as he then was) correctly, identified the issue for determination before it when it stated at page 184 - last paragraph of the records as follows:

*"As shown in this appeal, it is the validity of the service of the Writ of Summons on the 2nd defendant in the court below and, who is now 'the respondent before us, that is being challenged."*

*It is then submitted that "however", the court below, at page 185 of the records, held inter alia, as follows:-*

*"From the endorsement in the summons for service, it is not in dispute that the 2nd defendant has its address for service at Plot 452, Tafawa Balewa Way, Area 3 Garki, Abuja, a place outside the jurisdiction of the Federal High Court sitting in Lagos."*

That it is on this basis that it proceeded to apply the provisions of Sections 96,97,98 & 99 of the Sheriffs & Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990, (hereinafter called "*the Act*") and came to its decision to the effect that leave was required, to issue and serve the Writ of Summons on the defendant/respondent.

Sections 19(1) of the said Federal High Court Act and 228 of the Constitution of the Federal Republic of Nigeria, 1979, then applicable, are referred to and reproduced and it is submitted that there is only one Federal High Court established in the country which exercise jurisdiction throughout the country including Abuja. That the Federal High Court sitting in Lagos therefore, has jurisdiction over a defendant resident in Abuja. It is here the case of *Abiola v. FRN* (supra), is cited and relied on.

It is in the above premise or circumstance that it is submitted that the provisions of Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rules, 1976, requiring leave to issue and serve a writ out of jurisdiction:

*"will not and cannot apply in this particular case particularly,*

*when the service of the writ in question, was effected at Abuja within the jurisdiction of the Federal High Court....."*

It is finally submitted that both the issue and service of the said Writ of Summons on the respondent in the circumstance, was good and proper in law and should not have been set aside.

***Without much ado. I agree with the submission of the respondent, that the appellant, having admitted that it never complied with the mandatory requirement of the law as regards issuance and service of the Writ of Summons outside Lagos, it cannot avoid or escape from the consequences of such non-compliance merely by submitting that the law does not apply.***

***Firstly, as to how rules of court are treated, it is now firmly settled that rules of court, are not mere rules, but they partake of the nature of subsidiary legislations by virtue of Section 18(1) of the Interpretation Act and therefore, have the force of law.*** See the case of Akanbi & Ors. v. Alao Anor. (1989) 5 S.C. 1; (1989) SCNJ. 1 at 10. ***That is why rules of court, must be obeyed. This is because and this is also settled, that when there is non-compliance with the rules of court, the court, should not remain passive and helpless. There must be a sanction, otherwise, the purpose of enacting the rules, will be defeated.*** See the cases of Oba Aromolaran & Anor. v. Oladele & 2 Ors. (1990) 7 NWLR (Pt. 162) 359 C.A; Bango v. Chado (1998) 9 NWLR (Pt. 564) 139, The Hon. Mr. Justice Kalu Anya v. African Newspaper of Nigeria Ltd. (1992) 7 SCNJ. (Pt.1) 47 and Mr. C.O. Duke v. Akpabuyo Local Government (2005) 12 S.C. (Pt. I) 1 at 8-18; (2005) 19 NWLR (Pt. 959) 130 at 148-157; (2005) 12 SCNJ. 280 at 290-198; (2005) 24 NSCQR 404 at 417- 428; (2005) 12 SCM 174 at 185-193; (2006) 123 LRCN 108 at 129-142; (2006) ALL FWLR (Pt. 294) 559 at 573-580 and (2006) Vol. 2 MJSC 94, just to mention a few. In other words, rules of court, are not only meant to be obeyed, they are also binding on all the parties before the court. See the case of Ajayi & Anor. v. Umorogbe (1973) 7 SCNJ. (Pt. I) 168. I have gone so far, because of the obvious intendment of the appellant and its learned counsel to trivialise on the importance of rules of court.

Secondly, and this is also settled, **issuance of civil process and service of the same, are distinct though interrelated steps in civil litigation. A writ may be valid while its service, (as in the instant case leading to this appeal), may suffer from some defect.** See the case of Adegoke Motors Ltd. v. Dr. Adesanya & Anor. (1989) 5 S.C. 133; (1989) 3 NWLR (Pt. 109) 250 at 292-296; (1989) 5 SCNJ. 80. **This is why and this is also settled that where a Writ of Summons, has been regularly issued without compliance with the Act, what is void, and to be set aside is the service and not the writ itself.** See Nwabueze & Anor. v. Okoye (infra).

**The appellant in his said Brief, having conceded that no leave of court was sought and obtained for the service on the respondent, of the said Writ of Summons in spite of the mandatory provisions of Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rule, 1976, this should have been the end of this appeal. What is more, as rightly submitted in the respondent's Brief, neither Section 19 of the Federal High Court Act, nor any other Act, expressly or otherwise, excluded the operation of the Act and Order 10 Rule 14 of the Federal High Court (Civil Procedure) Rules. The provisions of the Act, guide the service of the processes of the Federal High Court as a court established by the National Assembly.** See the case of Union Beverages Ltd. v. Adamite Co. Ltd. (1990) 7 NWLR 348 C.A. **Service of a writ out of jurisdiction, is not a matter of the court's discretion. Not only is it provided for in the said rules of the Federal , High Court which provision, must therefore, be obeyed, it is crucial to the prosecution of an action in the court. This is why, without proper service, it follows without more that no valid appearance, can be entered by the defendant, although a defendant is entitled to and can enter an appearance on protest or a conditional appearance.**

**I note that even the issuance of the said Writ of Summons which was not endorsed for service of the defendants outside jurisdiction, was rightly declared by the learned trial Judge, as void. This is because of the mandatory nature of the provisions of Section 97 of the Act which provide as follows:-**



***“Every Writ of Summons for service out of the State in which it was issued shall, in addition to any endorsement of notice required by law of such State..... have endorsed thereon a notice to the following effect..... “this Summons is to be served out of the State .....and in the State of....”***

In the case of Bello v. National Bank of (Nig.) Ltd. (1992) 6 NWLR (Pt.246) 206 at 217-218 C.A. referred to at page 78 of the records, Achike, JCA., (as he then was and of blessed memory), stated inter alia as follows:-

It is clear that the provisions of Section 97 of the Sheriffs and Civil Process Act, are couched in mandatory terms. Any service of a writ without the proper endorsement as stipulated under Section 97 is not a mere irregularity but is a fundamental defect that renders the writ incompetent.....”

[the underlining mine]

See also the case of Nwabueze & Anor. v. Justice Obi Okoye (1988) 10-11 S.C. 77; (1988) 4 NWLR (Pt. 91) 664 (it is also reported in (1988) 10-11 SCNJ. 60) also referred to, by the learned trial Judge where it was held inter alia, as follows:-

*“.....A condition precedent for the issue of the Writ of Summons against the defendant in this case, who are resident outside the area of territorial jurisdiction of the High Court of Anambra State and who, again, does not carry on business within that area of jurisdiction is that leave of court is to be obtained before the writ is issued - Leave to issue writ which is to be served out of the jurisdiction is not a matter of course and the application for leave is not a mere irregularity.*

*In the instant case, since leave was not first obtained before the writ was issued, the Writ of Summons has been issued without due process of law; and accordingly, has to be set aside for being null and void.”*

In other words, it was held that where a defendant is outside jurisdiction, no writ for service out of jurisdiction, can be issued except by leave of the court. That the issue of Writ of Summons and the service of the same on the defendant, are conditions precedent, for the exercise of a court’s jurisdiction over the defendant.

Of course, and this is also settled, ***where an act is void, then***

**it is in law, a nullity. See the case of Odu'a Investment Co. Ltd. v. Talabi (1997) 10 NWLR (Pt.523) 1 at 617; (1997) 7 SCNJ. 600 - per Ogundare, JSC., (of blessed memory) in which both cases of Skenconsult Nig. Ltd. v. Ukey (1981) 1 S.C. (Reprint) 4 and Nwabueze & Anor. v. Okoye (supra), were referred to. Referring to**  
B **Skenconsult's case (supra), it was held that if the defect or non-compliance complained of, went to the competence or jurisdiction of the trial court, then the proceedings therein, would be null and void. That it is of no moment that the defend-**  
C **ant, had taken some steps in the proceedings. That non-compliance with the Act, was not a mere irregularity, but a fundamental defect which went to the root of the jurisdiction and competence of the court.**

**The court below at page 190 of the record also referred**  
D **to Nwabueze v. Obi Okoye (supra) and stated inter alia as follows:-**

**"Having regard to what I have said above, the learned trial Judge, in the proper exercise of her jurisdiction ought to have set aside the issuance and the service of the writ....."**  
E **I have somewhere in this judgment said service of the writ is very fundamental to assumption of jurisdiction by a court of law. If the, service of the writ as in the instant case, is basically and fundamentally defective at that point the court lacks juris-**  
F **diction to adjudicate, anything done thereon is null and void..."**

**The above is trite law which is long settled.** In spite of the fact that the learned trial Judge who eventually became the Chief Judge of that court, stated what is the firmly established law and also a plethora of decided authorities some of them referred to in this  
G judgment and the learned counsel for the appellant in the court below, still insists that his own interpretation of the law, should and ought to be preferred even by this court. Although he is entitled to his own views, but with respect the law so firmly settled, must prevail and in fact, prevails and subsists.

H Before concluding this issue, I will pause here, to comment on the reliance by the appellant, on the case of Abiola v. FRN (supra). The case with respect, as rightly pointed out in paragraph 1.14 of the respondent's Brief, did not at all deal with the issue of service of

process of the court outside the State where the court is sitting or with jurisdiction. It dealt with the question of whether the Federal High Court, has jurisdiction, to try an offence committed outside the State where the court is sitting. So, I do not see with respect, the relevance of the case to the instant case leading to this appeal.

***It is trite that where a court finds out and holds that an action is incompetent, null and void or that it has no jurisdiction to entertain it, it does not dismiss the action, but merely strikes it out. See the cases of Onumajuru v. Akanihu (1994) 3 NWLR (Pt.334) 620 at 630 C.A, Agbeniyi v. Abo (1994) 7 NWLR (Pt.359) 735 at 746-747 CA, Chief Eleki v. Oko XXVII & Anor. (1995) 5 NWLR (Pt.393) 100 at 109 C.A. The appellant in the court below, conceded that the suit ought and should have been struck out instead of being dismissed.*** See also the case of Okoye & 7 Ors. v. Nigerian Construction & Furniture Co. Ltd. & 4 Ors. (1991) 7 S.C. (Pt. III) 33; (1991) 6 NWLR (Pt.199) 501 at 534; (1991) 7 SCNJ. 365. My answer to issue 1 of each of the parties therefore, is that the court below, was right and not wrong in its said decision.

In respect of issue 2 of the parties, the court below, regrettably, did not consider any oral of the said issues although I agree that a court, does not indulge itself in dealing with and considering academic questions/issues. See the case of International Bank for West Africa Ltd. & Anor. v. Pavex International Co. (Nig.) Ltd. (2000) 4 S.C. (Pt.II) 196; (2000) 4 SCNJ. 200 and Alli & Anor. v. Chief Abasi & 8 Ors. (2000) 4 SCNJ. 264 at 297. However, ***I note that in the instant case, the respondent, had raised a Preliminary Objection to the effect that the writ was improperly issued and served and that the action, was statute-barred. This of course, raised the issue of jurisdiction and the respondent, in my respectful view, did not have to raise it only in its notice of intention to defend the suit as has been erroneously contended and canvassed by the appellant. The position of the law in this regard, cannot be different in my respectful view, merely because, the suit, was brought under the Undefended List.*** Although the return date, was 4th March, 1996, but as rightly stated in the respondent's Brief, as at 17th April, 1996, the appellant, had applied

ex parte, to amend the name of the parties in the said suit. See page 37 of the records. That motion was heard and granted on 22nd April, 1996, - See pages 46 - 48 of the records. So, the question I or one may ask is, in that circumstance, could it have got judgment entered in its favour because the respondent, had not filed a notice of intention to defend the suit the appellant had realised, was defective? I think not. I note that it was on that 22nd April, 1996, that the trial court, (after hearing the learned counsel for the parties), decided to hear the motion for striking/dismissal out of the suit which decision in my respectful view, was right. See pages 50-51 of the records. My reasons are predicated on a line of decided authorities herein below stated.

***It need be stressed and this is also settled firstly, that the question or issue of whether or not an action is statute-barred, is one touching on or goes to jurisdiction.*** See the case of *Emiatar v. The Nigerian Army & 4 Ors.* (1999) 9 S.C 89; (1999) 12 NWLR (Pt.631) 364 at 372, cited and relied on in the respondent's Brief (it is also reported in (1999) 9 SCNJ. 52). ***This is why, the question whether a period of limitation of action is held or settled not to be a matter of practice and procedure, but rather one of law as contained in relevant statutes.*** See the case of *Corona Schiffah R. MBH & Co. v. Emespo J. Continental Ltd.* (2002) 2 NWLR (Pt. 753) 205 at 209 C.A.

***Order 27 Rule 1 of the Federal High Court (Civil Procedure) Rules, Cap. 134, Laws of the Federation of Nigeria, 1990, provides as follows:-***

***"Where a defendant conceives that he has a legal or equitable defence to the suit, so that even if the ..... he may raise this defence by motion that the suit be dismissed without any answer upon questions of fact being required from him."***

***[the underlining mine]***

This provision, in my respectful view, is clear and unambiguous. The cardinal principle of law in the construction or interpretation of a statute, is that where the words are clear, the court should give the words used their ordinary meaning without resort to any internal or external aid. There are too many decided authorities in

this regard. But see the cases of Ojokolobo & Ors. v. Alamu & Anor. (1998) 7 S.C. (Pt.I) 38; (1987) 7 SCNJ. 98, Obomhense v. Erhahon (1993) 7 SCNJ. 479, Chief Imah Anor. v. Chief Okogbe & Anor. (1993) 9 NWLR (Pt.316) 159; (1993) 12 SCNJ. 57, Berliet Nig. Ltd, v. Alhaji Kachalla (1995) 9 NWLR (Pt. 420) 478; (1995) 12 SCNJ. 147, Oviawe v. Integrated Rubber Products Nig. Ltd. & Anor. (1997) 3 SCNJ. 29, City Engineering (Nig.) Ltd. v. Nigeria Airports Authority (1999) 6 S.C. (Pt.II) 41; (1999) 6 SCNJ. 263, Chief Gani Fawehinmi v. Inspector-General of Police & 2 Ors. (2002) 5 S.C. (Pt.I) 63; (2002) 7 NWLR (Pt.767) 606; (2002) 5 SCNJ 103, Olaide Ibrahim v. S.A. Ojomo & 3 Ors. (2004) 1 S.C. (Pt.II) 136; (2004) 4 NWLR (Pt.862) 89; (2004) 1 S.C. (Pt.II) 136 and just to mention but a few.

The said Motion of the respondent, is at page 30 of the records. It relied on the said Order 10 Rules 12 and 13 and Order 27 of the Federal High Court (Civil Procedure) Rules and it also relied on Sections 96, 97, 98 and 99 of the Act.

In the case of Hon. Justice Kalu Anya & 3 Ors. v. Dr. Festus Ajayi (1993) 17 NWLR (Pt. 305) 294 at 309-310; (1993) 9 SCNJ. (Pt.1) 53, - per Karibi-Whyte, JSC., (Rtd.), stated inter alia, as follows:-

*"However, a defendant who conceives that ex facie he has a good ground of law which if raised will determine the action in limine is entitled to raise such ground of law. See Martins v. Administrator-General of the Federation & Anor. (1962) 1 SCNLR 209; (1962) 1 ANLR 120....."*

(the underlining mine)

***This is exactly, what the respondent did by filing the said motion.***

In my concurring contribution in the case of Mr. Elabanjo & Anor. v. Chief (Mrs.) Dawodu (2006) 6-7 S.C 24 at 58-67; (2006) 15 NWLR (Pt.1001) 76 at 134-143; (2006) 6 SCNJ 204 at 238-245; (2006) 27 NSCQR 318 at 382-392; (2006) All FWLR (Pt.328) 604 at 667-675; (2006) 10-11 SCM 267 at 314-321 and (2006) 6 SCNJ (Pt.22) 181 at 241-250, I dealt with a similar issue as the instant one. In summary, a point of law or defence, can be raised on Preliminary Objection or in a motion, if the point of law, will be decisive of the whole litigation. I referred inter alia, to the cases of Everett

v. Ribbands (1952) 2 Q.B. 198 206 and Yeoman Credit Ltd. v. Latter (1961) 2 All E.R. 285 at 299. See also the case of Attorney-General of the Federation v. Guardian Newspapers Ltd. (1999) 5 S.C. (Pt.III) 59; (1999) 9 NWLR (Pt.618) 187 at 202; (1999) 5 SCNJ 324. As a matter of fact, an objection could be taken at any stage orally and not necessarily by a motion. See the cases of Chief Mokelu v. Federal Commissioner For Works & Housing (1976) 3 S.C. 35; (1976) 3 S.C. (Reprint) 60; (1974) (1) NMLR 69, Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 6 S.C. 175; (1976) 6 S.C. (Reprint) 115; (1976) 1 ANLR 409 and Petro-Jessica Enterprises Ltd. & Anor. v. Leventis Technical Co. Ltd. (1992) 5 NWLR (Pt. 244) 675; (1992) 6 SCNJ (Pt. I) 154 at 167, per Belgore, JSC. (as he then was). This is why and this is also settled, that the issue of jurisdiction which can be raised at any stage by either the parties, or the court, is decided when the point is taken. See the case of Adani v. Igwe (1956) 2 FSC 87 at 88. This is also why, it is settled that whenever an issue of jurisdiction is raised, a court should deal with it first or promptly or expeditiously, as it has jurisdiction, to decide whether or not it has jurisdiction. See the cases of Nalsa Team Associates v. NNPC (1996) , 3 NWLR (Pt.439) 621 at 637; (1996) 3 SCNJ 50 at 61, Chief Ukwu & 3 Ors. v. Chief Bunge (1997) 8 NWLR (Pt.518) 597 at 541-542, 544; (1997) 7 SCNJ. 262 at 273, Shitta-Bey v. Attorney-General of the Federation & Anor. (1998) 7 S.C. (Pt.II) 121; (1998) 10 NWLR (Pt.570) 392 at 414; (1998) 7 SCNJ. 264, Onuoha v. The State (1998) 12 SCNJ 1 at 27, citing several other cases therein and Messrs. NV. Scheep & Anor. v. 'The MV. "S. Araz" & Anor. (2000) 12 S.C. (Pt.I) 164; (2000) 15 NWLR (Pt.691) 622 at 658-659; (2000) 12 SCNJ. 24 at 55 - per Karibi-Whyte, JSC., citing Mills v. Renner (1940) 6 WACA 144.' I can go on and on, but I think, I have "flogged" the matter on the jurisdiction. **Finally and firstly, a judgment or order by a court without jurisdiction, is a nullity.** See the case of Timitimi v. Anabebe 14 WACA 374, Adefulu v. Chief Okulaja (1998) 4 S.C. 223; (1998) 5 NWLR (Pt.550) 435; (1988) 4 SCNJ 139, Adesola v. Alhaji Abidoye & Anor. (1999) 10-12 S.C. 109; (1999) 12 SCNJ 61 at 79 and many others. **Secondly, if a court is shown to have no jurisdiction, the proceedings however well conducted, are a nullity.** See the famous and often cited case of Madukolu v. Nkemdilim

(1962) 1 ANLR 584 and Adeigbe v. Kushimo (1965) 1 ANLR 248 referred to in the case of Alhaji Madaki & 6 Ors. v. Dangaladima & Anor. (1993) 2 SCNJ 122 at 130- per Karibi-Whyte, JSC.

**In the case of Alhaji Salami v. Oseni & 3 Ors. (supra), cited and relied on by the respondent's learned counsel, the Court of Appeal - per Onalaja, JCA., (Rtd.), stated at pages 631-632 inter alia as follows:-**

***"It is trite law that the competence of an action is a threshold question and once raised like locus stand and/or jurisdiction of the court it must be taken first and decided before consideration of any other issue*** Barrister Onyenucheya v. Military Administrator of Imo State & Ors. (1997) 1 NWLR (Pt.482) 429, Ogunmokun v. Military Administrator Osun State (1999) 3 NWLR (Pt.594) 261 C.A Sowemimo v. Awobayo (1999) 7 NWLR (Pt.610) 335 C.A, Balogun v. Panalpina World Transport (Nig.) Ltd. (1999) 1 NWLR (Pt.585) 66 C.A, Attorney-General of the Federation v. Guardian Newspapers Ltd. (1999) 5 S.C. (Pt.III) 59; (1999) 9 NWLR (Pt.618) 187 S.C, Ege Shipping & Trading Ind. v. Tigris Int'l Corp. (1999) 10-12 S.C. 60; (1999) 14 NWLR (Pt.637) 70 S.C, Ayorinde v. Obi (2000) 3 NWLR (Pt.649) 348 S.C, Babatunde v. Olatunji (2000) 2 S.C. 9; (2000) 2 NWLR (Pt.646) 557 S.C, Galadima v. Tambai (2000) 6 S.C. (Pt.I) 196; (2000) 11 NWLR (Pt.677) 1 S.C."

**Learned counsel for the appellant, can now see, that he was standing on quick sand, when he asked the trial court, to enter judgment for the appellant when an application challenging the jurisdiction of the court, to entertain the suit, was still pending.** It is a pity that this simple but well settled principle of law, has been dragged on and on, by the appellant since 1996 up to this court a period of about (12) twelve years. This is one of the reasons why I advocate that interlocutory appeals, should not come to this court, but should end in the Court of Appeal.

In concluding this judgment, since I am bound to confine myself to the said issues so raised by the parties - see the case of Alli & Anor. v. Chief Alesinloye & 8 Ors. (2000) 4 S.C. (Pt.I) 111; (2000) 6 NWLR (Pt.660) 177 at 211-212; (2000) 4 SCNJ 264, citing other cases therein, **my answer to this issue 2 is that the court below,**

**was right in refusing to enter judgment under the Undefended**

**List.** On the decided authorities hereinabove referred to, it could not have done so in the said circumstances adumbrated by me in this judgment. Any judgment if entered by any of the two lower courts, should have been a nullity. In the end result, this appeal, with respect, palpably, amounts to the appellant and his learned counsel, embarking on an exercise in futility. The appeal with respect, is most unmeritorious and therefore, fails. It is accordingly dismissed with N50,000.00 (Fifty thousand naira costs in favour of the respondent and payable to it by the appellant.

**CROSS-APPEAL**

I note that three grounds of appeal, were filed.

In its Brief, the defendant/cross-appellant, has formulated three issues for determination namely: -

D “1). *Whether the Hon. Court of Appeal was right when it held that such crucial, fundamental and jurisdictional issues of limitation of action canvassed in the cross-appellant’s cross - appeal were “rendered academic’ because of its decision in the cross-respondent’s appeal (on mere procedural question of service) and which is different in nature, substance and effect from the cross-appeal?*

E 2). *Whether the court below was right to have purportedly resolved the five issues raised in the cross-appellant’s cross-appeal against the cross-appellant, when in fact, it did not hear, consider or try the said issues?*

F 3). *Whether the court below, having set aside the order of dismissal and substituted it for the order of striking out, should not have either earlier, or immediately after proceeded to determine whether or not the cross-respondent’s action is statute-barred?*

G On the part of the cross-respondent, it has formulated one issue for determination, namely;

H “*Whether from the circumstances of this case and/or in spite of the clear admission of liability by the cross-appellant as 2nd defendant at the trial court, the claim of the plaintiff/cross-respondent could be said to be statute-barred (ground 1, 2 and 3)”. (sic).*

**I agree with the submission in paragraph 1.2 of the cross-appellant’s Brief that a cross-appeal, is a distinct appeal and independent appeal and whatever be the fate of the main ap-**



**peal, may not (not does not) affect the cross-appeal. This is because, not only does Order 3 Rule 9 of the Court of Appeal Rules, provide, as follows:-**

***"All appeals shall be by way of re-hearing and shall be brought by notice (hereinafter called "notice of appeal")***

***..... "***

See also the cases of Sabrue Motors Nig. Ltd. v. Rajab Enterprises Nig. Ltd. (2002) 4 S.C. (Pt.II) 67; (2002) 4 SCNJ/ 370 at 382; (2002) 7 NWLR (Pt. 766) 243 and Maersk Lines & Anor. v. Addide Investment Ltd. & Anor. (2002) 4 S.C. (Pt.II) 157; (2002) 11 NWLR (Pt.778) 317; (2002) 4 SCNJ 433 at 472."

***It is also settled, that a cross-appeal, is akin to a counter-claim and to be valid, a competent Notice of Appeal is filed, after which, Briefs are filed and exchanged.*** See the case of Hon. Minister FCT v. Kayode Ventures (2001) 4 NWLR (Pt.703) 421 at 424 C.A. - per Muntaka-Coomassie, JCA., (as he then was now JSC) also cited and relied on in the cross-appellant's Brief. ***This is why and this is also settled, that where a party is seeking to set aside a finding which is crucial and fundamental to a case, he can only do so, through a substantive cross-appeal. This is because, the effect of a cross-appeal, is to call for the reversal of a decision and that the error, is so crucial and fundamental.*** So said this court in the cases of African Continental Seaways Ltd. v. Nigerian Dredging Roads & General Works Ltd. (1977) 5 S.C. 235 at 247; (1977) 5 S.C. (Reprint) 141 - per Fatayi-Williams, JSC/CJN., and Anyaduba & Anor. v. Nigerian Renowned Trading Co. Ltd. (1990) 2 S.C. 106; (1990) 1 NWLR (Pt. 127) 397 at 400 also cited and relied on in the cross-appellant's Brief (it is also reported in (1990) 2 SCNJ. 85). From the foregoing, the court below, with respect, was in grave error, when in its comment observation, it held that the five issues distilled by the cross-appellant, are *"very horrible"* and proceeded to make some uncomplimentary remarks on the counsel that drafted the same. Worse still, in the end, it held that the cross-appeal, had turned academic and that the court cannot accommodate academic issues. It then struck out the cross-appeal.

It is settled firstly, that the attitude of an appellate court, is to make the best that it can, out of a bad or inelegant Brief and need not strike it out. See the cases of Gbafe v. Prince Gbafe & 3 Ors.

(1996) 6 SCNJ 167 at 178, Tukur v. Government of Taraba State (1997) 6 NWLR (Pt. 510) 549 at 569; (1997) 6 SCNJ 81, citing some other cases therein and Gurara Securities Finance Ltd. v. T.I.C. Ltd (1999) 2 NWLR (Pt.589) 29 C.A, citing some other cases therein.

Secondly, in a plethora of decided authorities of this court, ***it has been emphasized, stated and restated, that an intermediate appellate court such as the Court of Appeal, is duty bound, to consider all the issues that are properly raised before it. This is because, in the event of the decision on that point being reversed on a further appeal, its' decision on the rest of the other points, may then be considered by the higher court for a final determination of the appeal.*** See the cases of Okonji & 2 Ors. v. Njokanma & 2 Ors. (1999) 12 S.C. (Pt.II) 150; (1999) 12 SCNJ 259, Ifeanyichukwu (Osondu) Co. Ltd, v. Solen Boneh (Nig.) Ltd. (2000) 3 S.C. 42; (2000) 5 NWLR (Pt.656) 332; (2000) 3 SCNJ 18 at 38, - citing the case of Odunayo v. The State (1972) 8-9 S.C. 290 at 296; (1972) 8-9 S.C. (Reprint) 173 - per Sowemimo, JSC., (as he then was); Owodunni v. Registered .Trustees of Celestial Church of Christ & 2 Ors. (2000) 6 S.C. (Pt.III) 60; (2000) 10 NWLR (Pt.675) 315 at 326; (2000) 6 SCNJ 299 at 426-427 - per Ogundare, JSC, Brawal Shipping (Nig.) Ltd. v. F. I. Onwadike Co. Ltd. & Anor. (2000) 6 S.C. (Pt.II) 133; (2006) SCNJ 508 at 522 - per Uwaifo, JSC; 7-Up Bottling Co. Ltd. & 2 Ors. v. Abiola & Sons Bottling Co. Ltd. (2001) 6 S.C. 73; (2001) 6 SCNJ 18 at 32 - per Onu, JSC., Chief Okotie-Eboh v. Chief Manager & 2 Ors. (2004) 11-12 S.C. 174; (2004) 18 NWLR (Pt.905) 242; (2004) 12 SCNJ 139; (2004) 20 NSCQR 214 - per Edozie, JSC., and many others. ***In fact, in the case of Ishaya Bamaayi v. The State (2001) 4 S.C. (Pt.I) 18; (2001) 8 NWLR (Pt.915) 270; (2001) 4 SCNJ 103, it is stated or it was held that it is the duty of court, to pronounce on all issues raised before it.***

Since the court below did not at all, consider any or all the said issues of the cross-appellant, but rather held that the cross-appeal, was merely academic and proceeded to strike it out, I have no other alternative with respect, than to hold in this judgment, that the cross-appeal, has substance and it is meritorious. With respect, the court below, was not justified to merely state;

*"In view of the conclusion I have arrived in the main appeal on the issue of the service of the writ it is my view that the cross-appeal has turned academic. The time of court cannot accommodate academic issues. Consequently issues Nos. 1-5 raised in the cross-appeal are resolved against the cross-appellant."*

**I agree with the cross-appellant in its submission in paragraph 1.10 of its Brief, that the court below, having affirmed the decision of the trial court that the issuance and service of the Writ of Summons, were not valid, it should have proceeded, to deal with and determine, the issue of the suit or action itself, being statute-barred which was raised in the cross-appeal of the cross-appellant. More so, as it was/is an issue of law which also touched/touches on jurisdiction of the trial court to entertain the said suit.** Again, on the decided authorities, jurisdictional issue or issues of the competence of a suit, should and must be determined and pronounced upon first and foremost and promptly too. See also the case of Douglas v. Shell Petroleum Development Co. Ltd. (1999) 2 NWLR (Pt. 591) 467 at 473-474 C.A and First City Merchant Bank Ltd & 4 Ors. v. Abiola & Sons Bottling Co. Ltd. (1991) 1 NWLR (Pt. 165) 14 at 27 C.A. "

**Since I have respectfully held that the court below, was wrong in its said approach, this court in my respectful view, has an option either to send the case back to the court below to pronounce on the said issues which can be dealt with together or invoke its powers under Section 22 of the Supreme Court Act and Order 8 Rule 12 (2) of the Supreme Court Rules, which provides that the court, has wide powers to deal with any appeal before it and make any order as is just to ensure the determination on matters in respect of the real issue or issues in controversy between the parties. I have noted in this judgment that an appeal, is in the nature of a re-hearing. I have also noted that the suit leading to this appeal, was initiated/instituted in 1996 and that the latin maxim is, interest republicae ut sit finis litium - There must, in the public interest, be an end to litigation.** See the cases of Aro v. Fabohunde (1983) 2 S.C. 75 - 83 and Nwadike & Ors. v. Ibekwe (1987) 12 S.C 14; (1987) 11-19 SCNJ. 72; (1987) NWLR (Pt.49) 267.

***I will therefore, opt to deal with the issue of the action being statute-barred raised by the cross-appellant . more so, as there are arguments in respect thereof in the said Briefs of the parties. I have support in my decision in the case of Global Transport Oceanico S.A. v. Free Enterprises Nig. Ltd. (2001) 2 S.C. 154; (2001) 5 NWLR (Pt.706) 462 at 429; (2001) 2 SCNJ 224 - per Kalgo, JSC., (Rtd.) also cited and relied upon in the cross-appellant's Brief where it was held, inter alia, as follows:-***

***"Where the Court of Appeal fails to consider an issue submitted to it in judgment, on appeal the Supreme Court will either send the cases back to the Panel of the Court of Appeal to consider the issue or the Supreme Court can deal with it especially where the Issue is one of law in this case locus standi....."***

From the records, it appears to me that the cause of action, arose in May, 1993, - to be precise on 2nd May, 1993, - see page 3 thereof - the particulars of claim - last paragraph and at page 5, paragraph 4 of the affidavit in support. The action was instituted or filed on 4th January, 1996, thirty two (32) months when the right of action accrued.

Section 26(1) of Decree No. 37 of 1993, (hereinafter called "the Decree") which established the cross-appellant, provides as follows;

***"Notwithstanding anything in any other enactment, no suit against the corporation shall lie or be instituted in any court .....unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuing injury, within 12 months next after the ceasing of it."***

[the underlining mine]

I note that at page 72 of the records, the learned trial Judge, stated inter alia, as follows:-

***"Further, from the foregoing therefore, whereas by paragraph 4 of affidavit in support, the cause of action arose about September. 1991, yet by paragraph Exhibit FA1, the cause of action arose on 2nd May when adjustment of general average was made."***

***The learned trial Judge referred to the case of Eboigbe***

**v. NNPC (1995) (sic) (it is (1994) 5 NWLR (Pt.349) 649 (it is also reported in (1994) 6 SCNJ 71), where it was held that for purpose of instituting an action in court, time begins to run from the date the cause of action accrues. He/she thereafter, stated that Section 26(1) of the Decree, has the effect of a Statute of Limitation. His Lordship, then relied on an alleged "admission" in Exhibit FA4A dated 28th February, 1995 and Exhibit FA5 dated 30/3/95, in holding that the action, was not statute-barred.**

**With the greatest respect, having held that the cause of action arose either about September, 1991 or in May, 1993, the action having been brought in January, 1996, i.e. more than the (12) twelve months period specified in the gross error in relying on an alleged admission which in any case, was made, after the action had already been statute-barred. The said admission, were made in the said exhibits in 1995. The question I or one may ask is, did the so-called admission retrospectively, revive the suit that was already "dead" having been caught by the limitation period? I think not. In fact, the learned trial Judge "imported" the doctrine of admission which is a common law principle, into a statutory provision. This is not right.** The said admission, was about twenty-two (22) months after the action was statute-barred.

In paragraph 3.8 of the cross-respondent's Brief, it is also admitted or conceded that the "original" cause of action, occurred on 2nd May, 1993, when the adjustment of general average was made. The learned counsel, also referred to paragraph 4 at page 5 of the records and pages 22 and 73 where he admitted that the learned trial Judge, supported the position as to the date the action accrued. He however, submitted that Exhibit FA4A dated 28/04/95 and Exhibit FA5 dated 30/ 03/95, "revived the action" i.e. that a "dead" action, was revived. This is one of the wonders I have found in some Briefs.

**As rightly submitted by the cross-appellant at page 12 of their Brief, it is now settled, that where statutory provision, is in conflict with or differs from common law, the later-common law, gives place to the statute.** See the case of Patkun (not

Paikun) Industries Ltd. v. Niger Shoes Manufacturing Co. Ltd (1988) 12 S.C. (Pt.II) 1; (1988) 5 NWLR (Pt.93) 138; (1988) 19 SCNJ 124; (1988) NSCC (Pt.3) 814.

In the case of Egbe v. Adefarasin (No. 2) (1987) 1 NWLR (Pt.47) 1; (1987) 1 SCNJ 1, this court-per Aniagolu, JSC., stated inter alia as follows-

*“.....If the action was barred by statute, no amount of resort to the merit of appellant’s contention will serve to keep the action in being.”*

[the underlining mine]

See also the cases of Alhaji Ajibona v. Alhaji Kolawole & Anor. (1996) 10 NWLR (Pt.476) 22; (1996) 12 SCNJ 270 at 283 – per Ayoola, JSC., and Chief Woherem JP v. Emereuwa & Ors. (2004) 6-7 S.C. 161; (2004) 13 NWLR (Pt.890) 398; (2004) 7 SCNJ. 119 at D 130, 133, just to mention but a few. I therefore, with profound humility and respect, rest this cross-appeal on the above decided authorities.

In the final result or analysis, this cross-appeal has substance and merit. It succeeds and it is accordingly allowed by me. In the circumstance, the order that flows or follows from my so holding or decision, is that the plaintiffs/appellant’s/cross-respondent’s said suit, is hereby and accordingly dismissed by me being statute barred.

Costs follow events. The cross-respondent is awarded N.....?

Although costs follow events, there will be no order as to costs.

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### **ONU JSC**

I had the privilege to read the judgment of my learned brother, G Ogbuagu, JSC. I am in agreement with him that the cross-appeal has substance and merit. The plaintiff’s/ appellant’s/cross-respondent’s suit is hereby dismissed by me being statute-barred.

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### **MUSDAPHER JSC**

I have had the opportunity to read in advance the judgment of my Lord, Ogbuagu, JSC., just delivered with which I entirely agree. For the same reasons so eloquently and comprehensively set out in

the judgment which I respectfully adopt as mine, I too, find the appeal unmeritorious and I consequently dismiss it. The respondents are entitled to costs against the appellant assessed at N50,000.00.

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### AKINTAN JSC

I had the privilege of reading the draft of the leading judgment prepared by my learned brother, Ogbuagu, JSC. He has painstakingly set out the facts of the case and discussed in details all the issues raised in this appeal and the cross-appeal. I entirely agree with his reasoning and conclusions that there is no merit in the appeal and that the cross-appeal should be allowed.

The main issue raised in the appeal is whether a writ issued at the Federal High Court, Lagos for service on a defendant outside Lagos needs to comply with the provisions of Sections 96 and 97 of the Sheriffs and Civil Process Act. Section 97 of the Act provides as follow:-

*"97. Every Writ of Summons for service under this part out of the State or the Capital Territory in which it was issued shall, in addition to any other endorsement or notice required by the law of such State or the Capital Territory, have endorsed thereon a notice to the following effect (that is to say)*

*"This summons (or as the case may be) is to be served out of the..... State (or as the case may be)..... and in the ..... State (or as the case may be)."*

The Sheriffs and Civil Process Act, (Cap 407, Laws of the Federation of Nigeria, 1999), according to its heading, is *"an Act to make provision for the appointment and duties of sheriffs, the enforcement of judgments and orders, and the service and execution of civil process of the courts throughout Nigeria. "In Section 19 (1) of the Act, which is the Interpretation Section. "Court" is defined as "includes a High Court and a magistrate's court."*

It is not in doubt that the provisions of the said Section 97 of the Act, are applicable in all High Courts, including the Federal High Court. The said provisions, in my view, have nothing to do with the coverage of the Jurisdiction of the Federal High Court, which is nation-

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wide. It is therefore a total misconception to believe that the provisions of the section are inapplicable to the Federal High Court because the jurisdiction of that court covers the entire nation. Section 96 (1) and (8) of the same Act, on the other hand, provides as follows:-

B “96 (1) A Writ of Summons issued out of or requiring the defendant to appear at any court of a State or the Capital Territory may be served on the defendant in any other State or the Capital Territory.

C (2) Such service may, subject to any rules of court which may be made under this Act, be effected in the same manner as if the writ was served on the defendant in the State or the Capital Territory in which the writ was issued.’

D The rules of court requiring endorsement or leave to issue and serve outside the jurisdiction or coverage of the court issuing the writ are made applicable by Section 96 (9) of the Act Such rules are also applicable to writs meant for services by the Federal High Court.

E In the result, and for the above reasons and the fuller reasons given in the leading judgment, I also dismiss the appeal with costs as assessed in the leading judgment. I also adopt the reasoning and conclusion reached in respect of the cross-appeal. I accordingly hold that there is merit in the cross-appeal and I allow it with costs as assessed in the leading judgment.

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### **MUKHTAR JSC**

G In the Federal High Court, holden in Lagos, the appellant/cross-respondent instituted a suit under the Undefended List for a claim of US \$34,578.80, against the respondents jointly and severally arising out of a general average Bond/Guarantee signed by the respondents as cargo receivers Insurers. The supporting affidavit to the particulars of claim exhibited the relevant documents. The defendants/respondents filed and moved an application that:-

H “1. *The plaintiff’s claim is statute barred;*  
2. *The action is incompetent, having been commenced without the requisite statutory notice to the 1st defendant.*”

Dissatisfied with the decision of the trial court on the applica-



tion and the suit, the 2nd defendant appealed to the Court of Appeal, and the plaintiff filed a cross-appeal. The Court of Appeal allowed the appeal in part and struck out the cross-appeal for being purely academic. Again, not happy with the judgment of the Court of Appeal, the 2nd defendant has appealed to this court and the plaintiff has cross-appealed. The issues raised in the appellant's Brief of Argument and those raised in the respondent's Brief of Argument were carefully dealt with in the leading judgment. Likewise, the issues formulated in the cross-appellant's and cross respondent's Briefs of Argument were thoroughly dealt with in the leading judgment.

The gravamen of the main appeal revolves around the compliance with the rules of court, in this case Order 10 Rule 14 of the Federal High Court Civil Procedure Rules, which in fact has a mandatory provision. When rules of court governing proceedings in any of the courts exist, it is expected that they must be obeyed, and any party who fails to do so must bear the consequence of his failure/omission, as they are not made for fun. See *Ezeanah v. Attah* (2004) 2 S.C (Pt. II) 75; (2004) 7 NWLR (Pt.873) page 468 and *Malawi v. Gadzama* (2000) 11 NWLR (Pt.678) page 258.

I am satisfied with the reasoning and conclusion reached in the leading judgment. I therefore agree with my learned brother, Ogbuagu, JSC, that the appeal is unmeritorious and must fail, and I also dismiss it. I also agree that the cross-appeal should succeed and I hereby allow it and make an order of dismissal of the suit in the Federal High Court. I abide by the other consequential orders made in the leading judgment.

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