

SUPREME COURT OF NIGERIA

1ST JULY, 2008. SC. 136/2005

**CORAM:- N. TOBI, G. A. OGUNTADE, A. M. MUKHTAR,
F. F. TABAI, I. T. MUHAMMAD, JJSC**

1. ATTORNEY GENERAL OF FEDERATION

2. CHAIRMAN ZONE II

3. CHAIRMAN ZONE III

4. CHAIRMAN ZONE IV

5. CHAIRMAN ZONE V

6. CHAIRMAN ZONE VI

AND

1. USMAN ABUBAKAR & 26 OTHERS APPELLANTS/
RESPONDENTS

JURISDICTION - Ouster - Failed Banks & Financial Malpractices in Banks Decree, s. 1 (5) - The provision which takes away jurisdiction of courts over matters - In respect of which they had jurisdiction - Is an ouster clause (H1)

COURTS - Jurisdiction - Sources of - Ordinarily the Constitution and the statutes are the sources - But in a military regime it is the Decrees and Edicts - As a Decree was capable of suspending, modifying or abrogating the Constitution (H2)

JURISDICTION - Limits - Duty of courts - Is to expound the limits of their jurisdiction not to expand it - As jurisdiction is a matter of hard and rigid law (H3)

JURISDICTION - Issues - Primacy of - As jurisdiction is the pillar of every adjudication - Issues thereon must be taken first - Before hearing the merits of the matter (H4)

TRIBUNALS - Judgments - Time within which to deliver - Noncompliance - Unless a party shows a resultant miscarriage of justice - Judgment will not be vitiated on appeal (H5)

FACTS

The applicants/respondents had been variously charged with sundry offences under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree (No. 18) of 1994. While their respective charges were still pending, they came together and brought habeas corpus proceedings before the Lagos State High Court asking for their release from custody. Subsequently they also filed proceedings for a writ of certiorari for purposes of quashing the charges against them. Appellants challenged the jurisdiction of the Lagos High Court to hear the applications whereupon respondents raised objection to appearance of appellants' counsel in the matter without first obtaining fiat from the Attorney-General of the Federation.

Counsel for the parties addressed the trial court on the respondents' objection without addressing it on the appellants' objection. Nevertheless, in its ruling upholding the respondents' objection, the court also ruled that it had jurisdiction to hear the applications. Appellants appealed against the ruling. While the appeal was pending, respondents applied before the trial court for an amendment of their applications to include more applicants as parties. This application was granted. The grant was also appealed against by the appellants. The Court of Appeal consolidated the two appeals for hearing. Eventually, the consolidated appeal was dismissed by that court as lacking in merit. Appellants have brought this appeal to the Supreme Court against the judgment of the Court of Appeal .

ISSUES FOR DETERMINATION

"(i) Is it not wrong of the Court of Appeal to assert the jurisdiction of the trial court over the suit in the face of the express ouster of the latter's jurisdiction by Decree No. 18 of 1994 and when, at any rate, the appellants being agents of the Federal Government are not subject to the jurisdiction of a State High Court like the trial court by virtue of Section 230 of the 1979 Constitution as amended by Decree No. 107 of 1993?

(ii) Is it not wrong of the Court of Appeal to accept the trial court's peculiar procedure of refusing to deal first with the question of its jurisdiction (ever before any other motion) raised by the appellants when that procedure apart from being wrong per se tended in the circumstances to circumscribe their Right to Fair Hearing?

(iii) *Is it not an abuse of process for the respondents to initiate the present suit for judicial review during the pendency of their earlier suit for habeas corpus on the same facts and basis against the appellants and/or their privies?*

(iv) *Is it not wrong for the Court of Appeal to conclude that the third ground of appeal is of mixed law and facts and therefore incompetent for having been filed without leave when the contention that no evidence or material whatsoever was adduced to support a decision, as contended in/by the said ground; is always a question of law?"*

HELD (Allowing the appeal per **TOBI JSC**, Oguntade and Tabai JJSC dissenting)

JURISDICTION - Ouster - Failed Banks

1. The crux of this appeal is Section 1(5) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree No. 18 of 1994. It reads:-

"Notwithstanding the provisions of the Constitution of the Federal Republic of Nigeria, 1979, as amended, or any enactment to the contrary, the supervisory jurisdiction or power of judicial review of High Court shall not extend to any matter or proceeding before the Tribunal duly constituted under this Decree."

The above is an ouster clause. It ousts the jurisdiction of the courts. Ouster of jurisdiction is a condition which exists when a court which had jurisdiction over a matter ceases to retain that jurisdiction. (p. 3991 C)

Jurisdiction - Sources of

2. Jurisdiction of courts in Nigeria is contained in the Constitution and Statutes. Courts of law are therefore bound by the provisions of the Constitution and Statutes vesting jurisdiction in them. They have no jurisdiction to go outside the jurisdiction vested in them.

During the Military Regime, the jurisdiction of courts of law and tribunals were determined in accordance with the provisions of Decrees, Edicts and the unsuspended provisions of the relevant Constitution. During the Military Regime, the Decree culture was prominent, so much so that a Decree was supreme to the unsuspended provisions of the Constitution. This was so because a Decree had the

legal capacity to suspend, modify or completely abrogate the provision of the Constitution. (p. 3991 F)

JURISDICTION - Limits - Duty of courts

3. A court of law has jurisdiction to expound the limits of its jurisdiction; it has not the jurisdiction to expand it. Jurisdiction is a matter of hard and rigid law and courts of law must comply strictly with their jurisdiction as spelt -out in either the Constitution or a Statute. On no account should courts of law be hungry or have the gluttony for jurisdiction, to the extent that they arrogate to themselves jurisdiction where they have none. By such an injudicious conduct, the particular court does not only erode to the jurisdiction of other courts, but also erode to the legislative power of the Legislature. Both are illegal and courts of law established to do legality, cannot afford any illegality. (p. 3994 E)

JURISDICTION - Issues - Primacy of

4. As jurisdiction is the pillar of every adjudication and its cynosure, courts of law must take it first before the merits of the matter. They must not, in any case, keep the issue of jurisdiction till late in the litigation or when the merits of the case are heard. This is because if the court holds that it has no jurisdiction, that is the end of the matter. The suit will be struck out and the plaintiff goes home in vanquish. Of course, the law allows him to return to the courts after repairing the jurisdictional blunder. (p. 3994 G)

Judgments - Time within which to deliver

5. As it is, while Section 4(1) mandatorily and peremptorily provides that a tribunal must deliver its judgment not later than 21 working days from the day of its first sitting, Section 4(2) reduces the mandatory or peremptory impact of Section 4(1). By subsection (2) the decision of a Tribunal will not ordinarily be set aside merely because the judgment was not delivered within 21 days. Section 4(1) can only have effect if the Special Appeal Tribunal in the exercise of its appellate jurisdiction is satisfied that the party complaining of the non-compliance with the subsection has suffered a miscarriage of justice. In my view, a decision of a tribunal delivered without complying with Section 14(1) will remain valid until set aside by the Special Appeal

Tribunal under Section 4(2). (p. 3995 D)

NOTABLE POINTS OF INTEREST

OGUNTADE JSC (DISSENTING)

1. A court always has jurisdiction to decide if it has jurisdiction

The question I ask is - Was the Lagos State High Court in error to B have ruled without first hearing argument that it had jurisdiction?

In answering this question, it is helpful to call to mind the observation of the Supreme Court per Fatayi Williams, JSC., (as he then was) in Barclays Bank v. Central Bank (1976) 6 S.C 175 at pp. C 188-189; (1976) 6 S.C (Reprint) 115, where he said:-

"there is a clear distinction between stating that the court has no jurisdiction to hear a case and stating that that court has no jurisdiction to determine whether or not it has jurisdiction to hear the case. Thus, a court may, by statute, lack jurisdiction to deal with a D particular matter but it has Jurisdiction to decide whether or not it has Jurisdiction to deal with such matters."

(Underlining mine) (p. 4002 E/ 4003 A)

2. A tribunal loses the protection of the ouster clause after 21 days E without a decision

In the present case, having regards to the clear provisions of Section 4(1) of Decree No. 18 of 1994, once the tribunal fails to conclude the hearing of a case brought before it within 21 days or to render an F appealable decision after 21 days, then it loses the protection afforded it under Sections 1(5) and 4(2) of the Decree No. 18 of 1974. To hold the view that the High Court could not in such case intervene by granting an order of 'certiorari' is to allow the tribunal to exist outside the law and to detain citizens of Nigeria indefinitely. That G certainly was not the intendment of Decree No. 18 of 1994. The result of what I have said above is that issue one must be decided against the appellants. (p. 4009 A)

3. Failed Banks tribunals are not agencies of Federal Government H

The appellants have argued that by the force of the above provisions of the amendments to the 1979 Constitution, the Lagos State High Court was without the jurisdiction to hear the applications for certio- rari/prohibition. A close perusal of Section 230(1) (q) and (r) above

reveals that the matters committed exclusively to the jurisdiction of the Federal High Court are those arising out of the administration or the management and control of the Federal Government or any of its agencies. The interpretation of the provisions of Decree No. 18 of 1994, could not be seen as affecting the Federal Government or any of its agencies. The 2nd to 6th Tribunals which were courts created under Decree No. 18 of 1994, could not be seen as agencies of the Federal Government. They were simply tribunals created to perform judicial functions. I am therefore unable to conclude that the Lagos State High Court has not the jurisdiction to hear the certiorari/prohibition application against the 2nd to the 6th appellants. (p. 4009 F)

4. There is a difference between Habeas corpus and Certiorari

There is a marked difference in the use to which writs of Habeas Corpus and certiorari/prohibition may be put.

On the facts of this case, the writ of habeas corpus relevant for consideration is habeas corpus ad subjiciendum. It is a prerogative process for securing the liberty of the subject in order to ensure his immediate release from unlawful or unjustifiable detention whether in prison or private custody.

Certiorari/Prohibition on the other hand, is a writ issued out of the High Court directed to an inferior court of record asking that the Record of Proceedings before the inferior court in some cause or matter be transmitted to the High Court to be there dealt with in order to ensure that the applicant may have speedy justice. (p. 4010 D/F & 4011 A)

5. Respondents did not abuse the court's process

Now in this case, the respondents had been charged for various offences created by Decree No. 18 of 1994. They were all detained in prison custody. The tribunals were under Section 4(1) required to hear and determine the case against each of the respondents within 21 days after commencement of hearing. However, at the time the respondents brought their writs of habeas corpus and certiorari/prohibition one after the other, the period of 21 days had elapsed. The respondents were not released from custody. It was therefore appropriate that they applied for the issue of the writ of habeas corpus which in the circumstances amounted to a claim for their release

from unlawful custody.

The respondents could however not be sure that the High Court when ordering their release from custody would also make an order quashing the charges against them on the ground that the tribunals had lost their jurisdiction to continue to hear the case and detain them. It seems to me that the issue by the respondents of the writs of certiorari/prohibition was complimentary to the writ of habeas corpus earlier issued by them. I am therefore unable to agree that the respondents had abused the process of court by issuing the writ of certiorari/prohibition when there was still pending in court the writ of habeas corpus issued by them. (p. 4011 E)

6. Exercise of discretion without evidence is an error of law

Where a court of law exercises its discretion in a matter when there is no evidence or material placed before it to guide it in the exercise of its discretion, the error is one of law. This is because a court of law is not permitted to reach decisions in a case as a matter of law unless there is evidence placed before it. On the other hand, if the complaint is that the evidence or material placed before a trial court to enable it exercise its discretion is not enough, the error is one of mixed law and fact. This is because in that situation, the appellate court is being called upon to determine whether or not the facts available are strong enough to sustain the decision of the trial court. (p. 4013 H)

REPRESENTATION

F. C. A. Okoli, (with him; E. I. P. Odo and U. O. Mmonu), for the Appellants.

Nojim Tairu, for the 2nd Respondent.

Joseph Kulugh, for the 1st, 3rd-26th Respondents.

CASES REFERRED TO

Agwuna v. A.G. Federation (1995) 5 NWLR (Pt. 396) 418 at 432
 Osadebay v. A.G. Bendel State (1991) 1 S.C. (Pt. 11) 73; (1991) H
 NWLR (Pt. 169) 533
 Madukolu & Ors. v. Nkemdilim (1962) All NLR. (Pt.2) 581
 Miscellaneous Offences Tribunal v. Okoroafor (2001) 9-10 S.C. 92;
 (2001) 18 NWLR (Pt.745) 296 at 336

3990 A-G Federation v. Abubakar (2008) 12 KLR Tobi JSC

Onyeanusì v. 5 Miscellaneous Offences Tribunal (2002) 5 S.C. (Pt.II) 141; (2002) 12 NWLR (Pt.781) 227

Shodeinde v. Registered Trustees of Ahmadiya Movement in Islam (1980) 1-2 S.C. 225; (1980) 1-2 S.C. (Reprint) 99

Olaniyi v. Aroyehun (1991) 7 S.C. (Pt. I) 1; (1991) 5 NWLR (Pt. B 194) 653 and 686

Attorney-General of the Federation v. Sode (1991) 1 NWLR (Pt. 128) 500 at 517

C STATUTES & RULES REFERRED TO

Civil Rule (Political Programme) Acts No. 19 of 1987, Cap 443, LFN 1990.

Constitution of the Federal Republic of Nigeria, 1979, as amended by Decree 107 of 1993, ss. 33 (7) 40, 42, 230(1) & 258(1)

D Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994, ss. 1 (5), 3(1)(d), 4(1) & (2), 261 (1) & (2) Recovery of Public Property (Special Military Tribunals) Act, No. 3 of 1984, Cap 389 of L.F.N. 1990, ss. 15(1) and 21

E Special Tribunal (Miscellaneous Offences) Act, Cap. 410, L. F. N. 1990 Tribunal (Miscellaneous Provisions) Decree, No. 9 of 1991, s.1 (8),(9) & (10)

BOOKS REFERRED TO

F Halsbury's Laws of England, 3rd Edn; 124, page 125
Halsbury's Laws of England, 4th Edn; vol. 10, paragraph 729
Pleading & Practice, 20th, Edn. page 375

LEAD JUDGMENT BY TOBI JSC

G The respondents were arraigned before various zones of the defunct Failed Banks Tribunal in Lagos for diverse offences under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree No. 18 of 1994 (as amended). In the course of the proceedings, they applied for the issue of writ of habeas corpus in the High Court in Suit No. M/626/98, before Honponu-Wusu, J. The suit was pending when the respondents initiated the action which gave rise to the present appeal.

In an action for judicial review against their trial in the tribunal, the respondents asked for six reliefs: three declaratory, two *certiorari*

and one prohibition. The learned trial Judge granted the two certiorari reliefs and the one relief of prohibition. He refused the prayers on declaration in respect of the jurisdiction of the Failed Banks Tribunals, their proceedings, Rulings and Orders and Sections 1(5), 3(l)(d), 4(2) and 26(1) and (2) of Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree No. 18 of 1994. B

On appeal, the Court of Appeal held that the jurisdiction of the Failed Banks Tribunal to try the respondents ceased after 21 days and therefore the trial court had jurisdiction over the suit. The court also held that the suit was not an abuse of process. The appeal was consequently dismissed. It is against this judgment that the appellants have appealed to this court. Briefs were filed and exchanged. C

The crux of this appeal is Section 1(5) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree No. 18 of 1994. It reads:- D

“Notwithstanding the provisions of the Constitution of the Federal Republic of Nigeria, 1979, as amended, or any enactment to the contrary, the supervisory jurisdiction or power of judicial review of High Court shall not extend to any matter or proceeding before the Tribunal duly constituted under this Decree.” E

The above is an ouster clause. It ousts the jurisdiction of the courts. Ouster of jurisdiction is a condition which exists when a court which had jurisdiction over a matter ceases to retain that jurisdiction. See *The Attorney-General of Lagos State v. Hon. Justice Dosunmu* (1989) 6 S.C (Pt.II) 1; (1989) 3 NWLR (Pt. 111) 552. ‘ F

Jurisdiction of courts in Nigeria is contained in the Constitution and Statutes. Courts of law are therefore bound by the provisions of the Constitution and Statutes vesting jurisdiction in them. They have no jurisdiction to go outside the jurisdiction vested in them. G

During the Military Regime, the jurisdiction of courts of law and tribunals were determined in accordance with the provisions of Decrees, Edicts and the unsuspended provisions of the relevant Constitution. During the Military Regime, the Decree culture was prominent, so much so that a Decree was supreme to the unsuspended provisions of the Constitution. H

This was so because a Decree had the legal capacity to suspend, modify or completely abrogate the provision of the Constitution.

In Chief Osadebeye v. The Attorney-General of Bendel State (1991) 1 S.C. (Pt.II) 73; (1991) 1 NWLR (Pt.169) 525, a case involving the forfeiture of assets during the Military Regime and ouster clause in relation to the forfeiture. Belgore, JSC., (as he then was) said at page 571:-

"Any Decree ousting the jurisdiction of the court does so effectively, because a Decree is a special creature of the Military to shield their own peculiar method of governance; it is for this reason they make their Decrees superior even to the Constitution. Section 12 of Decree No. 37 of 1968 is clear and it should not be beclouded by court-induced ambiguity. When there is no jurisdiction the court will act ultra vires should it venture to assume one; for a court embarking on the hearing of a matter not within its jurisdiction is exercising in moot, a function not that of a court. (Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 6 S.C 175; (1976) 6 S.C. (Reprint) 115. The peculiar circumstance of a Military Regime is a point in issue, much as the Military exercise governance and do so effectively; their protective laws must be obeyed; and once the Decrees are clear and unambiguous as to ouster of court's jurisdiction in certain subject matters the courts indeed have no jurisdiction."

In Agwuna v. The Attorney-General of the Federation (1995) 5 NWLR (Pt. 396) 418, this court held that by virtue of the combined provisions of Sections 15(1) and 21 of the Recovery of Public Property (Special Military Tribunals) Act, No.3 of 1984, Cap 389 of the Laws of the Federation, 1990, the Transition to Civil Rule (Political Programme) Act, No. 19 of 1987, Cap 443, Laws of the Federation 1990, Special Tribunal (Miscellaneous Offences) Act, Cap, 410, Laws of the Federation, 1990 and Section 1(8), (9) and (10) of the Tribunal (Miscellaneous Provisions) Decree, No. 9 of 1991, the jurisdiction of all courts, other than the tribunals established under those laws, has been ousted in respect of those matters in the Acts, including the supervisory jurisdiction of the High Court conferred on it by Section 236(2) of the 1979 Constitution. The court also held that in a Military Regime, Decrees are the supreme laws of the land, and all other laws, including the Constitution are inferior and subject thereto.

See also Labiya v. Anretiola (1992) 8 NWLR (Pt. 258) 139, Attorney-General Anambra State v. Attorney-General of the Federation (1993) 6 NWLR (Pt. 302) 629.

In The Attorney-General of Lagos State v. Hon. Justice Dosunmu (1989) 6 S.C. (Pt.II) 1; (1989) 3 NWLR (Pt.III) 552, the respondent as plaintiff challenged the provisions of the Determination of Interests in State Lands Order, 1976, in respect of his ownership of the properties comprised in Title No. L.07307 registered pursuant to the Registration of Title Law. The appellant as defendant relying on the States Creation and Transitional Provisions) Act, No. 17 of 1977, the Tribunals of Inquiries (Validation etc.) Act, No. 18 of 1977; the Constitution (Basic Provisions) Act of 1975 and Section 6(6)(d) of the 1979 Constitution, submitted that the court had no jurisdiction to entertain the action. The Supreme Court held that by virtue of the provisions of Section 6(6)(d) of the 1979 Constitution, a court of law has no jurisdiction to determine the competence of a Military Governor to make any Edict or the competence of the Federal Military Government to promulgate any Decree that had been made between 1st January, 1966 and 1st October, 1979.

The court had earlier arrived at a similar decision in Din v. Attorney-General of the Federation (1988) 9 S.C. 19; (1988) 4 NWLR (Pt.87) 147. The appellant sought a declaration that the purported forfeiture by the Federal Government of Nigeria of his land and buildings situate at Vodiri Estate in Plateau State. At the close of address, the Supreme Court suo motu decided to hear further address on the following two issues: (1) can the appellant's Fundamental Right violated in 1970 and 1974 be enforced under the provisions of Sections 40 and 42 of the Constitution of the Federal Republic of Nigeria, 1979. (2) Whether this action is not a challenge to the competence of the Federal Military Government to promulgate the Recovery of Public Property (No.2) Act, No. 58 of 1970 and the validity of the Act. This court held in respect of issue No. 2 as follows: (1) Section 6(6)(d) of the 1979 Constitution precludes the court from inquiring into proceedings which seek to determine issues or questions as to the competence of any authority or person (i.e. the legal capacity, power, legal qualification or jurisdiction of any authority or person) to make any existing law promulgated between 15th January, 1966 and 1st October, 1979. (3) The provisions of Section 6(6)(d) are

aimed at proceedings which seek to detract from the binding force and or authority of any unrepealed law made by the Military Regime between 15th January, 1966 and 1st October, 1979, when the new Constitution came into force. The court followed its earlier decisions in Uwaifo v. Attorney-General of Bendel State (1982) 7 S.C. 124; B (1982) 2 S.C. (Reprint) 58.

By virtue of Section 6(6)(d) of the 1999 Constitution, the decision can be extended to cover the failed Banks (Recovery of Debts and Financial Malpractices) in Banking Decree, No. 18 of 1994. The effect of such extension is that by the constitutional provision on judicial powers, the courts have no jurisdiction to inquire into Decree No. 18 of 1994, being an existing law. C

And so, taking the issue from either the angle of Section 1 (5) of the Failed Bank (Recovery of Debts) and Financial Malpractices in D Banking Decree, 1994 or from the angle of Section 6(6)(d) of the 1999 Constitution, the courts lack the jurisdiction to inquire into Decree No. 18 of 1994. That is the essence of the decisions examined above.

There is no jurisdiction in law in a court saying that has jurisdiction E tion in all disputes. ***A court of law has jurisdiction to expound the limits of its jurisdiction it has not the jurisdiction to expand it. Jurisdiction is a matter of hard and rigid law and courts of law must comply strictly with their jurisdiction as spelt -out in either the Constitution or a Statute. On no account should F courts of law be hungry or have the gluttony for jurisdiction, to the extent that they arrogate to themselves jurisdiction where they have none. By such an injudicious conduct, the particular court does not only erode to the jurisdiction of other G courts, but also erode to the legislative power of the Legislature. Both are illegal and courts of law established to do legality, cannot afford any illegality.***

As jurisdiction is the pillar of every adjudication and its cynosure, courts of law must take it first before the merits of H the matter. They must not, in any case, keep the issue of jurisdiction till late in the litigation or when the merits of the case are heard. This is because if the court holds that it has no jurisdiction, that is the end of the matter. The suit will be struck out and the plaintiff goes home in vanquish. Of course, the law

allows him to return to the courts after repairing the jurisdictional blunder. The above briefly answers issue No.2 of the appellant.

It is good to stop here but I can take Section 4(1) and (2) of Decree No. 18 of 1994, on the 21 days provision for whatever it is worth. I do not think it is worth the candle but I can still take it as it has surfaced in the Brief of the appellant. Let me quickly read the two subsections:-

“1. The Tribunal shall deliver its judgment not later than 21 working days from the day of its first sitting.

2. The decision of a Tribunal shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of this section or Section 24(6) of this Decree unless the Special Appeal Tribunal exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.”

As it is, while Section 4(1) mandatorily and peremptorily provides that a tribunal must deliver its judgment not later than 21 working days from the day of its first sitting, Section 4(2) reduces the mandatory or peremptory impact of Section 4(1). By subsection (2) the decision of a Tribunal will not ordinarily be set aside merely because the judgment was not delivered within 21 days. Section 4(1) can only have effect if the Special Appeal Tribunal in the exercise of its appellate jurisdiction is satisfied that the party complaining of the non-compliance with the subsection has suffered a miscarriage of justice. In my view, a decision of a tribunal delivered without complying with Section 14(1) will remain valid until set aside by the Special Appeal Tribunal under Section 4(2).

I have decided to stop here. I will not take the 3rd and 4th issues of the appellant. The coast is clear for me to allow the appeal. I also make no order as to costs.

OGUNTADE JSC (DISSENTING)

The respondents in this appeal had been charged with various offences in different divisions of the Federal High Court in Lagos. They were said to have committed offences which were created by

the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks, Decree (No. 18) of 1994. Whilst the cases against them were still pending before the various Federal High Courts, they came together and brought Habeas Corpus Proceedings before the Lagos State High Court asking for their release from custody. Later, they brought yet another application before the said High Court for a writ of certiorari and prohibition to quash the charges brought against them.

The appellants who were the respondents in the two prerogative applications before the Lagos State High Court raised an objection before the court challenging the Lagos State High Court's jurisdiction to hear the matter. In reaction, the respondents who were the applicants, raised a Preliminary Objection to the appearance in the matter of appellants' counsel. It was contended that the counsel who appeared for the appellant could not do so without first showing that he had obtained the fiat of the Attorney-General of the Federation to so appear.

Arguments were heard by Oyekan-Abdullahi, J., on the objection filed against the appearance of Mr. Emeka Ngige as appellants' counsel. The learned Judge on 18/03/99, whilst upholding the objection to the appearance of appellants' counsel also decided that the High Court, Lagos had the jurisdiction to hear the application for certiorari/prohibition. She held as follows:-

"On the jurisdiction of the High Court to entertain applicants' application, I refer to the recent decision of Hunponu-Wusu, J., in the case of Dr. Femi Adekanye & 26 Ors. v. Controller-General Prison Service & 2 Ors. delivered on the 22nd January, 1999, on the authority bestowed on the court by the provision of Decree 3 of 1999 on the 5 jurisdiction of the High Court of a State and I hold that the court has jurisdiction to look into the applicants' application and the Preliminary Objection dated 2nd February, 1999, filed by the respondent fail and it is hereby dismissed."

It is to be said here that at the time the learned Judge ruled on the issue of jurisdiction in the manner shown in the passage reproduced above, parties had not previously advanced arguments to the court on the issue of jurisdiction. The appellants were dissatisfied with the Ruling and they appealed against it before the Court of Appeal, Lagos (hereinafter referred to as the 'court below').

Shortly after the Ruling appealed against, a letter did emanate from the office of the Attorney-General of the Federation authorizing the duo of Fidelis Nwadiakor, Esq., SAN., and Emeka Ngige, Esq., to appear for the appellants in the matter. The appellants' counsel, for a second time filed a Notice of Preliminary Objection challenging the jurisdiction of the Lagos State High Court to hear the matter. The respondents meanwhile brought an application to amend the processes they had earlier filed to enable them bring in more parties as applicants and respondents. The trial Judge, in spite of the vehement opposition by the appellants, went on to hear the respondents' application to amend. She not only granted the application but reaffirmed that the Lagos State High Court had jurisdiction to hear the prerogative applications brought by the respondents. The appellants were driven a second time to file an appeal against the second Ruling by the Lagos State High Court. There were thus two appeals before the court below.

The court below consolidated the two appeals for hearing. On 30-6-03, the court below in its judgment pronounced in favour of the appellants on some of the issues but finally concluded that the appeal was lacking in merit and accordingly dismissed it.

The appellants have come on a final appeal before this court, in their appellants' Brief the issues for determination were identified thus:-

"(i) Is it not wrong of the Court of Appeal to assert the jurisdiction of the trial court over the suit in the face of the express ouster of the latter's jurisdiction by Decree No. 18 of 1994 and when, at any rate, the appellants being agents of the Federal Government are not subject to the jurisdiction of a State High Court like the trial court by virtue of Section 230 of the 1979 Constitution as amended by Decree No. 107 of 1993?"

(ii) Is it not wrong of the Court of Appeal to accept the trial court's peculiar procedure of refusing to deal first with the question of its jurisdiction (ever before any other motion) raised by the appellants when that procedure apart from being wrong per se tended in the circumstances to circumscribe their Right to Fair Hearing?"

(iii) Is it not an abuse of process for the respondents to initiate the present suit for judicial review during the pendency of their earlier suit for habeas corpus on the same facts and basis against the

appellants and/or their privies?

(iv) *Is it not wrong for the Court of Appeal to mixed law and facts and therefore incompetent for having been filed without leave when the contention that no evidence or material whatsoever was adduced to support a decision, as contended in by the said ground;*

B *is always a question of law?"*

The 2nd respondent filed a Brief of Argument wherein three issues were identified as arising for determination in the appeal. The issues are:-

C *"(1) Whether the High Court of Lagos State had jurisdiction to entertain an action for judicial review of the proceedings (of) the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks Tribunal presided over by the 2nd - 6th appellants?"*

D *(2) Was it an abuse of the process of the court for the respondents to have instituted a suit seeking orders of certiorari and prohibition when there was pending in court another suit seeking the issuance of a writ of habeas corpus which was previously instituted by them?"*

E *(3) Whether ground 3 of the appellants' notice of appeal to the Court of Appeal dated 11th May, 1999, which complained about the exercise of court's discretion in granting the respondents' application for the amendment of their application for judicial review was a ground of law alone?"*

F Let me observe here that issue 1 in both the appellants and 2nd respondent's Briefs deals with the question of the jurisdiction of the High Court of Lagos State to hear the applications brought before it by the respondents. The said issue is of overriding importance in this appeal in the sense that if I hold that the High Court of Lagos State had not the jurisdiction to hear the matter, the other issues raised by parties in this appeal will become insignificant and irrelevant. This is because those other issues arose only on the supposition that there was jurisdiction in the Lagos High Court to hear the respondents' applications.

H Now Section 4(1) & (2) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, No. 18 of 1994 provides:-

"1. The Tribunal shall deliver its judgment not later than 21 working days from the day of its first sitting.

2. The decision of a Tribunal shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provision of this section or Section 24(6) of this Decree unless the Special Appeal Tribunal exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof.” B

In their application before the Lagos State High Court on the writs of Certiorari and Prohibition, the complaint of the respondents was that the proceedings in their trial before the various divisions of the Federal High Court had run foul of Section 4(1) of Decree No. 18 of 1994, above in that their trial had lasted beyond the period of 21 working days stipulated under the Decree. In their application, the respondents had sought the following reliefs:- C

“(i) A declaration that the jurisdiction of the 2nd, 3rd, 4th, 5th and 6th respondents failed after 21 ‘working days’ from the day of the first sitting of the respective tribunals presided over by the 2nd, 3rd, 4th, 5th and 6th respondents in the trial of the applicants.

(ii) A declaration that all proceedings, Rulings, orders and/or judgments of 2nd, 3rd, 4th, 5th and 6th respondents conducted after 21 ‘working days’ ‘from the first sitting’ commanded by the law maker in Section 4(1) of Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree, No. 18 of 1994, as amended is incompetent, invalid, null and void. E

(iii) A declaration that inter alia Sections 1(5), 3(1)(d), 4(2) and 261 (1) & (2) of Failed Banks Decree are otiose, incompetent and ‘ought not to be’ having regard to Nigeria’s international obligations under the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10, Laws of Nigeria, 1990. F

(iv) An order of certiorari quashing all and/or any proceedings, Rulings, and judgments of the 2nd, 3rd, 4th, 5th and 6th respondents on any of the respondents after the mandatory 21 Working Days ‘from the day of the first sitting of the said respondents’ commanded by the lawmaker in Section 4(1) Failed Banks Decree. G

(v) An order of certiorari directed to the 2nd, 3rd, 4th, 5th and 6th respondents directing (them) to bring all proceedings, Rulings, judgments and orders relating to the applicants occurring after the 21 working days commanded by the lawmaker in Section 4(1) of Failed Banks Decree before zones 2, 3, 4, 5 and 6 of Failed Banks H

Tribunal Lagos, before the High Court of Lagos State to be dealt with in order to ensure that the applicants may have ‘the more sure and speedy justice.’

(vi) *An order of Prohibition directed to the 2nd, 3rd, 4th, 5th and 6th respondents, forbidding further proceedings against the applicants in zones 2, 3, 4, 5 and 6 of Failed Banks Tribunal, Lagos.*

(vii) *And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances (pp. 2 & 3. R/A). ”*

In the appellants’ Brief before us, it is submitted that when the plain words of Section 1(5) of Decree No. 18 of 1994 are given their plain ordinary meaning, it is apparent that a State High Court has not the jurisdiction to entertain respondent’s application. Counsel relies on Tasha v. U.B.N. Plc. (2002) 2 NWLR (Pt. 753) 99 at 106, Agwuna v. A.G. Federation (1995) 5 NWLR (Pt. 396) 418 at 432, Osadebay v. A.G. Bendel State (1991) 1 S.C. (Pt. II) 73; (1991) NWLR (Pt. 169) 533, Adekanye v. FR.N. (2005) 15 NWLR (Pt. 949) 433. Counsel finally relies on Section 230(1) of 1979 Constitution as amended by Decree No. 107, 1993, which in subsections (q) and (r) vested jurisdiction in matters concerning the agencies of the Federal Government only in the Federal High Court.

The 2nd respondent in his Brief of Argument, submitted that the jurisdiction of the 2nd to 6th appellants was only protected for as long as they were duly constituted and did not exceed the jurisdiction granted them under Decree No. 18 of 1994. Counsel relied on Madukolu & Ors. v. Nkemdilim (1962) All NLR. (Pt.2) 581. Miscellaneous Offences Tribunal v. Okoroafor (2001) 9-10 S.C. 92; (2001) 18 NWLR (Pt.745) 296 at 336, Onyeausi v. Miscellaneous Offences Tribunal (2002) 5 S.C. (Pt.II) 141; (2002) 12 NWLR (Pt.781) 227. It was further submitted that Section 230(1)(q) and (r) of the 1979 Constitution as amended would not be relevant since the suit of the respondents did not affect the validity of any executive or administrative action or decision by the Federal Government or any of its agencies.

It is obvious that Section 4(1) of Decree No. 18 of 1994, postulates that the tribunal created under Section 1 (1) thereof shall dispose of cases before it within a period of 21 days from the day of its first sitting. It was also undisputed that at the time the respondents

approached the Lagos State High Court with their application for certiorari and prohibition, the different tribunals trying the respondents had exceeded the period allowed them under the decree to dispose of the cases involving the respondents. Did this situation prevent the Lagos State High Court from exercising its constitutional supervisory jurisdiction over the tribunals? B

Now Section 1(5) of the said Decree No. 18 of 1994 provides:-

"5. Notwithstanding the provisions of the Constitution of the Federal Republic of Nigeria, 1979, as amended, or any enactment to the contrary, the supervisory jurisdiction or power of judicial review of High Court shall not extend to any matter or proceeding before the Tribunal duly constituted under this Decree." C

It is apparent that the intendment of Section 1 (5) above was to oust the jurisdiction of the Lagos State High Court from exercising D its supervisory jurisdiction over the tribunals created under Section 1(1) of Decree No. 18 of 1994. When it is manifest from the language employed by a statute that the intention of the legislature is to oust the jurisdiction of the court, the court would ordinarily act in compliance with such ouster provisions and refrain from exercising a E jurisdiction withdrawn from it. In Agwuna v. A.G. Federation (1995) 5 NWLR (Pt.396) 418 at 437, Iguh, JSC., gave vent to this approach when he said:-

"Although therefore, the powers of the superior courts of record such as the High Court are great and indeed wide, they are certainly not unlimited. They can be and indeed sometimes properly limited by ouster of jurisdiction clauses in some legislations such as those above mentioned. See Shodeinde v. Registered Trustees of Ahmadiya Movement in Islam (1980) 1-2 S.C. 225; (1980) 1-2 S.C. (Reprint) G 99, Olaniyi v. Aroyehun (1991) 7 S.C. (Pt. I) 1; (1991) 5 NWLR (Pt. 194) 653 and 686 and Attorney-General of the Federation v. Sode (1991) 1 NWLR (Pt. 128) 500 at 517. I accept that it has always been the practice of the courts to guard their jurisdiction jealously, if in any given case that jurisdiction is expressly ousted by the provisions of the Constitution, an Act of Parliament or a Decree then the path of justice must dictate compliance with such an ouster of jurisdiction clause especially as under our present Constitution, Decrees are the supreme laws of the land" H

In the same case, Wall, JSC, at page 433 observed:-

“Where there is a clear and unambiguous ouster clause prohibiting interference with its decision, a superior court exercising supervisory jurisdiction cannot interfere with it.”

See *Osadebay v. A. G. Bendel State* (1991) 1 S.C (Pt. II) 73;
 B (1991) NWLR (Pt.169) 533.

I observed earlier in this judgment that the appellants filed a Notice of Preliminary Objection contending that the Lagos State High Court had not the jurisdiction to entertain the matter. The trial High Court peremptorily ruled that it had the jurisdiction to hear the application for certiorari and prohibition. The Ruling was peremptory because none of the parties had as at the time when the High Court so ruled canvassed argument as to whether or not the High Court had jurisdiction. The first time the High Court so ruled was during the consideration of the question whether or not Mr. Emeka Ngige ought to be allowed to appear for the appellants. The second time was when the High Court was considering whether or not to grant the amendment of the processes as sought by the respondents. It is remarkable that it was at this stage that the appellants’ counsel brought the appeal before the court below without insisting on a formal hearing of its Preliminary Objection on jurisdiction. The question I ask is - Was the Lagos State High Court in error to have ruled without first hearing argument that it had jurisdiction?

In answering this question, it is helpful to call to mind the observation of the Supreme Court per *Fatayi Williams, JSC*, (as he then was) in *Barclays Bank v. Central Bank* (1976) 6 S.C 175 at pp. 188-189; (1976) 6 S.C (Reprint) 115, where he said:-

*“In considering whether or not a court has jurisdiction to entertain any claim, it is our view that while a person’s right of access to the courts may be taken away or restricted by statute, the language of any such statute will be watched by the courts and will not be extended beyond its least onerous meaning unless clear words are used to justify such extension (see *Halsburys Laws of England 4th Edition, Vol. 10, para. 729*). That is why it is now well established that a provision in a statute ousting the ordinary jurisdiction of the court must be construed strictly. This means that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court. (See *Anisminic**

v. Foreign Compensation Commission (1969) 2 A.C. (HL) 147 at p. 170). Moreover,, there is a clear distinction between stating that the court has no jurisdiction to hear a case and stating that that court has no jurisdiction to determine whether or not it has jurisdiction to hear the case. Thus, a court may, by statute, lack jurisdiction to deal with a particular matter but it has Jurisdiction to decide whether or not it has Jurisdiction to deal with such matters.”

(Underlining mine)

Similarly this court in *Miscellaneous Offences Tribunal v. Okoroafor* (2001) 9-10 S.C 92; (2001) 18 NWLR (Pt. 745) 296 at 330, per Ejiwunmi, JSC, observed

“Having regard to the cases reviewed above, I think, it can be said that a court would be obliged to respect and uphold the ouster provisions of a decree or statute. But the court reserves to it the right to consider whether the ouster clause ought to be obeyed, having regard to other surrounding facts and the law relevant to the provisions ousting its jurisdiction.

In the instant case, the contention of the respondents is that both the Attorney-General of the Federation and the tribunal did not exercise the right to prosecute the charges leveled against the respondents as provided for in the Special Tribunal (Miscellaneous Offences) Act as amended (Cap. 410, LFN 1990), particularly, Sections 4, 5(5) and 6(1) thereof, that I have earlier held in this Judgment apply to the prosecution and trial of the offences for which the respondents were charged before the tribunal.

The question then is whether the High Court should not, having regard to the facts presented to it, consider whether proceedings before the tribunal have been properly initiated and conducted before it, in accordance with the Statutes that created it.

It seems to me that whereas in this case questions are raised as to whether the proceedings before the tribunal have been properly initiated in accordance with the law that set up the trial before the tribunal, the ouster of the jurisdiction of the court should not preclude it from exercising Jurisdiction to interpret the ouster clause or to determine or not if the proceedings in question comes within the scope of power of authority conferred by the enabling statute.

I would therefore uphold the view held by the court below that though the jurisdiction of the High Court appear ousted by vir-

tue of the provisions of Decree No. 9 of 1991, the court is not precluded from considering whether in the circumstances the ouster Jurisdiction comes within the scope of power of authority conferred by the enabling statute. This issue is therefore resolved in favour of the respondents. I would therefore uphold the view held by the court below. This issue is therefore resolved in favour of the respondents."

As it was, the trial Judge did not have the benefit or advantage of receiving addresses from parties' counsel as to whether or not the circumstances that led the respondents to bring the certiorari and prohibition application were such that the court should assume jurisdiction. In other words, the High Court was not enabled to proceed beyond the very first stage of the consideration of the question of jurisdiction. The approach of the appellants seems to have foreclosed a consideration of the fact that the trial court might still come to the conclusion that it had no jurisdiction to grant the reliefs sought after receiving addresses from counsel even if it had previously assumed the jurisdiction to consider the matter.

The court below would appear to have made the same point in its judgment when Aderemi, JCA., (as he then was) who wrote the leading judgment said:-

"I pause to say that the law is very sacrosanct that while a court may by virtue of an enactment, the like of the Decree under consideration lack jurisdiction to entertain a cause, it always has the jurisdiction to decide whether or not it has jurisdiction to deal with the cause, see Barclays Bank of Nigeria Ltd., v. C.B.N. (1976) 6 S.C. 75; (1976) 6 S.C (Reprint) 115. It follows that before a court of law can in all certainty agree that its jurisdiction to entertain a suit has been limited, confined or circumscribed by any legislation, the words of the legislation must be carefully examined and the surrounding facts properly studied. A court of law while it is never hungry after jurisdictional power, it has a duty not to easily surrender its power to adjudicate. It must never be forgotten that nothing shall be intended to be out of the jurisdiction of a superior court, the like of the court below. It is common ground between the parties as adumbrated in the appellants' Brief of Argument and clearly stated in the respondents' Brief that the trial of the respondents had gone beyond the 21- day period at the various tribunals, no judgment had at yet been delivered. This was contrary to the provisions of Section 4(1) of the Decree. Could it

be said that the Tribunals after the expiration of 21 days were still clothed with jurisdictional power to continue the hearing of the cases before them? Before answering that question, I wish to once more observe that want of Jurisdiction is not to be presumed as to a superior court. I find the answer to this question in the dictum of Coussey, JA., in Timitimi & Ors. v. Amabebe & Anor. 14 WACA 374, where at ^B
pages 376, he observed:-

Jurisdiction, when used in the context we are considering it, means the power or authority to judge. A court is said to be of competent jurisdiction with regard to a suit or other proceeding when it ^C
“has the power to bear or determine it or exercise any judicial power therein.”

In Nigeria, jurisdiction of courts and in particular that of the superior courts is derived from the Constitution and the relevant legislations. Having regard to the provision of Section 4 (1) afore-mentioned and the decision in Timitimi case (supra), I answer the question I have posed supra, in the negative. The barrier placed before the court below was thus removed by effluxion of time. The respondents, as I have said above, after the expiration of 21 days with the ^E
different cases preferred against them remaining unconcluded sought declaratory reliefs and some prerogative reliefs before the court below again with respect to the cases laid before the Tribunals which had since been stripped of its powers to continue with the hearing.”

It seems to me that the court below having made the point ^F
that the Lagos State High Court had the jurisdiction to consider whether or not its jurisdiction was ousted should have stopped there and not proceeded to consider whether or not Decree No. 18 actually precluded the Lagos High Court from determining the application for certiorari and prohibition. This is because the Lagos State ^G
High Court was not enabled to properly decide the issue.

The question must however be decided by this court in view of the fact that it has clearly arisen from the judgment of the court below. Earlier in this judgment, I set out the provisions of Section 4(1) and (3) of Decree No. 18 of 1994. Section 4(1) provides that the trial of an accused before a tribunal must be concluded within 21 days after the first day of hearing. Section 4(2) is important to the consideration of the matter and for emphasis I reproduce it once more- ^H

"4(2) The decision of a Tribunal shall not be set aside or treated

as a nullity solely on the ground of non-compliance with the provisions of this section or Section 24(6) of this Decree unless the Special Appeal Tribunal exercising jurisdiction by way of appeal from or review of that decision is satisfied that the party complaining of such non-compliance has suffered a miscarriage of justice by reason thereof."

(Underlining mine)

It is to be stated clearly here that what Section 4(2) above protects is the decision of a tribunal given as a result of non-compliance with Section 4(1) of the Decree. In other words, if a tribunal gives a judgment after 21 days, such judgment shall not be regarded a nullity or liable to be set aside just because it was given after a period of 21 days. However, the application for certiorari and prohibition brought by the respondents was premised on the fact that no decision whatsoever was made on their case which could be appealable, a situation which would result in their being kept indefinitely in the custody of the tribunal. The complaint was that the appellants had not acted within the jurisdiction granted them under Section 4(1) of Decree No. 18. Indeed the appellants were alleged to have acted beyond the jurisdiction granted them by keeping criminal charges hanging over the respondents beyond 21 days. The failure of the tribunals to conclude the trials of the respondents within 21 days, it was argued, meant that there were no decisions which could be appealable to the Special Appeal Tribunal, a situation which disabled the Special Appeal Tribunal from considering whether or not the non-compliance with Section 4(1) of the Decree had led to a miscarriage of justice.

Now in Anisminic Ltd, v. Foreign Compensation Commission (1969) 2 AC 147 at 171, Lord Reid observed-

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in

bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

In *Miscellaneous Offences Tribunal v. Okoroafor* (supra), Karibi-Whyte, JSC., observed at page 355:-

"There is no doubt in my mind that the charge against the applicants/respondents cannot be initiated by due process, the conditions to the exercise of jurisdiction having not been fulfilled - See Utih v. Onoyivwe (1991) 1 S.C. (Pt.1) 61; (1991) 1 NWLR (Pt.166) 166. In that case this court declared:-

'Where a statute purports to exclude the jurisdiction of the High Court and vest jurisdiction in a tribunal or an inferior court, the High Court in exercising its supervisory jurisdiction may by certiorari quash the decision of the tribunal or inferior court either for breaching the rules of natural justice or for following the wrong procedure.'

I have already stated above an ouster clause of the category enacted in Section 1 (8) can only protect proceedings validly conducted in compliance with its enabling procedure and in exercise of the prescribed jurisdiction vested in the appropriate tribunal. The proceedings of the tribunal which exceeded the powers vested in it or contravened its enabling procedural provisions would be impugned.

It is obvious from the foregoing that the supervisory jurisdiction of the High Court has not been ousted by the provisions of Section 1 (8) of Decree No.9 of 1991, since the Tribunal acted contrary to the provisions of the law establishing it ..."

The tribunals created under Section 1(1) of Decree No. 18 of 1994, were by the provisions of Section 4(1) enjoined to begin and conclude the trial of persons charged before it within 21 days. Where they failed to decide a case within 21 days but still decided the case

after 21 days, their decisions upon an appeal to the Special Appeals Tribunal may or may not survive depending on whether or not the failure to conclude the hearing within 21 days led or did not lead to a miscarriage of justice to the detriment of the appellants Special Appeals Tribunal. But where, as in this case, the tribunals did not
 B conclude the trial of the persons brought before them within 21 days, such that no appealable decision was rendered by them, the High Court would in my humble opinion be free to exercise its supervisory jurisdiction over the tribunals. This is because in such a situation, the
 C tribunals would have departed in fundamental respects from the terms of the jurisdiction granted them under Section 4(1) of Decree 20. 18.

In Onyeausi v. Misc. Offences Tribunal (2002) 5 S.C. (Pt.II) 141; (2002) 12 NWLR (Pt.781) 272, this court emphasized that an
 D ouster clause in a legislation would only protect the decisions of the inferior tribunal from the supervisory jurisdiction of the High Court when the tribunal acts within the limits of its jurisdiction. At page 254 of the report, Ogwuegbu, JSC., made the point thus:-

*“Where the Tribunal acts within its jurisdiction Section 8(1) of
 E Decree No. 20, of 1984, as amended is emphatic and absolute in its stipulation that no proceeding shall lie or be instituted in any court for or on account of any act or matter done or purported to be done or pursuant to the Decree. But where the Tribunal has acted in excess
 F of its jurisdiction, for example, if the offence of arson is not triable by it, certainly the High Court has the power to grant an order of certiorari.”*

In the same vein, Uwaifo, JSC., at page 258 of the same report observed:-

*“The question in the present case is whether, if the tribunal did
 G not have jurisdiction to try the offence with which the appellant was charged, the ouster clause in the Decree which established the tribunal would prevent any court from pronouncing on that issue of jurisdiction. When a law establishing an inferior court or tribunal sets out
 H the jurisdiction of that court or tribunal, the intention is that, that jurisdiction must not be exceeded. No ouster clause in the law establishing the said court or tribunal can protect it against a violation of its jurisdictional limit. It is only when the court or tribunal acts within jurisdiction set for it and in that regard does or purports to do any-*

thing that it can hide behind the ouster clause: See Anisminic Ltd. v. Foreign Compensation Commission (1969)2 WLR 123."

In the present case, having regards to the clear provisions of Section 4(1) of Decree No. 18 of 1994, once the tribunal fails to conclude the hearing of a case brought before it within 21 days or to render an appealable decision after 21 days, then it loses the protection afforded it under Sections 1(5) and 4(2) of the Decree No. 18 of 1974. To hold the view that the High Court could not in such case intervene by granting an order of 'certiorari' is to allow the tribunal to exist outside the law and to detain citizens of Nigeria indefinitely. That certainly was not the intendment of Decree No. 18 of 1994. The result of what I have said above is that issue one must be decided against the appellants.

The second limb of the objection to the jurisdiction of the High Court is premised on the effect of Section 230(1) of the 1979 Constitution as amended by Decree No. 107 of 1993, which provides:-

"230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters arising from:-

'(q) the administration of the management and control of the Federal Government or any of its agencies,

(r) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies'

(Underlining mine)

The appellants have argued that by the force of the above provisions of the amendments to the 1979 Constitution, the Lagos State High Court was without the jurisdiction to hear the applications for certiorari/ prohibition. A close perusal of Section 230(1) (q) and (r) above reveals that the matters committed exclusively to the jurisdiction of the Federal High Court are those arising out of the administration or the management and control of the Federal Government or any of its agencies. The interpretation of the provisions of Decree No. 18 of 1994, could not be seen as affecting the Federal Government or any of its agencies. The 2nd to 6th Tribunals which were courts created under Decree No. 18 of 1994, could not be seen

as agencies of the Federal Government. They were simply tribunals created to perform judicial functions. I am therefore unable to conclude that the Lagos State High Court has not the jurisdiction to hear the certiorari/prohibition application against the 2nd to the 6th appellants.

B The 2nd issue is a complaint that the court below erroneously affirmed the procedure adopted by the trial court which had not first dealt with the issue of jurisdiction raised before it before considering other matters. The short answer here is that the trial court which had not been addressed on the issue of jurisdiction acted properly by assuming a jurisdiction which in the peculiar circumstances was only a jurisdiction to determine whether or not it could adjudicate in the matter having regard to the ouster clause in Section 1(5) of Decree No. 18.

D The third issue raises the question whether the proceedings for habeas corpus and that of certiorari/prohibition could be pursued simultaneously by the same applicants.

E There is a marked difference in the use to which writs of Habeas Corpus and certiorari/prohibition may be put. They are both common law remedies and have been in use for a long time in England as an aid to the administration of justice. The remedy given or sought to be derived from the issuance of habeas corpus and certiorari often overlap in the reliefs derivable by the applicant.

F There are various kinds of the writ of habeas corpus and they serve different purposes. They include habeas corpus ad respondendum, habeas corpus ad deliberandum ad recipial, habeas corpus ad subjiciendum, habeas corpus ad testificandum, habeas corpus ad respondendum, habeas corpus ad prosequendum et. On the facts of this case, the writ of habeas corpus relevant for consideration is habeas corpus ad subjiciendum. It is a prerogative process for securing the liberty of the subject in order to ensure his immediate release from unlawful or unjustifiable detention whether in prison or private custody. When issued, it is an order given by the High Court at the instance of the person detained or his relations commanding that the person detained be produced so that the court may conduct an inquiry into the cause of his imprisonment. If there is no legal justification for the detention, the court may order the release of the person detained.

Certiorari/Prohibition on the other hand, is a writ issued out of the High Court directed to an inferior court of record asking that the Record of Proceedings before the inferior court in some cause or matter be transmitted to the High Court to be there dealt with in order to ensure that the applicant may have speedy justice. In Halsbury's Laws of England (3rd Edition) 134 at 125, the use of the writ is explicitly explained thus:-

'The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the courts of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be satisfied whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'Court.' It is not necessary that it should be a court in the sense in which this court is 'a court;' it is enough if it is exercised, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition and it is not necessary to be strictly account; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari.'

Now in this case, the respondents had been charged for various offences created by Decree No. 18 of 1994. They were all detained in prison custody. The tribunals were under Section 4(1) required to hear and determine the case against each of the respondents within 21 days after commencement of hearing. However, at the time the respondents brought their writs of habeas corpus and certiorari/prohibition one after the other, the period of 21 days had elapsed. The respondents were not released from custody. It was therefore appropriate that they applied for the issue of the writ of habeas corpus which in the circumstances amounted to a claim for their release from unlawful custody.

The respondents could however not be sure that the High Court when ordering their release from custody would also make an order quashing the charges against them on the ground that the tribunals had lost their jurisdiction to continue to hear the case and detain them. It seems to me that the issue by the respondents of the writs of

certiorari/prohibition was complimentary to the writ of habeas corpus earlier issued by them. I am therefore unable to agree that the respondents had abused the process of court by issuing the writ of certiorari/prohibition when there was still pending in court the writ of habeas corpus issued by them.

B The fourth issue for determination is a challenge to the approach of the court below to the appellants' 3rd ground of appeal. The said ground reads:-

C *"The learned trial Judge erred in law in granting leave to the respondents to amend their applications for issue of prerogative writs of certiorari and prohibition against the appellants when no materials were placed before the court for the grant of the application."*

D The court below did not consider the issue arising from this ground of appeal. Rather it struck it out as a ground of fact or mixed law and fact for which the leave of the court was necessary. In responding to the argument on the point, the court below at pages 10-12 of its judgment said:-

E *"For a full understanding of a proper appraisal of the divergent arguments of both sides, I think the aforesaid ground 3 must be brought into the fore. I hereunder reproduce it:-*

F *'The learned trial Judge erred in law in granting leave to the respondents to amend their application for issue of prerogative writs of certiorari and prohibition against the appellants when no materials were placed before the court for the grant of the application.'*

PARTICULARS OF ERROR

G (a) *In an application for leave to issue writ of certiorari or prohibitions, the proceedings or decisions sought to be quashed must be placed before the court or sufficient explanation given for failure to do so.*

(b) *Where relevant materials are not made available to the court, the application ought to be thrown out.'*

H Undoubtedly, this ground relates to the leave of court granted to the respondents who were the applicants before that court to amend their processes. Generally, a court of law has the duty to grant an application for the amendment of processes before it to enable it completely adjudicate on all matters in controversy between the parties appearing. Whether the application will be granted or not often depends on the facts of each particular case. Such facts will have to

be assessed by the court. Of course, a great deal depends on the discretion of the Judge. See *Okeowo & Ors. v. Migliore & Ors.* (1979) 11 S.C. 1; (1979) 11 S.C. (Reprint) 87. Judicial discretion has always and must always be founded upon the facts and circumstances placed before the court from which the *judex* must draw a conclusion governed by law. I pause to consider the principles to guide the court in determining whether a ground of appeal is one of pure law, or mixed law and facts or *facts simpliciter*. Not the cognomen nor the designation of the ground as 'Error In Law' is of any consequence in the determination. Rather, it is the purport of the ground of appeal, in deed, the reality of the complaint put up by the appellant in the couching of the ground of appeal that determined the nature of the ground. See *Ogbechie v. Onochie* (1986) 2 NWLR (Pt.23) 484 and *Abidoye & Ors. Alawode & Ors.* (2001) 3 S.C. 1; (2001) 6 NWLR (Pt.709) 463. From the ground of appeal under consideration it is very obvious that it is the evaluation of the material facts placed before the Judge that was being questioned not the application of the law. A calm reading of the said ground of appeal leaves one in no doubt that it is not complaining about the application of law to settled or agreed facts; rather it is obvious that there is disagreement between the parties as to the correctness of the facts placed before the court by each side. In other words, it is saying no more than that if the trial Judge had done a proper appraisal of the material facts placed before him, he would not have granted the application. That ground of appeal is, at best, one of mixed law and facts which by virtue of Section 220(1) of the 1999 Constitution requires leave of the court to grounds its validity. No leave was obtained. The ground is therefore incompetent and is accordingly struck-out while the issue predicated on it together with the argument thereon are discountenanced. Having regard to what I have just said, issue No. 8 on the appellants' (sic) thereon shall not be c countenanced."

Was the court below right in its approach to the matter? I think not. In *Ogbechie v. Onochie* (1986) 1 NSCC 443, this court per Eso, JSC., explained the approach to be followed by the Court of Appeal in distinguishing an error of law from one of fact.

Where a court of law exercises its discretion in a matter when there is no evidence or material placed before it to guide it in the exercise of its discretion, the error is one of law. This is because a

court of law is not permitted to reach decisions in a case as 9, matter of law unless there is evidence placed before it. On the other hand, if the complaint is that the evidence or material placed before a trial court to enable it exercise its discretion is not enough, the error is one of mixed law and fact. This is because in that situation, the appellate court is being called upon to determine whether or not the facts available are strong enough to sustain the decision of the trial court. In that situation the appellate court will consider the quantum of evidence or material available. In Coker v. U.S.A. Plc. (1997) 9 NWLR (Pt.90) 641 at 660-661, this court per Ogundare, JSC, restated the analysis as to the distinction between grounds of law and of facts as discussed by Nnaemeka-Agu, JSC., in Nwadike v. Ibekwe (1987) 4 NWLR (Pt.67) 718. He said at pages 660-661:-

“(v) Lastly, I should mention one class of grounds of law of which have the deceptive appearance of grounds of fact *id est* where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based. This is regarded as a ground of law on the premises that in a jury trial, there would have been no evidence to go to the jury. Before a Judge sitting with a jury could have left a case to the jury there ought to have been more than a scintilla of evidence, upon which a or finding was based has always been regarded as a ground of law. See *Odgers on: Pleading & Practice* (20th Edn.) p 375; also the decision of the House of Lords in *Edwards (Inspector of Taxes) v. Baerslow* (supra) at 53; In *Ogbechie v. Onochie* (supra) at p. 491 para. 14, my Lord, Eso, JSC. citing with approval an article by C. T. Emery in Vol. 100 LQR. held:-

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

The complaint of the appellants as framed in their third ground of appeal is that there was no evidence upon which the trial court could have granted leave to the respondents to join more parties to the certiorari/ prohibition proceedings before the court. It was not that there was no sufficient material. Clearly therefore the said ground of appeal is a ground of law and the court below was in error to have struck it out. ‘

In exercise of the power vested in this court by Section 22 of the Supreme Court Act, I shall consider the conclusion to be arrived

at on the supposition that the said ground of appeal was validly laid. Now, in the application brought by the 28th to the 33rd respondents to be joined as parties to the application for certiorari/prohibition before the Lagos State High Court, one Ezekiel Atat, deposed to an affidavit in support. Paragraphs 3 to 22 of the affidavit read

"3. That the applicants herein are facing the same trial as the first 27 applicants in the Failed Banks Tribunals, sitting in the various parts of the country.

4. The 28th applicant was arrested on 31/1/96, arraigned at zone IV, Failed Bank Tribunal Lagos on B16/8/96 and judgment and sentence pronounced on 11/11/98 and 27/11/98 respectively.

5. I have been informed by the 28th applicant and I believe him that judgment was delivered more than 8 months after the close of address by counsel on both sides and that the trial of 28th applicant lasted for 27 months instead of the prescribed 21 Working Days under the enabling law.

6. That I have been further informed by the 28th applicant and I believe him that he applied for the certified true copy of the judgment of the Zone IV Tribunal and has not been given a copy Four months after the said judgment.

7. That the transaction pursuant to which the 29th applicant was tried in Kano Zone 1 occurred mainly in Lagos and marginally in Port-Harcourt.

8. That I have been informed by the 29th applicant believe him as follows:-

'(i) That the transaction which gave rise to his purported trial in Kano Zone 1 of Failed Bank Tribunal took place mainly in Lagos and marginally in Port Harcourt Rivers State.

(ii) That his trial commenced on 15/3/96 and the charge later amended on 10/10/96.

(iii) That judgment was delivered orally on 20/6/97 and no certified true copy of the said judgment was obtained after application for same till September, 1998.'

9. That I have been advised by Dickson D. I. Osuala, Esq., of H counsel and I believe him

'(i) That the action of the tribunal is contrary to Sections 33(7) and 258(1) Constitution of the Federal Republic of Nigeria, 1979, as amended and the African Charter on Human and Peoples Rights

(Ratification and Enforcement) Act, Cap. 10, Laws of Nigeria, 1990.'

10. That I have been further informed by the 29th applicant and I believe him that he petitioned the Chief Justice of Nigeria through his solicitors, complaining of judicial improprieties of the Chairman of Kano Zone 1 of the tribunal and received a reply to the effect that
B the Attorney-General of the Federation is responsible for the Judges of the Failed Bank Tribunals

11. That I have been further informed by the applicants and I believe them, that Nigerian Deposit Insurance Corporation, the complainant in the cases is responsible for the operational expenses of the tribunals including providing cars, quarters and other benefits to the tribunals.
C

12. That I have been advised by Dickson D.I. Osuala, Esq., of counsel and I believe him further as follows:-

D '(i) That a situation where the Attorney-General of the Federation doubles as the prosecutor and the person responsible for Judges of the tribunal negates the rules of natural justice relating fair hearing and transparency of justice.

(ii) That a situation where the complainant, an interested party is the same party responsible for providing soft furnishing, accommodation, and cars to the Judges of the tribunals expected to do impartial justice between the applicants and the complainant is inconsistent with the rules of natural justice and creates the likelihood of bias in favour of the funding complainant.
E

(iii) That the said practice of the prosecutor being responsible for the Judges of the tribunal militates against the express provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, Laws of Nigeria, 1990 relating to Fair Hearing.
F
G

13. That a photocopy of the petition of the 29th applicant dated 10/11/97, is herewith attached, exhibited and marked as Exhibit EA1.

14. That the reply of the Chief Justice of Nigeria dated 17/11/97 is hereby annexed and exhibited and marked as Exhibit EA2.
H

15. That I have been advised by Dickson D. I. Osuala, Esq., of counsel and I believe him that criminal law is territorial not extra-territorial.

16. That 30th applicant was arraigned on 20/11/97 and he is

still on trial at Zone II, Failed Banks Tribunal, Lagos.

17. *The 31st applicant was arraigned on 14/4/97, and he is still standing trial till date at Enugu Zone 1 for transactions that occurred in Lagos.*

18. *That the applicants' interest will be greatly jeopardized if the applicants are not joined as necessary and interested parties to the herein suit.* B

19. *That the 32nd applicant arraigned on 15/8/98, has been standing trial at Zone II Failed Banks Tribunal, Lagos, for more than six months and is still on trial till the time of this application.* C

20. *That the applicants herein have been, are being and were tried under the Failed Banks (Recovery of Debts) And Financial Malpractices In Banks Decree, No. 18 1994, in the undermentioned charges, that is:-*

*'FBFMT/L/ZIV/3C/96; FNET/L/ ZIV/4C/96; FBT/KNZ/CR/Z/96; D
FBFMT/L/ZIV/IC/97; FBFMT/L/Z.II/ 9C/97; FBTMT/L/ZII/8C/97; FBT/
EZ/IC/97; FBFMT/L/ZI V/IC/98; FBFMT/L/SII/01/98; FBFMT/L/ ZVII/
CR/01/98; FBFMT/L/ZM7/98; FBFMT/L/ZIV/ CR/02/98.'*

21. *The 33rd applicant, arraigned on 17/11/97, is still on trial at Zone II, Failed Bank Tribunal, Lagos at the time of this application,* E

22. *That I have been informed by the 28th to 33rd applicants and I believe them that the applicants only became aware of the suit herein through a friend and same was confirmed after much enquiries."*

A close look at the extracts of the affidavit reproduced above reveals that there was affidavit evidence in support of the application that the 28th to 33rd applicants be made parties to the application for certiorari/prohibition. I am not here concerned with the sufficiency of the affidavit evidence since the ground of appeal is framed narrowly and complains only of the absence of evidence. If I were to consider the sufficiency of the evidence, I would be viewing the said ground of appeal as of mixed law and fact in which event, the appellants would have needed to first obtain the leave of the court below. They did not obtain such leave. The result is that the complaint of the appellants in their 3rd ground of appeal and the issue formulated thereupon were not sustainable. In the final result, I decide the 4th issue against the appellants. F G H

In the final conclusion, this appeal fails. It is dismissed. The

application of the respondents for certiorari/prohibition is remitted to a Judge of the Lagos State High Court for determination on the merit. I make no order as to costs.

B

MUKHTAR JSC

I have had the opportunity of reading in advance the leading judgment delivered by my learned brother, Tobi, JSC. I am in full agreement that the appeal is meritorious and deserves to be allowed.

C

I hereby strike out the suit in the court below, as it was an abuse of court process. In this vein, I also allow the appeal.

TABAI JSC

D

I read, in advance the judgment prepared by Oguntade, JSC, and I agree that the appeal be dismissed. I also make no orders as to costs.

E

MUHAMMAD JSC

My learned brother, Tobi, JSC., who wrote the lead judgment, afforded me an opportunity of reading in advance the judgment just delivered.

F

I am in agreement with his reasoning and conclusion which I adopt as mine. I find merit in the appeal. I too allow the appeal. I abide by all consequential orders made in the lead judgment.

G

H